UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/066
Judgment No.: UNDT/2016/117
Date: 26 August 2016
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

AUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 23 December 2015, the Applicant, a former Principal Officer at the D-1 level in the Department for General Assembly and Conference Management ("DGACM"), filed an application contesting the decision to separate him from service upon the expiration of his fixed-term appointment on 31 December 2015.

2. The Respondent submits that the application is not receivable because the Applicant did not submit a request for management evaluation within 60 calendar days from the date on which he received notification of the contested decision, as required by staff rule 11.2(c). Should the Tribunal find the application receivable, the Respondent submits that it is without merit because the decision not to renew the Applicant's fixed-term appointment was a lawful exercise of discretion.

Facts

3. The parties agree that on 19 June 2013 a meeting took place between the Applicant, Mr. Tegegnework Gettu, who was the Under-Secretary-General, DGACM ("USG/DGACM") at the time, and Mr. Magel Abdelaziz, the Under-Secretary-General and Special Adviser to the Secretary-General on Africa. The Applicant submits that during the meeting, Mr. Gettu provided an express promise regarding the Applicant's future employment with the Organization. The Respondent disputes this claim.

4. By interoffice memorandum dated 27 September 2013 from Mr. Gettu, the Applicant was informed that effective 1 October 2013, he would be reassigned from his position to implement a project referred to as "Update and Digitization of the DGACM Compendium of Administrative Policies, Practices and Procedures" ("the Compendium Project"). The memorandum further stated (emphasis added): "While the project timeline should be completed by June 2014, *it is my intention to*

provide you with other challenging and interesting assignments based on a high quality outcome."

5. On 4 October 2013, a personnel action was approved formally reassigning the Applicant within DGACM effective 1 October 2013.

6. On 15 May 2014, a personnel action was approved extending the Applicant's fixed-term appointment for six months from 29 May 2014 until 31 December 2014.

7. On 19 June 2014, the Applicant's performance assessment was completed for the 2013–2014 performance cycle. The Applicant listed four goals for the performance period, including acting as Project Coordinator for the Compendium Project. He received an overall rating for the performance period of "Successfully meets expectations". His First Reporting Officer, Ms. Heather Landon, Director of the Documentation Division, DGACM, at the time, stated that the Applicant had "demonstrated a significant amount of initiative and creativity" in the implementation of the Compendium Project.

8. On 4 December 2014, Ms. Landon responded via email to a query from another United Nations office about progress on the Compendium Project. She stated:

> While indeed it was our expectation that the Compendium would be available in July 2014, it appeared that this project was more time consuming and more complicated tha[n] originally envisioned … We anticipate that the first electronic draft will be available at the end of January for Departmental review and then, depending on the type and number of changes required, the Compendium may be available for external use by end March 2015.

9. On 31 December 2014, a personnel action was approved extending the Applicant's fixed-term appointment for one year, from 1 January 2015 until 31 December 2015.

10. By email dated 20 February 2015, the Applicant advised other staff members on how to access the Compendium.

11. By email dated 11 September 2015, the Executive Officer, DGACM, reminded colleagues that in accordance with ST/AI/2010/5 (Performance Management and Development System), first reporting officers should be undertaking midpoint performance reviews with their staff.

12. In an email dated 16 September 2015, addressed to a number of colleagues, including Ms. Catherine Pollard, the then Assistant Secretary-General, DGACM ("ASG/DGACM"), and Mr. Gettu, the Applicant noted that he did not have a work plan for the 2015–2016 performance cycle and that "none seems to be interested in discussing it with me." He stated that three scheduled meetings with Ms. Pollard—on 9, 11, and 29 June 2015—had all been cancelled. By email response to the Applicant the same day, Ms. Pollard stated that she would arrange to meet with him the following week.

