

UNDT/2018/092, Agha

UNAT Held or UNDT Pronouncements

There is no evidence on the record that the mandatory procedure established in secs. 9, 10, 15 and 16 of ST/AI/400 for separation by abandonment of post was followed in the Applicant's case. The Administration did not act fairly and transparently with the Applicant. DSS lead the Applicant to believe that it was still considering granting him a SLWOP, while, at the same time, it recommended the non-extension of his fixed-term appointment due to his unauthorized absence on the other. That the non-renewal decision following the expiration of the Applicant's contract, constitutes a separation decision for abandonment of post, which was issued unlawfully, without following the mandatory procedure established in ST/AI/400. This case differs and is therefore distinguishable from Abdallah for the following reasons: (a) the Applicant's request for SLWOP was still under review and the Administration cannot argue that the Applicant's absences were unjustified when it had failed to properly respond to the Applicant's request for SLWOP, and (b) the Applicant's absence from the office was not stated or recorded in an annual report and/or in an evaluation performance document. The unlawful decision is rescinded and, in absence of any indication that the reinstatement is not an option in the present case, the Applicant is to be retroactively reinstated under a two-year fixed-term contract starting 1 March 2017 until 28 February 2019, the same duration as his previous contract. Consequently, the Respondent is to retroactively pay the Applicant as compensation for loss of earnings (material damages), the salary corresponding to the period 1 March 2017 until the effective implementation/execution of the present judgment pursuant to art. 10.5(a) of the Tribunal's Statute.

Decision Contested or Judgment/Order Appealed

The non-renewal of the Applicant's fixed-term appointment following its expiration on 28 February 2017.

Legal Principle(s)

The Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction. Under the Staff Regulations and Rules, the Secretary-General may separate a staff member from service in accordance with the terms of his/her appointment or for any of the reasons specified in the staff regulations 9.1 to 9.3 and staff rules 9.1 to 9.6. According to the general principle of legal symmetry—*mutuus consensus, mutuus disensus*—a labor contract, which is a consensual contract, can be terminated by agreement between the parties. All types of appointments (temporary, fixed-term or continuing/indefinite/permanent) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the United Nations Charter provided that this action is not contested by the staff member. A termination based on this reason can only take place if the action is not contested by the staff member. In other words, such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally, the offer is then an agreed termination and the parties can come to an agreement orally or in writing. An agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c), namely when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text, this reason itself can be interpreted in two ways, either as a change or a termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the United Nations mandate and/or the availability of funds. Abandonment of post is a form of separation initiated by the staff member under staff rule 9.3 which is distinct from the separation as a result of the expiration of the contract pursuant to staff rule 9.1(iii) and 9.4, which can only be initiated by the employer. For the Administration to be able to infer the staff member's irrevocable will/intention to abandon his or her

post and to put an end to his/her contract, it must follow the procedure stipulated in ST/AI/400. Compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5 (b) of the Statute. In cases where the separation decision is rescinded and the Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages, if any, produced by the rescinded decision. The purpose of compensation is to place the staff member in the same position s/he would have been had the Organization complied with its contractual obligations.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Agha

Entity

DSS

Case Number(s)

UNDT/NY/2017/084

Tribunal

UNDT

Registry

New York

Date of Judgement

20 Sep 2018

Duty Judge

Judge Greceanu

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Compensation

In-lieu compensation

Non-renewal

Arbitrary or improper motive

Remedies

Rescission

Applicable Law

Administrative Instructions

- ST/AI/400

Staff Rules

- Rule 3.1
- Rule 6.2
- Rule 9.1
- Rule 9.4

UNDT RoP

- Article 7.1
- Article 7.2
- Article 7.3

UNDT Statute

- Article 10.5
- Article 3.1
- Article 8.1
- Article 9.1
- Article 9.3

Related Judgments and Orders

2010-UNAT-073

2011-UNAT-182

2013-UNAT-313

2013-UNAT-335

UNDT/2010/149

2010-UNAT-091

UNDT/2011/012

UNDT/2011/068

2010-UNAT-092