

UNITED NATIONS D

Introduction

1. By application filed on 11 May 2015, the Applicant contests the decision of 29 October 2014 not to renew her fixed-term appointment beyond its expiration date of 2 December 2014, and the decision conveyed to her by email of 10 December 2014 "that the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional

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Chief, Field Operations and Technical Cooperation Division (“FOTCD”), Africa Branch, informed the unit that upon the return of the incumbent of RB post 501057, the structure of the Branch remained identical with two Sections and that the Applicant “continue[d] to oversee the East and Southern Africa Section”, that

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15 September 2014, from the Chief, FOTCD, OHCHR, by which all staff had been informed that upon the return of the incumbent of post No. 501057, the

her sick leave entitlement, as reflected in the relevant personnel actions and letters of appointment, as Senior Human Rights Officer, OHCHR, in Geneva.¹

20. By letter dated 19 November 2014, the Applicant's then counsel wrote to the High Commissioner, requesting him to "immediately renew [the Applicant's] contract". The Counsel noted that the High Commissioner himself had told the Applicant on 1 November 2014 that she was "'on strong legal grounds' for contesting the decision", and that the High Commissioner had "promised [the Applicant] that she would not lose her job at OHCHR" adding that "however, she [had] not yet received written confirmation of this".

21. On the same day, the Chief of Office, OHCHR, contacted the Applicant via email to schedule a meeting on 24 November 2014 with the High Commissioner and the Deputy High Commissioner, in light of her request for reconsideration of the decision not to renew her FTA. The Applicant's then Counsel, by email of 20 November 2014, declined the meeting, requesting that it be postponed until the Applicant, who was purportedly on "service-incurred" sick leave, had recovered.

22. On 24 November 2014, the High Commissioner signed a memorandum dated 20 November 2014, deciding to laterally transfer Ms. P., a permanent appointment holder who at that time was Head, South Africa Regional Office, to post No. 509992, against which the Applicant had been placed effective 15 August 2014. MSS, UNOG, had issued a recommendation for Ms. P. to be reassigned to Geneva, in light of her need to access medical facilities.

23. By memorandum dated 3 December 2014 from the Director, FOTCD, to the Chief, Programme Support and Management Services ("PSMS"), through the Deputy High Commissioner and High Commissioner, the Director, FOTCD, recommended the extension of the Applicant's fixed-term appointment for a period of two years, stressing that the "recommendation for an extension of the

¹ Applicant submitted a declaration on 2 May and notification would be on 2 May, subsequent to 2 May in May, submitted a new declaration and notification was able to return to work at a time as of 2 May, subsequent to declaration forwarded to M was not approved prior to Applicant's separation, or 2 May

appointment should also go together with a recommendation for a lateral transfer of [the Applicant] to the P-5 post of Regional Representative, Pacific Regional Office". The Deputy High Commissioner signed the memorandum on 4 December 2014, and the High Commissioner on 10 December 2014.

24. By email of 10 December 2014, the High Commissioner acknowledged receipt of an email from the Applicant and "[took] the opportunity to underline that, in [their] meetings, while [he] undertook to look at [her] situation and try to find a suitable position for [her], [he] never made any promise to [her] in respect of any particular position". He referred to the terms of the job opening for which the Applicant had been selected, stressing that "it [was] beyond [his] or anyone else's control that the regular incumbent of this position returned and resumed his functions". He further stressed that a vacant and suitable position at the P-5 level had been identified and offered to her, and that he hoped that the Applicant would accept this offer and continue to work for OHCHR. The High Commissioner also expressed his concern about the Applicant having made allegations with respect to her contractual situation being linked somehow to the request to interview her in connection with an investigation concerning WIPO, and that no such link existed. He recalled that he had formally indicated that he had no objection to the Applicant participating in such an interview.

25. By email also of 10 December 2014, the Chief, Human Resources Management Section, OHCHR, informed the Applicant that "the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional Office of OHCHR in Suva, Fiji as the Regional Representative for the Pacific". He also referred to an earlier phone conversation on this matter.