13. It is stipulated by the parties that on 2 October 2015, the Applicant was verbally informed by Ms. Pollard that his fixed-term appointment would not be renewed beyond 31 December 2015. In his application on the merits, the Applicant stated:

> On 3 occasions—9 June, 11 June, and 29 June 2015—Ms. Pollard scheduled a meeting at the request of the Applicant to discuss a work plan, only to cancel it shortly before the meeting. Upon the Applicant's insistence, the Applicant finally met Ms. Pollard on 2 October 2015 for the midpoint performance review ... In this meeting, Ms. Pollard verbally informed the Applicant that his appointment will not be renewed when it expires on 31 December 2015 because his initial assignment was ad-hoc and there has not been any work for him in DGACM since the beginning of the year. There was no performance discussion and Ms. Pollard had no work plan to offer to the Applicant!

14. The parties also agree that on 6 October 2015, Mr. Gettu, the then USG/DGACM, again informed the Applicant, verbally, that his fixed-term appointment would not be renewed.

15. On 5 November 2015, Mr. Gettu informed his colleagues in DGACM that he had been appointed Under-Secretary-General and Associate Administrator of the United Nations Development Programme ("UNDP") and that his last day in the office would be 13 November 2015.

16. By email dated 12 November 2015, the Applicant was provided with an interoffice memorandum (dated 6 November 2015) from the Executive Officer, DGACM, which informed him as follows (emphasis in original):

> This is to confirm that your fixed-term appointment expiring on **31 December 2015** will not be renewed. As earlier conveyed to you by the Assistant Secretary-General on 2 October and confirmed by the Under-Secretary-General on 6 October, the decision is due to the completion of your assignment on [the Compendium Project].

The Applicant was then advised of various separation procedures.

17. On 2 December 2015, the Applicant submitted a request for management evaluation of the decision not to renew his fixed-term appointment.

18. On 3 December 2015, the Applicant filed an application for suspension of action pending management evaluation, requesting suspension of the decision not to renew his fixed-term appointment beyond 31 December 2015. The case was registered under Case No. UNDT/NY/2015/064.

19. By Order No. 301 (NY/2015) dated 8 December 2015 and issued in Case No. UNDT/NY/2015/064, the Tribunal suspended the implementation of the contested decision pending the outcome of the request for management evaluation.

20. On 17 December 2015, the Applicant was informed by the Management Evaluation Unit that his request for management evaluation was considered not receivable.

Receivability of the application

21. Article 8 of the Statute of the Dispute Tribunal states in relevant part (emphasis added):

> **Article 8**
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> 1. An application shall be receivable if:
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> …
>
> (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and;
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> …
>
> 3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. *The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.*

22. Staff rule 11.2 of ST/SGB/2014/1 (Staff Rules and Staff Regulations of the United Nations) states in relevant part (emphasis added):

> **Rule 11.2**
>
> **Management evaluation**
>
> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
>
> …
>
> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days *from the date on which the staff member received notification of the administrative decision to be contested*. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

Preliminary issue: Order No. 301 (NY/2015)

23. As a preliminary issue, the Tribunal will consider the Applicant's submission regarding a statement made in Order No. 301 (NY/2015), issued by a different Judge of the Tribunal in Case No. UNDT/NY/2015/064, concerning notification of the contested decision.

24. At para. 29 of Order No. 301 (NY/2015), the Tribunal stated:

> The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention, the Applicant having filed the present application [for suspension of action pending management evaluation] approximately three weeks after the notification of the contested decision and less than four weeks before its implementation.

25. The Applicant submits that reference to the "notification of the contested decision" in this quotation means 12 November 2015 and that the Tribunal has therefore already determined the date of notification.

26. The Respondent submits that Order No. 301 (NY/2015) did not make a finding that the application in the present case is receivable. He notes that the Order was made in relation to the Applicant's request for suspension of action of the contested decision, and submits that it does not constitute a final determination on the receivability or merits of the contested decision. In deciding whether to grant a request for suspension of action, the Dispute Tribunal only makes a *prima facie* determination. The Respondent submits that such a determination is not binding on the Dispute Tribunal in its consideration of the issues of receivability or the merits in rendering its final judgment.

