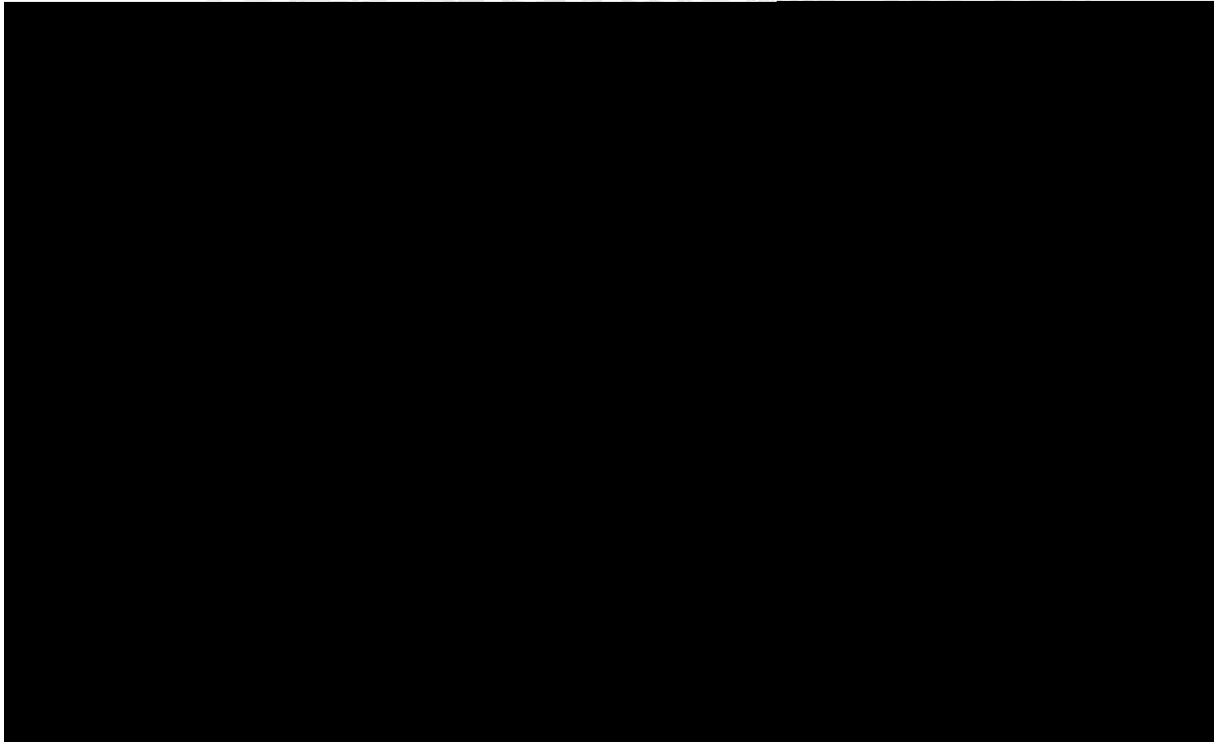




# UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D 'A

JdgmentNo. 2018-UNAT-875



Consil for Mr. Kellie:

Self-represnted

Consil for Commisioer

-General:

Rachel Ers

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JdgmentNo. 2018-UNAT-875

JUDGE MARTHA HALFELD , PRESIDING .

6. In a memorandum dated 15 August 2016, a Human Resources Officer asked the ASD Director for advice as to whether he would recommend the extension of Mr. Kellie's appointment for another three years in accordance with the Agency's current practice and on the basis of the continuing need for the function performed, availability of funding and the work performance of the staff member.<sup>1</sup> On 20 August 2016, the ASD Director signed off on a memorandum addressed to the Human Resources Officer, confirming the continued need for Mr. Kellie's functions and recommending that Mr. Kellie's appointment be extended for three years from 14 September 2016 to 13 September 2019.

