

UNDT/2017/048, Brown

UNAT Held or UNDT Pronouncements

Case No. UNDT/GVA/2015/129

Contingency of the Applicant's FTA: return of Mr. C. to post No. 501057

Under sec. 6.7 of ST/AI/2010/3, in cases of secondment, a lien against a specific post shall only be granted for up to two years, after which it shall be surrendered. No discretion is granted to the Administration for extending the lien beyond the two years. Quite distinctly, para. 7 of ST/AI/404 allows the Administration to extend the mission assignment beyond the two years period, and continue blocking a specific post in the parent department, provided there is a specific written agreement to continue blocking that post. The case at hand is one of mission assignment and falls under ST/AI/404. Therefore, ST/AI/2010/3, relied upon by the Applicant, is not applicable to the case at hand.

The extension of Mr. C.'s mission assignment to MONUSCO beyond the two years properly fell within the Administration's discretion under ST/AI/404. Even if one were to conclude that the above-quoted para. 7 of ST/AI/404 was violated in that no written agreement existed to continue blocking post No. 501057, that would have no impact on the Applicant's case. Indeed, a violation of the requirement of a written agreement to continue blocking the post in the parent department, in case of extension of the mission assignment, does not make such blocking legally non-existent or void.

Mr. C.'s mission assignment was extended, and he did keep a lien against post No. 501057, until he returned to it on 15 August 2014. As of 15 August 2014, the Administration placed the Applicant against post No. 509992 in order to honour her fixed-term appointment, which expired on 2 December 2014. Thereafter, Mr. C. went on temporary duty assignment to MONUSCO from 11 September 2014 until 17 October 2014, when he returned "for good" to his post at OHCHR. Thus, Mr. C.'s lien with post No. 501057 did not expire. It follows that his return to that post was a valid reason to justify, insofar as such may be required, the non-renewal of the Applicant's fixed-term appointment, which had always been subject to the contingency of the return of the incumbent of the post in question.

Applicant continued to exercise functions of Head, Africa I Section

The fact that, upon his return, Mr. C. was asked to perform the functions of Head of Africa II Section, rather than Section I, does not contradict the fact that he had returned as the incumbent of the post for which the Applicant had been hired, and that he was put back against that post, administratively, as of 15 August 2014. The Administration is free, for operational or strategic reasons, to assign the staff member who returns to a particular post to which he or she had kept a lien, to other functions, without transferring him/her against another post, administratively.

As the Applicant had been expressly recruited in replacement of Mr. C. for a determined period during his mission assignment, this did not give her a right to be extended against another post (post No. 509992), even if she continued to exercise the functions of the post for which she had been recruited.

The Administration had to honor its obligations vis-à-vis another staff member, Ms. P., who, for medical reasons, had to leave her assignment in South Africa, and for whom a new assignment had to be found. It was the Administration's discretion, if not duty, to place Ms. P., a permanent staff member, against an available post

that was commensurate with her level and skills, and for which she was medically fit.

No such obligation existed in respect of the Applicant who had been recruited under a fixed-term appointment, for a determined period, and for the express purpose of the replacement of an incumbent who had returned to his post.

The fact that the Applicant was placed against that available post (post No. 509992), did not result in any legal obligation for the Administration to keep her against that post beyond the duration of her fixed-term appointment. Rather, upon the expiration of her fixed-term appointment, and since the incumbent of the post for which she had been recruited had returned to it, the Administration was justified not to renew the Applicant's fixed-term appointment. The reason for the recruitment of the Applicant no longer existed.

Expectancy of renewal

No express promise for contract renewal had been given to the Applicant. The Applicant had no proof in writing of any commitments to extend her fixed-term appointment.

Extraneous factors

Having analysed the available evidence, the Tribunal concludes that the Applicant did not meet the burden of proof with respect to the allegation that the non-renewal decision was based on extraneous factors, namely on her religion and/or her status as a "whistle blower" at WIPO.

It appears that the Applicant unduly used her network of Ambassadors in order to resolve her administrative situation within OHCHR.