27. As noted by the Respondent, the Order was made in relation to the Applicant's request for suspension of action of the contested decision, and does not constitute a final determination on the receivability or merits of the application in the present case, the application on the merits not having been filed at the date the Order was issued. The Respondent does not appear to have made any submissions

regarding the timeliness of the request for management evaluation during the suspension of action proceedings, and the Tribunal accepted, for the purposes of those proceedings, the date of notification indicated by the Applicant—12 November 2015. Interdict proceedings are by their very nature urgent, with the parties filing submissions that may not be fully complete, and the Tribunal reaching only *prima facie* determinations given the interim nature of the proceedings. These findings are not binding on the Tribunal when it comes to consider a substantive case following the filing of an application on the merits and with the benefit of the full submissions of the parties.

28. In conclusion, the Tribunal finds that the statements made in Order No. 301 (NY/2015) are not relevant to the Tribunal's consideration of the receivability of the application in the present case.

Was the request for management evaluation filed in accordance within the time limit established by staff rule 11.2(c)?

29. Staff rule 11.2(c) states that a request for a management evaluation must be submitted within 60 calendar days from the date on which the staff member received *notification* of the administrative decision to be contested. In contrast, former staff rule 111.2(a) required staff members to request the review of an administrative decision (emphasis added): "within two months from the date the staff member received notification of the decision *in writing*."

30. The Appeals Tribunal has consistently held that a *timely* request for management evaluation is a mandatory first step in the appeal process and in the absence of this administrative review, an application to the Dispute Tribunal is not receivable *ratione materiae* (*Kazazi* 2015-UNAT-557, para. 38). The Appeals Tribunal has also clearly and consistently held that time limits must be observed and strictly enforced (*Eng* 2015-UNAT-520, para. 22; *Kazazi* 2015-UNAT-557, para 38).

31. Article 8.3 of the Dispute Tribunal's Statute specifically states that the Tribunal "shall not suspend or waive the deadlines for management evaluation." The Appeals Tribunal has reiterated the Tribunal's lack of jurisdiction in this regard on a number of occasions (see, most recently, *Survo* 2016-UNAT-644, paras. 31 and 32).

32. The Tribunal has also held that repetitions of the same administrative decision in response to an applicant's communication do not reset the clock with respect to the applicable time limits in which the original decision is to be contested (*Aliko* 2015-UNAT-539, para. 35; *Kazazi* 2015-UNAT-557, para. 31).

33. It has been stipulated by the parties that on 2 October 2015, the Applicant was verbally informed by the ASG/DGACM that his fixed-term appointment would not be renewed when it expired on 31 December 2015. However, the parties disagree on whether this was the date on which the 60 day time limit for requesting management evaluation under staff rule 11.2(c) began to run. If the Tribunal finds that the date of notification of the contested decision was 2 October 2015, the Applicant's request for management evaluation, submitted on 2 December 2015 was one day late, and his application to the Tribunal will not be receivable. If the Tribunal finds that the date of notification is 12 November 2015, i.e. the date he was informed of the decision in writing, then the application is receivable and the Tribunal can proceed to consider the merits of the case. The parties have cited a number of authorities regarding notification, however, the Tribunal does not consider any of them to be determinative of the issue in question.

Review of authorities cited by the parties

34. The Respondent cites *Gusarova* UNDT/2013/072 in support of his submission that, in contrast to the former staff rule, staff rule 11.2(c) does not require a staff member to receive written notification of an administrative decision in order for the time limit to start to run. In *Gusarova,* the Dispute Tribunal stated:

> 21. … it is not an essential element of an administrative decision that it be notified in writing. In contrast to former staff rule 111.2(a) according to which the letter requesting administrative review had to be sent within two months from the date the staff member "received notification of the decision in writing", current staff rule 11.2(c), which was already in force at the material time, does not entail such a requirement. Indeed, current staff rule 11.2(c) reads that the request for management evaluation must be sent within sixty days from the date the staff member "received notification of the administrative decision to be contested". Therefore, for the case at hand it is irrelevant that on 7 July 2011 the Applicant had been informed about her ineligibility by the Interview Panel only orally, over the telephone.