7. However, on 21 August 2016, Mr. Kellie had a meeting with the DHR, during which he was verbally informed that his fixed-term appointment would not be renewed beyond 13 September 2016. According to a note for file dated 22 August 2016, the DHR told Mr. Kellie at the meeting that the reasons for the [non-extension] decision were the restructuring of PLD and the ongoing [ISR] , and that senior management had made the decision on the reduction of the P5 posts that Mr. Kellie encumbered. The DHR indicated in the note for file that before he met Mr. Kellie he had discussed the matter with the Deputy Commissioner-General and he later had agreed to the non-extension of Mr. Kellie's fixed-term appointment.

8. After the meeting, on 22 August 2016, Mr. Kellie wrote an e-mail to the DHR, expressing his shock at the "fully expected" decision not to extend his fixed-term appointment beyond 13 September 2016 despite all the written and verbal communication and assurances that he had received from the IPS and the ASD Director. He requested that the non-extension decision be recorded in writing. Mr. Kellie intimated that he had signed private school contracts for his daughters' rental renewal agreements for his family in the United States and for himself in Amman, and declined other job opportunities on the basis of his expectations for contact renewal at the Agency.

9. In a letter dated 22 August 2016, the DHR confirmed to Mr. Kellie that the Commissioner-General had decided on the non-extension of his fixed-term appointment beyond 13 September 2016, because of the three conditions precedent for contact renewal—continuing need for the posts and continued funding for the posts no longer met. The

<sup>1</sup> The memorandum was erroneously dated 15 September 2016. In light of the content of the memorandum and a subsequent recommendation dated 20 August 2016, it was the author of the memorandum meant 15 August 2016.

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notice and etion alreadyproid to he s aff member de to ime presoiwg to he  
original contactend dat of 13 September 2016.” On 12 October 2016, he Commiioner-General  
approod he ACHR’srecommendaion in respectof Mr. Kellie.

13. By letr daed 9 November 2016, he DHR adid Mr. Kellie of he otcome of he  
ACHR dision held in October”on hisco ntractul sta and he Commiioner-Generals  
decision of 12 Oand h

verbally raised Mr. Kellie's position, he clearly stated that there would be no job loss in PLD Amman. Her reassurances were confirmed by the subsequent decisions of the 2017 organizational chart, the reports and minutes of the management review meetings, and the Deputy Commissioner-General's annotated post-harmonization II report and her talking points to the Staff Union Executive Board. Moreover, the recommendation from the ASD Director also renewed Mr. Kellie's appointment for three years. Additionally, the IPS officer's e-mail raised Mr. Kellie's position letter should be ready the following week.

17. The UNRWA Dispute Tribunal ignored the crucial and undisputed facts and evidence that Mr. Kellie had provided to prove that the conduct of the Agency failed to remind and retract the 22 August 2016 decision as procedurally wrong. The Tribunal failed to inform Mr. Kellie in writing

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ACHR meeting. That decision was not tainted by any irregularity. It is therefore immaterial to consider the validity of the reasons proffered in the earlier communication.

23. The remedies sought by Mr. Kellie have no legal basis as the contested decision was lawful and was properly effected. There is no causal link between Mr. Kellie's medical condition and the impugned decision to award an award of compensation.

24. The Commissioner-General therefore requests that the Appeals Tribunal dismiss the present appeal in its entirety.

### Considerations

#### *Alleged errors of law and errors of fact, resulting in a manifestly unreasonable decision*

25. According to Article 2 of the Appeals Tribunal's Statute, the competence of the Tribunal is limited to certain issues. For a first instance decision to be rescinded or overturned, an appellant must establish that the first instance tribunal, in rendering its judgment, exceeded its jurisdiction or competence, failed to exercise the jurisdiction vested in it, erred on a question of law, committed an error in procedure which affected the decision of the case, or erred on a question of fact, resulting in a manifestly unreasonable decision.

26. It follows that it is not enough for an appellant to disagree with the findings of fact or the conclusions of law made by the trial court. Rather, for an appeal to succeed, an appellant must persuade the Tribunal that the contested decision fails to meet the objective criteria of its competence.<sup>3</sup> In the present case, however, this did not occur.