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27. The Applicant, by email of 16 December 2014 to the Human Resources Officer, HRMS, UNOG, informed the latter that her treating physician and MSS, UNOG, had certified that in view of her health situation she could not leave Geneva.

28. By email of 18 December 2014, the Human Resources Officer, HRMS, UNOG, informed the Applicant that in view of her sick leave, which had been certified by MSS, UNOG, her appointment, which was due to expire on 31 December 2014, had been extended, for administrative purposes only, until 13 January 2015, to cover her sick leave period.

29. By email of 22 December 2014 from the Deputy High Commissioner to the Applicant, she was informed that “[a]s earlier indicated [the Office] could confirm a two-year contract extension as OHCHR Representative based in Suva, Fiji”.

30. On the same day, the Applicant filed a request for management evaluation against the decision of 29 October 2014 not to renew her fixed-term appointment beyond its regular expiration date of 2 December 2014, and the decision contained in the email of 10 December 2014 from the High Commissioner, conveying “that the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move” to Fiji. She also mentioned that she had been informed on 18 December 2014 that, at that time, her appointment had been extended for administrative reasons to cover her certified sick leave until 13 January 2015.

31. On 16 January 2015, the Human Resources Officer, HRMS, UNOG, reiterated the terms of ST/AI/2005/3 (Sick leave), and noted, inter alia, that if the Applicant were to continue on sick leave, she would have exhausted all her sick leave entitlements (full and half pay) on 21 May 2015.

32. On 10 February 2015, in reply to the Applicant’s request for management evaluation, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decision.

33. By email of 11 February 2015, the Human Resources Officer, HRMS, UNOG, in response to a query from the Applicant, recalled that the latter had not been transferred from WIPO to OHCHR, but had been recruited by OHCHR on initial appointment. Since she had completed less than three years of continuous service, her sick leave entitlement was three months on full salary and three months on half salary. The Applicant was informed, again, that she would, accordingly, have exhausted her sick leave entitlements at full and half pay on 21 May 2015.

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failing this, access to external arbitration. In both letters, she raised her concern that she was subjected to retaliation as a “UN whistle blower” with respect to issues she had reported at WIPO.

37. By letter dated 30 April 2015, the Director of Office, Office of the Chef de Cabinet, responded to the Applicant’s letter of 27 April 2015, stressing that the only recourse mechanism available to her was within the United Nations internal justice system. With respect to her concern to have been the subject of retaliation, she was informed that she could file a formal request for protection with the United Nations Ethics Office. Finally, he stressed that the offer for the Applicant to take up a P-5 position in Fiji was still standing.

38. By email of 6 May 2015, the Applicant asked the Human Resources Officer, HRMS, UNOG, “to be provided with [her] contract as soon as possible”. On the same day, the Human Resources Officer, HRMS, UNOG, responded to the Applicant that “to the best of her knowledge, [the Applicant had] so far indicated that [she] did not wish to take [the] position in Fiji”, and that “[she had been] placed on sick leave before the end of [her] contract in December 2014 and [her] appointment [had] been since then extended month by month, for administrative purposes, upon receipt of medical certificates ... solely to allow [her] to use [her] sick leave entitlements”. She finished her message stressing that “[a]s already conveyed in several of [their] exchanges, [the Applicant] [would] have exhausted all [her] entitlements to sick leave (with full and half pay) on 21 May 2015” and that “[a]fter that day, [UNOG] [would] initiate [her] separation”.

39. By email of the same day, the Applicant informed the Human Resources Officer, HRMS, UNOG, that if the only option to separation was accepting the assignment to Fiji, she had no choice, so she requested to be forwarded the contract.

40. On 6 May 2015, the Human Resources Officer, HRMS, UNOG, responded to the Applicant in the following terms:

You are currently on certified sick leave until 13 May 2015. In order to take your new functions, you have to contact ["MSS"] as you need to be medically cleared for your new assignment. Once

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47. Also on 13 May 2015, the Applicant filed a second request for management evaluation of her “threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave” and the “refusal to grant [her] request for a stay (on medical grounds) of [her] lateral transfer to Fiji”. Additionally, on the same day, the Applicant filed an application for suspension of action of said decisions with this Tribunal.