35. However, the Dispute Tribunal in *Gusarova* went on to find that the time limit for requesting management evaluation in the case began from the date the applicant received written notification of the relevant decision. The conclusion reached by an interview panel that the applicant was ineligible for the position for which she had applied, a conclusion relayed to her verbally over the phone, "was merely a preliminary determination requiring confirmation from the competent authority within the Organization." The Tribunal found that the final, authoritative decision was relayed to the applicant in a subsequent email because under ST/AI/2010/3 (Staff selection system) it is the role of the recruiter, rather than the assessment panel, to determine eligibility. The application was found receivable and the judgment was appealed on remedy alone (see *Gusarova* 2014-UNAT-439). Given the overall findings in the case, the Tribunal does not consider the comments quoted at para. 21 of the *Gusarova* Judgment persuasive.

36. The Applicant cites two authorities—*Ngoma-Mabiala* UNDT/2012/134 and *Schook* 2010-UNAT-103—in support of his submission that the prerequisite of written notification of a decision to mark the beginning of the 60 day period to request management evaluation remains applicable even if reference to such a requirement is omitted under staff rule 11.2(c). The Tribunal does not consider either of these authorities to be helpful. The relevant paragraph (para. 34) from *Ngoma-Mabiala* UNDT/2012/134 was rejected and redacted by the Appeals Tribunal in *Ngoma-Mabiala* 2013-UNAT-361 and is, therefore, of no assistance or relevance.

37. The Tribunal has considered *Manco* 2013-UNAT-342, in which the Appeals Tribunal cited *Schook* and *Bernadel* 2011-UNAT-180 as authority for the principle that notification must be provided in writing before the time limit for requesting management evaluation begins to run. However, both *Schook* and *Bernadel* interpreted former staff rule 111.2(a) rather than staff rule 11.2(c) and are therefore not of relevance to the present case. In *Manco*, the Appeals Tribunal did not comment on the clear difference between the two provisions, namely the omission from staff rule 11.2(c) of the words "in writing." In addition, *Manco* concerned an implied decision—failure to respond to a staff member's written challenge to the legality of a specific policy—rather than an explicit written or verbal decision.

38. It has long been recognized that administrative decisions can be either explicit or implied. In the United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), it was noted that administrative decisions (emphasis in original): "are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions" (see also *Terragnolo* 2015-UNAT-566, para. 34).

39. In *Awan* 2015-UNAT-588, the Appeals Tribunal confirmed that staff rule 11.2(c) applies to both explicit and implied administrative decisions (para. 18). The Tribunal considers that the fact that staff members are able to challenge implied administrative decisions is perhaps one reason why staff rule 11.2(c) omits reference to *written* notification. The Appeals Tribunal has developed a number of principles for determining when a staff member has been "notified" of an implied decision for the purposes of staff rule 11.2(c). A number of the authorities cited by the Respondent in the present case concern such principles. However, the cited principles cannot necessarily be extrapolated to apply equally to the present case, in which the Applicant was informed explicitly of the decision, both verbally and in writing.

40. The jurisprudence is neatly summarized in *Awan*. A staff member contested an implied decision of UNICEF not to provide him "safety and functional immunity" from criminal proceedings. In upholding the Dispute Tribunal's judgment that the case was not receivable, the Appeals Tribunal affirmed previous judgments in which it had set out tests for determining the date of notification of an implied administrative decision. The Appeals Tribunal stated (emphasis added):

> 19. *With an implied administrative decision*, the Dispute Tribunal must determine the date on which the staff member knew or reasonably should have known of the decision he or she contests [citing, by way of footnote, *Rosana* 2012-UNAT-273 and *Chahrour* 2014-UNAT-406, para. 31]. Stated another way, the Dispute Tribunal must determine the date of *the implied decision* based "on objective elements that both parties (Administration and staff member) can accurately determine" [citing *Terragnolo* 2015-UNAT-566, para. 36; *Rosana* 2012-UNAT-273, para. 25; *Collas* 2014-UNAT-473, para. 40].

41. The Tribunal considers that the tests cited by the Respondent regarding when a staff member knew or reasonably should have known of a decision and objective elements that both parties can accurately determine are applicable to determining the date of notification of an *implied* decision, as is made clear in para. 19 of *Awan* (see also the use of square brackets at para. 36 of *Terragnolo*), and are not applicable to the present case, which the Applicant was informed of the contested decision both verbally and in writing.