Alleged extension of contract and transfer to Fiji

With respect to the alleged decision to extend the Applicant's fixed-term appointment and also to transfer her to Fiji, the Tribunal notes that no such decisions existed. Indeed, the Administration, without any obligation to do so, in good faith, offered the Applicant another post, at the P-5 level and with Fiji as a duty station.

In order for the proposed renewal of appointment and proposed reassignment to give any rights to the Applicant, she had to first satisfy all the conditions including those arising from the relevant rules of the Organization. Since that was not the case, the Applicant did have no contractual rights from the proposed contract renewal and reassignment to Fiji. The Applicant's allegations with respect to the alleged "stay of transfer", including any allegations of bias, must thus equally fail.

The Applicant's fixed-term appointment was renewed after 2 December 2014 solely to allow her to exhaust her sick leave entitlement, in accordance with para. 3.9 of ST/AI/2005/3.

Case No. UNDT/GVA/2015/133

While the Applicant filed a claim under Appendix D, no determination was made as to her being on service incurred sick leave. The Applicant's fixed-term appointment was not renewed, not terminated. Therefore, the provisions of ST/AI/1999/16 (Termination of appointment for reasons of health) are not applicable to the Applicant's case.

Since there was no decision to transfer the Applicant, there could not be a decision to stay such transfer on newly asserted medical grounds or otherwise.

The Tribunal lacks jurisdiction to review the outcome of the Applicant's requests at the MEU. The Applicant's application in this respect is therefore not receivable, *ratione materiae*.

Decision Contested or Judgment/Order Appealed

Case No. UNDT/GVA/2015/129

The Applicant contests the non-renewal of her fixed-term appointment beyond 2 December 2014, and what she characterises as the High Commissioner's decision to extend her appointment for two years and to laterally transfer her to Fiji.

Case No. UNDT/GVA/2015/133

The Applicant contests:

- a. "her threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave";
- b. the "Respondent's refusal to grant [her] request for a stay (on newly asserted medical grounds) of her lateral transfer to Fiji;
- c. the decision by the MEU to reject her request for management evaluation and suspension of action.

Legal Principle(s)

A fixed-term appointment has no expectancy of renewal or of conversion to any other type of appointment.

A non-renewal decision can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation. The burden of proving improper motivation lies with the staff member contesting the decision and a conclusion that the Administration had hidden motives not to renew a fixed-term appointment has to be based on evidence and not solely on speculation.

Expectancy for renewal requires an express promise that cannot be based on mere verbal assertion, but has to be in writing. A legitimate expectation of renewal has to be "based on ... a firm commitment to renewal revealed by the circumstances of the case".

The Tribunal's jurisdiction is strictly limited to examine the legality of the administrative decision that was the subject of a management evaluation request, and does not extend to the MEU findings.

Outcome

Dismissed as not receivable

Outcome Extra Text

Case No UNDT/GVA/2015/129 was rejected on the merits

Case No. UNDT/GVA/2015/133 was dismissed as not receivable.

Full judgment

[Full judgment](#)

Applicants/Appellants

Brown

Entity

OHCHR

Case Number(s)

UNDT/GVA/2015/129

UNDT/GVA/2015/133

Tribunal

UNDT

Registry

Geneva

Date of Judgement

27 Jun 2017

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Jurisdiction / receivability (UNDT or first instance)

Subject matter (ratione materiae)

Non-renewal

Reason(s)

Reassignment or transfer

Discretion

Applicable Law

Administrative Instructions

- ST/AI/1999/16
- ST/AI/2005/3
- ST/AI/2010/3
- ST/AI/2013/1
- ST/AI/404

Agreements, conventions, treaties (etc.)

- Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among Organizations applying the United Nations Common System of Salaries and Allowances

Staff Regulations

- Regulation 4.5(c)

Staff Rules

- Appendix D
- Rule 1.1(j)
- Rule 4.13
- Rule 6.2(b)(ii)

Related Judgments and Orders

2010-UNAT-061

2013-UNAT-341

2011-UNAT-153

2013-UNAT-298

2010-UNAT-021

2015-UNAT-500

2015-UNAT-534
2011-UNAT-184
2015-UNAT-506
2015-UNAT-503
2013-UNAT-311
2014-UNAT-411
2015-UNAT-522
2011-UNAT-120
UNDT/2014/006