27. As discussed, the UNRWA DT Judgment is predicated on the following main findings:

- i. There was no legitimate expectation and no express promise in writing that Mr. Kellie's contract would be renewed;
- ii. There was no evidence of bias and/or discrimination or improper motive;

<sup>3</sup> *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-707, paras 16-18, citing *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29, in turn citing *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-045.



iii. There was no obligation for the Agency to offer Mr. Kellie a post at the P-4 level;

iv. The procedural irregularity related to the first administrative decision of 22 August 2016 had no bearing on the outcome, because the second decision as embodied in the 9 November 2016 memorandum superseded the first decision, and it was not tainted by any irregularity and

v. There was no evidence that the decision to abolish the post was encumbered by Mr. Kellie's refusal.

28. Although the appeal seems to question the validity of the International Staffing Review, its impact on Mr. Kellie's P-5 post leading to its abolition, will result in considerations and determinations in his Judgment in line with the UNRWA DT Judgment to the alleged nullity of the non-renewal of Mr. Kellie's contract.

*Procedural irregularities*

29. The UNRWA DT found that the decision of 22 August 2016 was superseded by a new and procedurally regular decision, communicated by letter dated 9 November 2016. Mr. Kellie appeals this finding.

30. The Administration has a duty to correct its own errors. The interests of administrative justice require that the Agency should retain the discretion to correct erroneous decisions. To deny this authority on a quasi-judicial basis would be contrary to both the interests of staff members and the Organization. However, the discretion to correct or reverse a prevailing practice or a specific decision should be exercised and necessarily depend on the circumstances of any given case.<sup>4</sup>

31. In *Cranfield*,<sup>5</sup> the Appeals Tribunal held that the Administration was entitled to correct erroneous decisions and stated *inter alia*:

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment it is entitled to remedy the situation. The interests of justice require

<sup>4</sup> *Husseini v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-701, para. 23.

<sup>5</sup> *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

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35. Like Mr. Kellie's argument that the UNWRA DT did not consider the fact that the DT is not given a responsibility to his request for decision review submitted on 10 September 2016 is not merit. In addition to the fact that there is no obligation on the Administration's part to respond to such a request<sup>6</sup> as noted, the first decision was subsequently replaced by a new one communicated on 9 November 2016. Thus, here, there is absolutely no need to assess any request for review of the first decision.

36. Regarding the ACHR's role in the present case, Organization Directive No. 20 establishes among others the ACHR's responsibility to make recommendations to the Commissioner-General on proposals from the DHR regarding managed realignment of international staff members' proposals regarding non-extension of fixed-term appointments for international staff and for the area staff at Grade 18 and above and any other human-resource related matters deemed appropriate by the Commissioner-General or the DHR.<sup>7</sup>

37. Mr. Kellie's claim that the Deputy Commissioner-General and the DHR were in a conflict of interest situation and should have recused themselves from the ACHR meeting on Mr. Kellie's contact has no merit as on the one hand, the Deputy Commissioner-General serves *ex-officio* as Chairperson of the ACHR,<sup>8</sup> and, on the other hand, the DHR attends the ACHR meetings in an *ex-officio* capacity to present proposals and items and to provide expert or technical input.<sup>9</sup> We agree with the UNRWA DT that since Mr. Kellie's evaluation performance was not the case of the request regarding proposals 13/TT4 1 Tf1-1.7321 TD-.000ff((i)n Dis49r((

38. As to the date of the ACHR meeting, the UNRWA DT found that it was held on 9 October 2016, when the ACHR recommended his non-renewal of Mr. Kellie's contract. This Appeals Tribunal did not find any convincing evidence that could challenge his finding. The DHR memorandum to the ACHR was also dated 9 October 2016. It is that the annexed minutes of the meeting bore the date of 14 September 2016, but this date seems to be erroneous as it indicated that the ACHR meeting was held in October. <sup>11</sup> <sup>12</sup>

39. In any event regardless of the specific date on which the meeting occurred, the DHR's memorandum of 9 October 2016 and the ACHR meeting hereafter were the origin of the new decision, taken on 12 October 2016 by the Commissioner-General and communicated to Mr. Kellie by the 9 November 2016 letter.

40. To that end, it is noted that the UNRWA DT's decision was incorrectly based on the applicable law and the available evidence. Mr. Kellie has failed to establish that the UNRWA Dipt Tribunal committed any error, whether of law or fact or procedure.