42. Finally, the Respondent has cited *Onana* 2011-UNAT-157 in support of his submission that a staff member's actual knowledge cannot be ignored for the purposes of calculating time limits. *Onana* concerned the issue of whether an appeal against a Dispute Tribunal judgment had been filed in accordance with the statutory time limit. The appellant submitted that he never received the judgment and that his former legal counsel had failed to share information with him about its issuance or the appeal procedure. The Appeals Tribunal noted that the judgment had been issued and sent by email to the staff member's counsel, posted on the Dispute Tribunal website, that the applicant had been informed of its issuance the following day, and

that he had been formally notified by his former counsel that the Office of Staff Legal Assistance would not be assisting him in any appeal.

43. In these circumstances, the Appeals Tribunal stated that "Onana's contention that he did not receive the said UNDT Judgment or any notification from the UNDT Registry does not persuade this Tribunal, since it would be senseless to rely just on a formality to ignore Onana's actual knowledge of the UNDT Judgment." The Tribunal considers that the facts and legal issues arising in *Onana* are different to those in the present case. The case concerned whether and on what date the appellant was in "receipt" of a written judgment under art. 7.1(c) of the Appeals Tribunal Statute after it had been published on the Dispute Tribunal website and formally transmitted to his counsel by email. The present case, by contrast, concerns a question as to whether informing a staff member of a decision verbally constitutes "notification" of an administrative decision under staff rule 11.2(c).

Conclusion

44. Staff rule 11.2(c) does not explicitly refer to *written* notification. However, this may be in recognition of the fact that implied decisions, which are, by their very nature, not usually written, may nevertheless be challenged before the Dispute Tribunal.

45. The case law in this area is not clear. While the Tribunal cannot suspend or waive the time limit for management evaluation, there is no clear law at the Appeals Tribunal level on whether the verbal conveyance of a decision constitutes notification sufficient to initiate the running of the time limit. While it is clear that repetitions of the same administrative decision in response to an applicant's communications do not reset the clock with respect to the applicable time limits (*Aliko*, *Kazazi*), this jurisprudence is not determinative of the issue, since in both the cited cases, as well as *Cremades* 2012-UNAT-271, which was also cited by the Respondent, initial notification was provided in writing. The issue of whether or in what circumstances

an administrative decision may be conveyed verbally for the purpose of initiating time limits was therefore not addressed.

46. The Applicant submitted that Ms. Pollard and Mr. Gettu declined to provide him with copies of the records of the meetings of 2 and 6 October 2015, "indicating that the meetings were informal and he would be receiving a formal notification." The Respondent did not address this contention in the reply to the application. Since the Applicant believed that he had a legitimate expectation of renewal of his appointment based on an alleged express promise from Mr. Gettu, it would be understandable if he sought formal confirmation of any non-renewal decision in writing.

47. Time limits exist in the system of administration of justice for reasons of certainty and the expeditious disposal of disputes. The expiry of the time limit set out in staff rule 11.2(c) extinguishes a staff member's right to submit a request for management evaluation, and therefore to challenge a decision before the Dispute Tribunal.

48. In a case such as the present one, in which notification of a decision has been provided in writing after the Applicant was verbally informed of the decision, the Tribunal considers that the correct approach is to rely on the date of this written notification for the calculation of the time limit for requesting management evaluation. In the circumstances, and considering the facts of this case, I hold that where there is written notification of a decision, receipt of which is either expressly acknowledged by the Applicant or not denied by Applicant and it is not a reiteration of a previous written decision, this will be the date of notification for the purpose of the time limit for requesting management evaluation, as a written decision is formal and usually clear and final. This allows both parties in a case to proceed with certainty.

49. As such, the Tribunal finds that this application is receivable.

Merits of the application

50. The Applicant submits that he had a legitimate expectation of renewal of his appointment, that the reasons given for the non-renewal are not supported by the facts, and that the decision was tainted by bias, prejudice, and discrimination.

