

UNDT/2019/137, Robinson

UNAT Held or UNDT Pronouncements

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 seek review of the non-renewal decision by the UNDT. The Tribunal considers that the objective factual element as to the non-renewal of the Applicant's appointment consists in the memorandum instructing the Applicant to commence his separation procedure, dated 4 January and delivered to the Applicant on 11 January 2016. Recalling that the Applicant sought information about the extension of his appointment at the beginning of December and received no response, noting further that it happened at ECA that letters of appointment were issued with a retroactive effect and personnel actions were taken literally last minute, the Tribunal has no reasons to believe that the implicit decision was issued at an earlier time. There are two reasons why differentiating the two dates—the date of sending or the date of receipt—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 necessarily equipped with a "return receipt" function, which would reliably inform of the receipt date by the MEU. Accordingly, a reasonable reading of article 8.1(i) of the UNDT Statute in respect of the term "submission" is that a request is deemed 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. ECA's refusal to give reasons for the impugned decision was unlawful. The Applicant's rushed separation cannot be justified under reasonable exercise of managerial discretion. The most logical conclusion to which it leads the Tribunal, is that retaining the Applicant at his post had been forgone, no matter the circumstance. This conclusion is strengthened by the fact that ECA administration purposefully kept the Applicant uninformed, just as before the communication of the decision as afterwards. Altogether, the Tribunal finds that the reorganization as a reason is *ex post facto* and, notwithstanding that it may have been a legitimate goal in a longer perspective, is unsupported by evidence as to the necessity of the abrupt discontinuation of the Applicant's employment at the time of his separation. The Tribunal finds that the arbitrariness and lack of transparency exhibited by the ECA Administration authorize it to draw adverse inferences that the Applicant's non-renewal had an improper purpose. It is clear that the disagreement alone created a motive on the part of ECA leadership to get rid of the Applicant, both as a person whose opinions were uncomfortable and as a message to the Staff Association that disagreements with the hierarchy will not be tolerated (which worked, as demonstrated by the fact that the next communication from the Staff Association was sent anonymously). The proven financial damage for the Applicant in nexus with the unlawful separation consisted of eight months of unemployment and the attendant loss of emoluments.

Decision Contested or Judgment/Order Appealed

The decision not to renew the Applicant's fixed-term appointment beyond 31 December 2015.

Legal Principle(s)

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. 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. 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. The Tribunal's cognizance extends over express as well as implied administrative decisions; the lack of an express decision only poses the question of dating. The date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine. The Administration has a general duty to act fairly, justly and transparently in its dealings with its staff. Notwithstanding that the fixed-term appointments end by the effluxion of time, a good administrative practice requires that relevant notice be given sufficiently in advance of the expiry of the appointment. Such notice, apart from the fact that it informs against eventual expectations for an extension that a staff member might harbour, also facilitates a timely and cost-effective separation. Parting with the articulated good practice, especially if aimed at obscuring the fact of issuance of a negative decision, should be discouraged. 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. The question of how to calculate the deadline for filing the application in the situation where no management evaluation was obtained is not a matter of course and must be determined by a positive rule. In the case of lack of response from the Management Evaluation Unit (MEU), the time to file an application is to be calculated from the date of the receipt of the request by MEU. Of note is, however, that, as pointed out by the Respondent, effective implementation of staff rule 11.4(a) requires acknowledgement of the receipt of the request, which is indeed a consistent MEU practice. The provision of staff rule 11.4(a), as read together with staff rule 11.2(d), remains in the relation of *lex specialis* to article 8.1(i) of the UNDT Statute, supplying the needed specificity.; Reliance on erroneous information from the MEU about the calculation of time would automatically justify restoration of the statutory time limit. As results from UNAT jurisprudence, this would be applicable even where the Applicant would have been represented by counsel. A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment. However, it is also settled law that the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment when requested. Transparency in the decision-making process has a wider purpose than enabling judicial control – in the first place it serves to demonstrate reasonableness and lawfulness of the actions of the administration to any potential reader, to prevent abuse of discretionary powers, to promote acceptance of the decision by the addressee, and to facilitate informal resolution if the dispute ensues. Indeed, however, when the case has reached the Tribunal and the Respondent still refuses to provide reasons for an administrative decision, or decides to subsequently change the reasons that were put forth as the basis for it, the consequences go beyond the loss of credibility: the applicant is impeded in the exercise of the right to properly advance his/her case, additional burden is placed upon the Tribunal and costs are unduly incurred for the Organization. The Organization cannot use the blanket reason of "funding constraints" as a reason for non-renewal without actual proof of lack of funding, how the lack of the funding adversely impacts the Organization in general and, specifically, how it affects the particular staff member whose contract is not being renewed allegedly because of it.; 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, therefore, the Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like any other administrative decision, the administration has the duty to act fairly, justly and transparently in dealing with its staff members. There are situations in which - while there are available funds - the functions of a staff member are no longer required. That can be due to a reduction in workload in a particular department or programme, or due to the fact that the functions of a staff member have been subsumed by changes in a restructuring process. A non-renewal decision can be justified in such a scenario. However, the obligation is on the Respondent to prove the changes in the operational realities or the restructuring exercise that justify the non-renewal. Also in the case of restructuring, as part of judicial review, it is necessary to determine whether the decision on non-extension was vitiated by bias or bad faith, that

is, if it was taken for an improper purpose. In other words, while the staff member on a fixed-term appointment has no right to have his employment extended, he or she still has the right to be treated fairly, with the non-extension decision not being tainted by improper purpose. On the evidentiary plane, the staff member has the burden of proving that improper factors played a role in the administrative decision. Any consideration of an award of damages for persons who are recruited on FTAs must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the time of any alleged breach. It has also given consideration to the length of expectancy of renewal. 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.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Robinson

Entity

ECA

Case Number(s)

UNDT/NBI/2016/51

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

9 Sep 2019

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Jurisdiction / receivability (UNDT or first instance)

Temporal (ratione temporis)

Non-renewal

Arbitrary or improper motive

Reason(s)

Separation from service

Expiration of appointment (see also, Non-renewal)

Applicable Law

Staff Rules

- Rule 11.2
- Rule 11.4

UNDT Statute

- Article 10.5
- Article 8.1

Related Judgments and Orders

2013-UNAT-335
2013-UNAT-313
2011-UNAT-182
2018-UNAT-825
2012-UNAT-261
2012-UNAT-201
2016-UNAT-644
2015-UNAT-588
2014-UNAT-406
2012-UNAT-273
2011-UNAT-153
2011-UNAT-118
2015-UNAT-574
UNDT/2013/124
UNDT/2011/073
2013-UNAT-331
2019-UNAT-941
UNDT/2018/031
2018-UNAT-882
2014-UNAT-433-Corr.1
UNDT/2016/008
2016-UNAT-660
2016-UNAT-659
2015-UNAT-534
2015-UNAT-500
2013-UNAT-387
2013-UNAT-341
2017-UNAT-742
2019-UNAT-926