*Non-expectancy of renewal, unless there is an express and written promise*

41. 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. Even the renewal of the appointment of a staff member on a fixed-term contract does not in and of itself give grounds for an expectation of renewal, unless the Administration has made an express promise that gives the staff member an expectation that his or her appointment will be extended. In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, it must be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case. <sup>13</sup> <sup>14</sup>

<sup>11</sup> Impugned Judgment para. 8.

<sup>12</sup> This is confirmed by the ACHR meeting minutes.

42. Nevertheless an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly or transparently in its dealings with the staff member or was motivated by bias, prejudice or improper motives.<sup>15</sup> The staff member has the burden of proving that such factors played a role in the administrative decision.<sup>16</sup>

43. When judging the validity of the Commissioner-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision or of a decision for a lesser period than expected by the staff member, the UNWRA DT determines if the decision is

46. Besides what has been the purpose of a request for recommendation from the Human Resources Officer made on 15 September 2016 which led to the recommendation of a three-year extension by the Director of ASD on 20 August 2016? In other words, what would be the purpose of seeking a recommendation from the Director of ASD after a decision had been taken on 15 September 2016? <sup>20</sup> The Agency's handling of Mr. Kellie's case was disorganized, as demonstrated by the lack of coordination, confusing messages to the staff member, lack of transparency and even an element of surprise.

47. While this reveals a regrettable lack of communication amongst different sections within the Agency, the interpretation of any possible promise of extension has to be consistent with the entirety of the evidence. Although Mr. Kellie had possibly expected the extension for a longer period of time, by his own volition, he rejected the final offer of extension, contained in the 9 November 2016 letter, to renew his service through 31 December 2016.

48. Mr. Kellie's argument for an expectation of renewal is also based on the written recommendation by the ASD Director dated 20 August 2016. However, it was only a recommendation, not corroborated by the subsequent decision, as occurred in his absence. 21 Nor does the principle of good faith call for the Agency to correct its previous decision by renewing Mr. Kellie's appointment.

49. By the same token, there was no obligation, on the part of the Agency, to reclassify Mr. Kellie's position as he was employed under an FTA and he encumbered a P-5 level position which was abolished in the course of a restructuring exercise, the genuineness of which was accepted since there was no evidence to the contrary.

50. In his regard, International Personnel Directive I/2/Part I is not applicable to the present case as it was issued on 13 December 2016, after the taking of the impugned administrative decision, on the day Mr. Kellie was separated from service.

<sup>20</sup> Supposing, *arguendo*, that a promise of renewal did exist in the said e-mail of 15 August 2016, it was quickly dispelled, a day later, by the decision communicated to Mr. Kellie on 21 August 2016, during his meeting with the DHR.

<sup>21</sup> Reference is made to the ASD Director's recommendation signed on 20 August 2016, followed by the DHR's communication in the meeting held the next day as noted above.

51. Neither is International Staff Personnel Director ISPD/104.2/Rev.4 on International Staff Selection Policy effective 1 May 2015 relevant to the present case, since the purpose of ISPD/104.2/Rev.4 is to define the Agency's processes for international staffing, to clarify the roles and responsibilities of those involved in the selection process and to outline the procedures involved through a combination of managed reassignments, optimal mix of rotation of candidates and competitive selection. The present case is not a case of managed reassignment, optimal mix of rotation of candidates or competitive selection, but a violation of a policy regarding an organizational restructuring.

52. Furthermore, the UNWRA DT examined whether the contested decision stemmed from bias, discrimination or improper motive, as alleged by P d i, by 5.5(bc) and 5.5(l) and 5.5(bc)2527( )-TJ-21.

for IFTA, sent 53( )-3.8(e) had no difference with TJ-702 0 0 1702 0

Judgment

55. The appeal ~~is dismissed~~ and JudgmentNo. UNRWA/DT/2018/015 ~~is~~ hereby affirmed.

Original and ~~Authentic~~ Version: English

Dated ~~his~~ 26<sup>th</sup> day of October 2018 in New York, United States

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Knierim

Entered in the Register on ~~his~~ 20<sup>th</sup> day of December 2018 in New York, United States

*(Signed)*

Weicheng Lin, Registrar