51. In *Ahmed* 2011-UNAT-153, the Appeals Tribunal stated:

> 45. It is recognized that, if based on valid reasons and in compliance with procedural requirements, fixed-term appointments may not be renewed. Accordingly, an administrative decision not to renew a fixed-term appointment can be challenged as there is a duty and requirement on the Organization to act fairly, justly, and transparently in its dealings with the staff members.
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> 46. In that respect, if the Administration gives a staff member a legitimate expectancy of renewal of his or her fixed-term appointment, then that may be a good reason for the Tribunal to interfere with the non-renewal decision on the grounds of unfairness and unjust dealing with the staff member. Similarly where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene.
>
> 47. We concur with the former Administrative Tribunal which held that, unless the Administration has made an "express promise … that gives a staff member an expectancy that his or her appointment will be extended", or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful.

Did the Applicant have a legitimate expectation of renewal of his fixed-term appointment?

52. The Applicant submits that he had a legitimate expectation that his fixed-term appointment would be renewed based on express promises from Mr. Gettu. He submits that at the 19 June 2013 meeting between himself, Mr. Abdelaziz, and Mr. Gettu, who had recently been appointed USG/DGACM, the latter (emphasis added):

> informed the Applicant that he would like to bring his own team into his new Office, including appointing a new Chief of Office in place of the Applicant, and in return *promised that the Applicant would continue as the Chief of Office until he has found another position*, and *that his appointment would not be terminated for as long as he stays in DGACM*. In addition, Mr. Gettu discussed the possibility of moving laterally to another position within DGACM, and offered to assist in finding another position outside DGACM, to the degree that he would bring the job applications to the attention of the Secretary-General personally. Mr. Gettu's express assurances and promises were explicit and clear.

53. In support of his case, the Applicant submitted in evidence an email from Mr. Abdelaziz, the Under-Secretary-General and Special Adviser to the Secretary-General on Africa, dated 30 November 2015, which states:

> As requested, I hereby confirm that the meeting [between the Applicant, Mr. Abdelaziz, and Mr. Gettu] referred to in your email was held in my office on 19 June 2013. In that meeting, Mr. Gettu, you and me discussed your situation as chief of the office of the [USG/DGACM]. During that discussion, Mr. Gettu stated that he would extend your contract with DGACM until you have found an alternative position at the same level somewhere else.
>
> This only is my recollection of the meeting.

54. The Respondent submits that Mr. Gettu stated at the 19 June 2013 meeting that he would be willing to support the Applicant's candidacies for other positions. However, Mr. Gettu did not give any promise to the Applicant that his career with the Organization would continue until such time as the Applicant was selected for another position.

55. The Respondent further submits that a claim of legitimate expectation cannot be based on verbal assertions; there must be a firm commitment to renew an appointment and, in particular, there must be an express promise in writing. He submits that the Applicant has not adduced any evidence that the USG/DGACM gave him a written promise to renew his fixed-term appointment beyond 31 December 2015. Contrary to the Applicant's assertions, the USG/DGACM did not give a verbal promise not to terminate the Applicant's appointment, nor give

an assurance of the "continuance" of his appointment to the Applicant or any other person at the meeting on 19 June 2013 or at any other time.

56. It is well established that a party to a fixed-term appointment has no expectation of renewal of that contract. In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, "it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case" (*Abdalla* 2011-UNAT-138, para. 24; *Munir* 2015-UNAT-522, para. 24).

57. In *Igbinedion* 2014-UNAT-411, the Appeals Tribunal stated (emphasis added):

> [T]he renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectancy of renewal; unless the Administration has made an *express promise* that gives the staff member an expectancy that his or her appointment will be extended. *The jurisprudence requires this promise at least to be in writing*.

58. In *Munir* 2015-UNAT-522, the Appeals Tribunal upheld the finding of the Dispute Tribunal that a staff member had a legitimate expectation of renewal of his fixed-term appointment for one year based on a decision that was found to have been made during a meeting of the Core Management Group of the UNDP Country Office in Sudan. The Appeals Tribunal judgment stated (footnotes omitted, emphasis in original):

> 28. … the UNDT held that:
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> > [T]he decision taken at a regular and proper [Country Office] [Core Management Group] meeting to extend the contract of a staff member, which decision is embodied in open recorded meetings and accessible to staff members, carry [sic] far greater weight than any '<u>express promise</u>' that can be made to the said staff member about extending his contract. …
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> 29. Finding that "it was not just a case of a <u>promise</u> by a [First Reporting Officer], but a decision […] which only remained to be implemented," the UNDT therefore concluded that Mr. Munir had

> a legitimate expectation that his contract would be extended for one year.
>
> 30. We find no reason to reverse this finding as, in the instant case, a legitimate expectation was unequivocally created by virtue of the decision taken at the CO Core Management Group meeting.