48. The Officer-in-Charge, Management Evaluation Unit (“MEU”), responded to said request by letter of 15 May 2015, noting that it was not receivable. In view of the foregoing, the Tribunal, by Order No. 105 (GVA/2015) of 18 May 2015 rejected the request for suspension of action, for lack of merit.

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- a. The decision to transfer her to Fiji and to separate her from service is illegal because she is on service-incurred sick leave and not fit for deployment outside of Geneva. She cannot be transferred to Fiji so long as such health restrictions persist for her and her son;

h. Ms. P. who had to leave her assignment in South Africa was accepted for the P-5 post in Fiji and was ready to go on that assignment;

i. It was only when she requested permission to give evidence in the WIPO investigation that she was informed that Mr. C. had returned to his liened post;

j. The Applicant then exercised her contacts with Ambassadors, particularly the Somali Ambassador, who tried to meet with the High Commissioner and met with the Director-General, UNOG, to discuss the Applicant's case;

k. Just after she had been informed that OHCHR "was going to get rid of her", she was notified that OHCHR had decided to put her on the P-5 post in Fiji; that position was explicitly presented to her as a transfer, not as a new appointment; she was not looking for a new appointment, but for the expected renewal of her FTA; the offer of transfer to Fiji was conditional for her to actually fly to Fiji first, before she could see or sign her contract for the transfer;

l. While she was on medical sick leave, her medical practitioner informed her that if she felt comfortable in transferring to Fiji, there would be no medical impediment to her accepting the transfer. Had the Organisation been transparent about the transfer and the reason why she had to report to Fiji first, she would not have remained under enormous psychological stress, and could have taken the Fiji position; those decisions rendered her medically unfit to blindly accept the transfer to Fiji;

m. Her former post and its functions were not abolished, and remain fully funded; hence, any claims of financial difficulties are inapposite; the non-renewal decision was taken prior to the announcement of any decision resulting from the alleged financial crisis at OHCHR;

n. Her performance cannot be a reason for non-renewal, since she had no performance evaluations since she entered the OHCHR, at no fault of her;

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- o. The non-renewal decision constitutes a violation of the principle of**

as to the prior and later withdrawn, irregular decision not to renew her contract;

ii. **Withdrawal of the impugned transfer decision to Fiji;**

iii. **Assignment to a two year fixed-term post commensurate with her grade, skills and experience in Geneva, retroactively from 2 December 2014;**

iv. **An award of moral damages of two years net base salary for anxiety, humiliation and stress resulting from the impugned decision;**

v. **Interest of 5% on the amounts above, from 10 December 2014 through the date of satisfaction of a judgment; and**

vi. **Such other relief as the Tribunal des irtc**

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(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).²

57. Similarly, according to staff regulation 4.5(c) “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”.

58. This is confirmed by the established jurisprudence of the Appeals Tribunal, which ruled that a fixed-term appointment has no expectancy of renewal or of conversion to any other type of appointment (

of renewal has to be “based on ... a firm commitment to renewal revealed by the circumstances of the case”.

61. The decision not to renew the Applicant’s appointment beyond its expiration date on 2 December 2014 was notified to her by email dated 29 October 2014. In that email, the Chief, Human Resources, OHCHR, informed her of the reason for the non-renewal of her appointment in the following terms:

[T]his decision is based on the fact that you were appointed against a position which was temporarily vacant as the incumbent was on assignment to another Department of the Secretariat. The incumbent has now returned from his assignment.

...

Please contact Ms. [E.D.] at UNOG to make all the necessary administrative arrangement for your separation.

62. Having reviewed the parties’ submissions, the evidence on file and that provided at the hearing, the Tribunal is satisfied that the reason provided by the Administration to justify the non-renewal of the Applicant’s appointment beyond 2 December 2014 is substantiated.

