



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2019-UNAT-916

Resources Officer further asked [Mr. Agha] to clarify what would be his availability to return to work if his request for SLWOP was granted.

... On 3 February 2017, [Mr. Agha] received an email from the Acting Administrative Officer at DSS requesting an explanation as to why he had not reported back to duty following expiration of the approved leave period. [Mr. Agha] was requested to provide an explanation for his absence, or a medical certificate of illness within 10 working days.

... On 22 February 2017, [Mr. Agha] wrote to DSS indicating that his mother had been discharged from the hospital and his doctor had allowed him to travel, so he was returning to New York.

... On 24 February 2017, the Senior Human Resources Offices of DSS informed [Mr. Agha] that SSS had recommended non-extension of his fixed-term appointment beyond its expiry on 28 February 2017.

... On 13 March 2017, [Mr. Agha] wrote to the Under-Secretary-General for Security and Safety (USG/DSS) explaining that he overstayed his leave due to his medical condition and the critical health condition of his mother, which he considered to be extraordinary.

... On 28 March 2017, the Director of the Division of Headquarters, SSS, wrote to [Mr. Agha] on behalf of the USG/DSS. He informed [Mr. Agha] that SWLOP was not approved in his case amid multiple follow-up attempts by SSS and that [Mr. Agha] failed to respond in a timely manner to a request regarding his continued absence. The Director noted that [Mr. Agha] had been given an opportunity to return to work and/or provide medical certification on 4 October 2016 as well as on 3 February 2017.

3. Mr. Agha filed an application before the UNDT which issued its decision on 20 September 2018. The UNDT ordered the contested decision not to renew his fixed-term appointment be rescinded and Mr. Agha be retroactively reinstated from 1 March 2017 until 28 February 2019. In addition, the UNDT ordered the Secretary-General to retroactively pay Mr. Agha his salary from 1 March 2017 to the effective date of his reinstatement together with his and the Organization's contributions to the Pension Fund for this period, as compensation for loss of earnings in accordance with Article 10(5)(a) of the UNDT Statute. As an alternative to reinstatement, the UNDT ordered in-lieu compensation in the amount of two years' net base salary, which would include the compensation for loss of earnings.

4. The Administration admitted that the decision not to extend Mr. Agha's fixed-term appointment was based on his unauthorized absence. The UNDT concluded that the non-renewal decision constituted a separation decision for abandonment of post, which was issued unlawfully, without following the mandatory procedures of Administrative

Instruction ST/AI/400 (Abandonment of post). For the Administration to infer Mr. Agha's intention to abandon his post it first had to follow the procedures. The UNDT noted there was no evidence that the Administration followed the procedures set forth in ST/AI/400. Mr. Agha had been in contact with the Organization during his absence and he had clearly confirmed his will and interest in maintaining the post. The four-month delay in considering his initial request for SLWOP from May to October 2016 cannot be attributed to Mr. Agha who had submitted his request and documentation timely. Upon notice of rejection on 6 October 2016, Mr. Agha submitted additional documents and renewed his request. On the same day, the

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Mr. Agha's Answer

11. Mr. Agha requests the Appeals Tribunal to uphold the UNDT Judgment in its entirety and specifically ensure he is reinstated to the post that he encumbered since 2005 and for which he was almost eligible to receive 15-year pension benefits. The UNDT did not err in finding his separation was unlawful. On 23 February 2017, the date he was notified he would not be renewed, his request for SLWOP was still pending and thus the Administration could not consider this time as unauthorized absence. The Administration did not act justly, fairly, and transparently as it took several months to respond to his request for SLWOP despite his repeated provision of additional documents that they had requested. The Administration had led him to believe it was considering his request.

12. Mr. Agha argues that the UNDT correctly held that the contested administrative decision was actually separation based on abandonment of post and that the Administration had not followed the requisite procedures. At all times, he had been in contact with DSS and expressed his will and intent to continue in his post. In turn, the Secretary-General's argument that he failed to meet any duties or obligations of a staff member is unfounded.