59. There is a dispute between the parties as to what was said at the 19 June 2013 meeting involving the Applicant, Mr. Abdelaziz, and Mr. Gettu. The Applicant submits that two distinct promises were made by Mr. Gettu during this meeting. The first was that the Applicant would continue in his position as Chief of the Office of the USG/DGACM until he found another position. The Applicant was subsequently reassigned from his position as Chief of Office to perform other functions effective 1 October 2013 and therefore he cannot be considered to have had a legitimate expectation regarding continuance in his former position. The Tribunal notes that the Applicant did not contest the reassignment at the time of the decision. However, in the application he stated that Mr. Gettu reassured him "privately and through others of the continuation of his contract" and that given these "continued assurances," he complied with the reassignment.

60. The second alleged promise made was that the Applicant "would not be terminated for as long as he stays in DGACM." The Tribunal notes that staff rule 9.4 differentiates between termination of appointment and expiration of appointment. Staff rule 9.4 states: "A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment." Termination of appointment is defined in staff rule 9.6 as a separation from service initiated by the Secretary-General on the grounds of, for example, abolition of post or unsatisfactory services. As a matter of fact and law, the Applicant was not terminated from his appointment but rather, his fixed-term appointment expired and was not renewed. To the extent that a promise was made not to terminate the Applicant's appointment, that promise was kept.

61. However, viewing the Applicant's case in the light most favorable to his position, even if the Tribunal found that Mr. Gettu verbally stated that he would

extend or renew the Applicant's contract with DGACM until he found a position at the same level elsewhere in the Organization, as Mr. Abdelaziz's 30 November 2015 email suggests, the Tribunal does not consider that such a statement would be sufficient to support a claim of legitimate expectation in this case. The Appeals Tribunal jurisprudence requires "a firm commitment to renewal revealed by the circumstances of the case." The commitment must be more than "a mere verbal assertion" (*Abdalla*; *Munir*); it must be an express promise in writing (*Igbinedion*). The Tribunal finds no evidence of an express promise in writing in this case.

62. The Applicant does not submit that his case is analogous to *Munir* and the Tribunal considers that it can be distinguished in that none of the statements or assurances that the Applicant submits were made or given could be regarded, based on a review of the factual background, as "a decision … which only remained to be implemented."

63. In addition, the Tribunal does not consider that the statement by Mr. Gettu in the memorandum dated 27 September 2013 expressing an "intention to provide [the Applicant] with other challenging and interesting assignments based on a high quality outcome" can be considered an express promise regarding the continued renewal of the Applicant's appointment. The memorandum did not mention renewal of the Applicant's appointment or any promised period of renewal. It does not rise to the level of an "express promise" or "firm commitment" as required by the Appeals Tribunal jurisprudence. In addition, the Tribunal notes that the record shows that the Applicant's fixed-term appointment was in fact extended twice following his reassignment, on the first occasion until 31 December 2014, and on the second occasion, until 31 December 2015.

64. The Applicant has not met the burden of proving that the Administration provided a "firm commitment" or made an "express promise" in writing to renew his fixed-term appointment, so as to support his contention that he had a legitimate expectation that his appointment would be renewed beyond 31 December 2015.

Was the reason given for the decision not to renew the Applicant's appointment supported by the facts?

65. Both parties have cited the jurisprudence of the Appeals Tribunal which states that "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (*Islam* 2011-UNAT-115, para. 29).