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

63. The Tribunal first notes that the job opening for which the Applicant applied, and was ultimately selected, namely JO OHCHR-24481-R-Geneva, clearly spelled out the purpose of the recruitment as follows: “[t]his position is vacant due to the temporary assignment/secondment of the regular incumbent to another office/organization. The selection and extension of the appointment of the selected candidate will be contingent on the return of asreof2hrdpmc04p2h dtcpmbp“lhsdcpmxc40he

terms of the JO, the extension of her appointment was subject to the contingency of Mr. C.'s return to the position for which she had been recruited. She also confirmed that she had been recruited against post No. 501057. She argued, however, that that condition had not been met. The Applicant submitted that Mr. C.'s lien to the post for which she had been recruited had been relinquished, if not in January 2014, then on 23 June 2014 or at the latest by July 2014. As a consequence, Mr. C. could no longer legally claim a lien, and the Administration could not rely on its subsistence upon the return of the incumbent to justify the non-renewal of her FTA.

65. The release of Mr. C. was pursuant to ST/AI/404 (Assignment to and return from mission detail). That administrative instruction provides in para. 7 that:

7. [I]t is most important that staff in the Professional ... categories proceeding on mission detail be assured that they can return to their current post. Accordingly, for a period of up to two years, in conjunction with a staff member's mission assignment, releasing departments/offices are responsible for ensuring that the posts of detailed staff members holding permanent or long-term appointments are blocked. These posts are to be filled only through temporary recruitment of replacement staff, if necessary, or through temporary staff redeployment (including a special post allowance, when called for). If it is proposed that the mission detail be extended beyond two years, it will not be possible to grant any extension unless there is a specific written agreement to continue blocking the post in the parent department. The implementation of this agreement will be monitored by the Office of Human Resources Management.

66. Quite distinctly, administrative instruction ST/AI/2010/3 (Staff selection system) provides in sec. 6.7:

A staff member who is considered an internal Applicant and who is on secondment to a separately administrated United Nations fund or programme, specialized agency or organization of the United Nations common system shall be granted a lien against a specific post for up to two years. ... After two years should the staff member wish to remain on secondment, the lien on the specific position shall be surrendered but the staff member retains return rights to the Secretariat up to a maximum of five years.

67. Section 1(z) of ST/AI/2010/3 distinguishes temporary assignments, mission assignments, special leave, secondment and/or loans. Secondments are governed by the Inter-Organizational Agreement concerning Transfer, Secondment or Loan of Staff among Organizations applying the United Nations Common System of

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The memo is entitled "Request for Release of [Mr. C] (Index No. [#####]) on Assignment to the United Nations Organization Stabilization Mission in the

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(No. 501057). The record further shows that as of that date (15 August 2014), the

76. The Tribunal is satisfied from the evidence given by the Human Resources Assistant, Human Resources, OHCHR, that he moved the Applicant, temporarily against post No. 509992 in light of the experience in 2013, to avoid a controversy with the Applicant, who had made it clear at the time that she would be very unhappy if she were not in the payroll. The Tribunal notes that this situation was later corrected, by PA No. 4460366, which placed the Applicant again against post No. 501057; the PA states, under remarks “[modify post incumbency] to place s/m against correct P-5 through 14.08.14”. The above administrative arrangement was undertaken to ensure the Applicant stayed on the payroll, and no more. It did not have any significance in respect of the actual incumbency of the post, and the lien that Mr. C. kept with post No. 501057.

77. The Tribunal is also satisfied that the actions done on 23 June 2014 and on 1 August 2014 were different from that which happened on 15 August 2014. Indeed, PA No. 4456955 of 15 August 2014 states under remarks “[modify post incumbency] through expiration of appointment against 509992 upon return of [Mr. C.] from assignment”. There is no ambiguity that effective from 15 August 2014, the Applicant was administratively placed against post No. 509992, given that Mr. C. had returned from mission assignment and had to be placed against post No. 501057.