13. Mr. Agha submits that the UNDT correctly distinguished *Abdallah* from his situation. Agha's Answer U(O.3)

16. On appeal, we must determine whether the UNDT erred in law or fact when it ultimately concluded that the Administration's decision not to renew Mr. Agha's fixed-term appointment was unlawful. Before considering that question, we turn to the standard of judicial review in non-renewal cases. We recall the well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.³

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to Mr. Agha from the Director of the Division of Headquarters, SSS on 28 March 2017 pointed out to Mr. Agha “that [he] did not report for duty after being advised that [his] leave was not approved. Moreover, [he] also failed to respond in a timely manner to a request regarding [his] continued absence.”

23. The UNDT’s finding that the non-renewal decision constituted a separation decision for abandonment of post was not supported by the evidence and was, therefore, an error in fact and in law. The evidence very clearly established that the non-renewal decision was solely based on Mr. Agha’s unauthorized absence from duty.

24. We further find that the UNDT erred in law in distinguishing Abdallah¹² from the present case. The ratio decidendi in Abdallah is that chronic absenteeism may be a lawful basis for a decision not to renew a fixed-term contract. Abdallah is, therefore, pertinent to the present case. The matters considered by the UNDT as distinguishing Abdallah are not relevant.

Did the Administration act fairly towards Mr. Agha?

25. The evidence on which the UNDT based its finding that the Administration failed to act fairly, justly, and transparently towards Mr. Agha emerged from an exchange of e-mails between DSS and Mr. Agha between 4 October and 6 October 2016.

26. On 4 October 2016, DSS informed Mr. Agha that his request for SLWOP had not been approved because of lack of supporting evidence. He was directed to return to work within two weeks and he was warned that failure to do so may result in administrative actions for abandonment of post. Mr. Agha replied on 6 October 2016, attaching some documents. The Senior Human Resources Officer of DSS replied, saying that he found the documents difficult to understand. He also asked the following question on which the UNDT based its finding that Mr. Agha had been treated unfairly: “Could you please clarify your plans? If your SLWOP is approved, can you commit to returning to work in January 2017?”

27. The UNDT found that “from this language ... at the relevant time, [Mr. Agha’s] request for SLWOP was still under consideration by DSS”. It concluded that the Administration failed to act fairly in leading Mr. Agha to believe that it was still considering granting him SLWOP while at the same time recommending the non-renewal of his fixed-term appointment.

¹²Abdallah v. Secretary-General of the United Nations, Judgment No. 2010-UNAT-091.

28. The UNDT erred in finding that this was evidence of unfairness. The e-mail from the Senior Human Resources Officer did not say that Mr. Agha's request for SLWOP was being considered. It indicated that consideration was conditional upon Mr. Agha committing to return to work in January 2017, which he never did. Moreover, even if Mr. Agha mistakenly believed that his SLWOP was still being considered, it was clear that the leave would not be approved if he did not commit to returning to duty in January 2017.

29. The burden of proving that the Administration did not act fairly, justly, or transparently rests with Mr. Agha. In our view, there was overwhelming evidence that he has not satisfied this burden. The evidence not only showed that the Administration had treated Mr. Agha fairly, but, that it had treated him with amazing patience.

30. In total, Mr. Agha was absent from his duty station for more than one year, that is from 20 February 2016 to the end of his contract on 28 February 2017. Of that period, 10 months were unauthorized absence from duty. From May 2016, his absence from duty became unauthorized, yet he still failed to return to work. In August 2016, DSS attempted to obtain his commitment to return to duty in January 2017 so that his SLWOP could be approved. By October 2016, nothing had been heard from him, so he was directed to report for duty. Even then, DSS was prepared to consider granting him SLWOP if he would commit to returning to duty in January 2017. He was given many opportunities to provide justification for his leave requests but neglected to do so.

31. The evidence in the case establishes that the Administration acted fairly and transparently towards Mr. Agha. It cannot be said that the decision not to renew his fixed-term appointment on the basis of his failure to report for duty was in any way arbitrary. The facts support the conclusion that such a decision was a reasonable exercise of the Administration's discretion.

32. For the foregoing reasons, we find that the UNDT erred in fact and in law, resulting in a manifestly unreasonable decision.

Judgment

33. The appeal is granted, and Judgment No UNDT/2018/092 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th