66. The Applicant submits, essentially, that the reason given for the decision not to renew his fixed-term appointment is not supported by the facts. He states that he was informed by Ms. Pollard on 2 October 2015 that his appointment would not be renewed beyond 31 December 2015 "because his initial assignment was ad-hoc and there [had] not been any work for him in DGACM since the beginning of the year." He submits that he was informed by Mr. Gettu on 6 October 2015 that his appointment would not be renewed "since he is no longer placed against a regular post." The official separation memorandum dated 12 November 2015 stated that the Applicant's fixed-term appointment would not be renewed "due to the completion of [his] assignment on [the Compendium Project]."

67. In his application, the Applicant stated that the Compendium Project was not *ad hoc*, and that he had performed "an abundance of work" since the beginning of 2015. His own submissions and the annexes to the application demonstrate that he did indeed complete the Compendium Project as the separation memorandum stated. In the application, the Applicant refers to the "completion" of the project, stating that it was "completed at no cost" and "produced and delivered earlier than anticipated." The Applicant submitted a copy of a document titled "Compendium of Administrative Policies, Practices and Procedures of Conference Services" as an annex to his application. The document is dated January 2015.

68. The Respondent submits that the Compendium Project is not ongoing, and that the project was completed in February 2015.

69. The Applicant makes a number of submissions regarding the quality of the output generated to produce the Compendium Report and the timeline for

completing it. However, these submissions are irrelevant in that there is no evidence that the Applicant was separated due to unsatisfactory performance in relation to the Compendium Project.

70. The Applicant further notes that he performed a number of other tasks throughout 2015. The Respondent does not dispute that the Applicant carried out a number of other tasks, as recorded by his First Reporting Officer in his performance assessment for the 2014–2015 performance cycle but states that these were temporary, *ad hoc* assignments. The Respondent states that these assignments did not give rise to an organizational need to renew the Applicant's appointment.

71. In *Kacan* 2015-UNAT-582, the Tribunal found that, in the absence of an express promise of renewal of appointment, and having failed to establish improper motives or discrimination, the decision not to renew a staff member's fixed-term appointment was a legitimate exercise of the Administration's discretion, based on the operational realities of the office concerned, and the fact that the staff member's services were no longer necessary.

72. The Tribunal finds that the official reason given to the Applicant for the non-renewal of his fixed-term appointment, i.e. "due to the completion of your assignment on [the Compendium Project]" is sufficiently supported by the weight of the credible evidence.

Is there any evidence that the contested decision was motivated by bias, prejudice, discrimination or other extraneous considerations?

73. The Applicant submits that "the conduct of DGACM has all the markings of an ill-motivated and unlawful action, based on an abuse of discretion including bias, prejudice, and other discrimination against the Applicant." He submits that Mr. Gettu "not only wanted [him] out as Chief of Office [of the USG/DGACM], but also out of DGACM" and "out of the Secretariat altogether" and that this is evident from Mr. Gettu's comment on his performance assessment for the 2013–2014 performance

cycle in which he stated that the Applicant "needs to focus on his job and creatively find out what best fits his talents and skills in the organization." The Respondent submits that these comments were intended to provide guidance to the Applicant and no more, and that they do not demonstrate a desire to remove the Applicant.

74. The Applicant further submits that it is "not surprising that Ms. Pollard had not kept her previous appointments [with him] to discuss a work plan for the [2015–2016] performance cycle, for she would not have been able to contend so easily that the Applicant had no work to do and still not establish a work plan for him." He alleges that Ms. Pollard "purposely has opted not to fulfil her duty as a First Reporting Officer … for the sole purpose of making up the reason for separating the Applicant upon the expiration of his appointment." The Respondent submits that these submissions are without merit.

75. Having considered the Applicant's contentions, and the evidence on record, the Tribunal does not consider that the Applicant has met his burden of proving that the non-renewal of his appointment was motived by bias, prejudice, discrimination, or other extraneous considerations. The comments from Mr. Gettu on the Applicant's 2013–2014 performance appraisal are not sufficient to establish an improper motive. Nor are the allegations regarding the delay in creating a work plan for the Applicant, even if established. In the absence of sufficient evidence, there is no basis for concluding that the contested decision was improperly motivated.

Conclusion

76. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of August 2016

Entered in the Register on this 26th day of August 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York