78. The Tribunal is satisfied that MONUSCO and OHCHR agreed on extending the mission appointment of Mr. C. beyond the two year period, namely until 14 August 2014, and that OHCHR continued blocking post No. 501057 for the return of Mr. C.. Relevantly, the contemporaneous personal action for Mr. C. shows that he was placed against post No. 501057 upon his return to OHCH

85. No such obligation existed in respect of the Applicant who had been recruited under an FTA, for a determined period, and for the express purpose of the replacement of an incumbent who had returned to his post. Once this incumbent returned, as described above, the Administration acted in good faith when it placed the Applicant against another available post, for the remainder of her FTA. 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 FTA. Rather, upon the expiration of her FTA, 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 FTA. The reason for the recruitment of the Applicant no longer existed.

Expectancy of renewal

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88. By a later email of the same day, the Chief, Human Resources, OHCHR, wrote to the Applicant that “the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional Office in Suva, Fiji, as the Regional Representati

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full and genuine consideration to her case. The evidence by the High

High Commissioner: I was, it wasn't exactly like that, no. I had a meeting with representatives of the Israeli government, a confidential meeting, it was not on my schedule, put on my schedule at their request, and at the end of a discussion on another issue all together, [the Applicant's] situation was raised by one member of the Israeli delegation, who, although I knew, it was not a long association that I had with that particular member.

94. Later in the High Commissioner's testimony, the following is recorded with respect of the town hall meetings:

Respondent's Counsel: Okay. And did you mention during this town hall meeting that Member States had contacted you with regard to fixed-term contracts at OHCHR?

High Commissioner: I believe I alluded to comments by a Member State, yes.

Respondent's Counsel: Okay. And did you make any comments with regard to religion and, if so, in what context did you make these comments?

High Commissioner: The context was again it came at the end of this confidential meeting that I had and I was asked whether I could help Ms. Brown. I said I, you know being new to the office and not knowing how it functions exactly, I'd look into it and the comment came in the form of, it wouldn't look good if you as an Arab Muslim were not to be helping a Jewish member of the staff or something along those lines, and I was surprised, not least

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High Commissioner: No it was, the question was a general

Applicant's Counsel: Okay. Your testimony here as it is the introduction of religion, to your testimony is that introduction of religion as a topic came from some member of the audience, it's just really a very simple question, is that true? That an audience member raised this issue of religion, not you?

High Commissioner: I don't believe so.

Applicant's Counsel: Okay, let's just ...

High Commissioner: I don't believe so.

96. Earlier in the course of evidence, Mr. A.K. had testified about the town hall meeting as follows:

Applicant's Counsel: And did you hear any discussion at that town

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107. The Tribunal notes that the Applicant's FTA 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. No other rights of the Applicant resulted from these renewals granted for purely administrative purposes.

108. In conclusion, the Tribunal finds that the reason provided to the Applicant for the non-renewal of her FTA was clearly established, and that she had no expectancy of renewal. The Organization went beyond its obligations in trying to

111. As far as the Applicant contests in her second application the “Respondent’s refusal to grant [her] request for a stay (on newly asserted medical grounds) of her lateral transfer to Fiji”, and without otherwise entertaining any considerations as to the receivability of that claim, the Tribunal refers to its conclusions under paras. 101 to 106 above and notes that 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.

112. Finally, with respect to the Applicant’s contesting the decision by the MEU to reject her request for management evaluation and suspension of action, the Tribunal notes that it lacks jurisdiction to review the outcome of the Applicant’s requests at the MEU. Indeed, 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 (Hassanin UNDT/2014/006). The Applicant’s application in this respect is therefore not receivable, *ratione materiae*.

on this basis

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

- a. The application in Case No. UNDT/GVA/2015/129 is dismissed.
- b. The application in Case No UNDT/GVA/2015/133 is dismissed

(Signed)

Judge Rowan Downing

Dated this 27th day of June 2017

Entered in the Register on this 27th day of June 2017

(Signed)

René M. Vargas M., Registrar, Geneva