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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/035

Judgment No.: UNDT/2017/0



8. On 26 September 2005, the Applicant was re-engaged by UNDP as a Communications Assistant for UNFPA on a series of Service Contracts (SC) which were renewed annually until 31 December 2010.<sup>3</sup>

9. On 8 November 2010, UNFPA posted a Vacancy Announcement (VA) for the position of Communications and Advocacy Officer at the NO-B grade, in Brazzaville, RoC. The deadline for submitting applications was 19 November 2010. The VA specified a list of eligibility requirements which included:

- a. university degree at the Baccalaureate (BAC) level + 5 [Masters] in journalism, communications or sufficient professional experience;
- b. at least five years of professional experience in communications and;
- c. to be of Congolese nationality.<sup>4</sup>

10. On 16 November 2010, the Applicant applied for the vacancy.<sup>5</sup>

11. Between 30 November 201 and submission for the VA was reviewed by an *ad hoc* committee<sup>6</sup> which preselected him for the position on 3 December 2010.<sup>7</sup> He interviewed for the post on 16 December 2010, where he scored second out of the three shortlisted candidates. The *ad hoc* committee designated the Applicant as its preferred choice for the advertised post since he was an internal candidate.<sup>8</sup>

12. On 11 January 2011, Mr. David Lawson, UNFPA Resident Coordinator, informed the Applicant that he had been selected for the position at the NO-B grade, step 1, effective 1 April 2011, on a one year fixed-term appointment.<sup>9</sup>

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<sup>3</sup> Annex 1 - reply.

<sup>4</sup> Annex 11 - application.

<sup>5</sup> Annex 2 - reply.

<sup>6</sup> Annex 3 - reply.

<sup>7</sup> Annex 4 - reply.

<sup>8</sup> *Ibid.*

<sup>9</sup> Annex 5 - reply.



17. In a memorandum dated 30 October 2015 to Mr. Mabingue Ngom, UNFPA Regional Director for West and Central Africa, Ms. Laurenceau requested that he recommend the approach to be taken in relation to the



28. The Applicant has not met the burden of proof in his claim that the non-renewal of his appointment was motivated by undue pressure, harassment or abuse of authority since he never filed any complaint regarding the same.

29. The Applicant submits that the UNFPA Administration was fully aware of his nationality and at no point in time did he ever attempt to conceal the same. He asserts that prior to applying for the position, he had discussed with the former UNFPA Representative and had been advised that obtaining RoC nationality would render him eligible for the position.<sup>23</sup> He admits that after a first approach to the RoC bureaucracy, which had proven inadequacy or incompleteness of the documents submitted, he did not pursue the matter.<sup>24</sup> He claims that the non-renewal of his appointment was borne from undue pressure, harassment and abuse of authority by the UNFPA Resident Representative.<sup>25</sup>

30. The Applicant contends that the non-renewal of his appointment has left him in financial detriment and thus, the UNFPA Administration should compensate him CFA francs 300,000,000.

## **Considerations**

### *Receivability*

31. The Respondent submits that between 1 July 2004 and 31 March 2005, the Applicant was not a staff member appointed by the Secretary-General. To this end the Respondent references :

Service Contract No. 2005/002

Clause 1: Status of the Contracting Party - The contracting party shall be deemed to have self-employed legal status. He shall in no respect be considered a staff member of UNFPA.<sup>26</sup>

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<sup>23</sup> Para. 5 - application.

<sup>24</sup> *Ibid.*

<sup>25</sup> Annex 16 - application: Letter

32. The Tribunal is satisfied that in the period in relation to which the



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decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.<sup>33</sup>

39. Discontinuation of the unlawful situation is the most obvious remedy. UNAT jurisprudence confirms that availability of this remedy is not disabled by the circumstance that the Administration would have maintained the unlawful situation for a period of time or that it would have been at fault for an oversight.<sup>34</sup> In other words, the fact that an unlawful situation was overlooked or tolerated in the past does not justify continuing it. Rather, deriving from this jurisprudence, the relevant concerns here include: whether the breached regulation concerned a fundamental matter or peripheral issues;<sup>35</sup> specifically regarding appointments - whether all conditions of the offer were met by the candidate<sup>36</sup> and what kind of detriment the corrective action entails to the staff member.<sup>37</sup>

40. The general requirement of proportionality in balancing valid interests on the part of the administration and the individual concerned remains valid. This would include considering availability of different courses of action. It is only where such correction is manifestly impossible to effect owing to the nature or gravity of the irregularity that the administration may terminate a staff member.<sup>38</sup> Moreover, a staff member acting in good faith acquires rights resulting from an appointment, save where the latter is fake or fraudulent.<sup>39</sup> Circumstances such as prior practice, whether the staff member induced the unlawful situation or knew or should have known of it or whether they relied on an erroneous advice of the administration, are material for the question of whether there were legitimate expectations on the part of the staff member giving rise to compensation.<sup>40</sup>

41. In the present case, the nationality requirement for the NO-B post results from the Staff Rules and cannot be waived. s to  
obtain RoC nationality failed in 2010

assuming, for the sake of argument, that the requirement of nationality received different interpretations among the concerned United Nations Administration and the Applicant could have presumed that the Administration had eventually accepted his eligibility for the position, any legitimate expectations on the part of the Applicant could not extend beyond the duration of his fixed-term appointment.<sup>41</sup> In the totality of the circumstances, the decision

45. Considering that the impugned decision was lawful, the Tribunal finds that any pecuniary claim made by the Applicant in relation to what he perceives as his right of renewal of his appointment fails. On the other hand, the unlawful action of the Administration only benefitted the Applicant who for several years was retained in employment for which he was not eligible.  
that this benefit offsets any claim for compensation for the administrative error.

**Judgment**

46. The application is dismissed in its entirety.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 17<sup>th</sup> day of October 2017

Entered in the Register on this 17<sup>th</sup> day of October 2017

*(Signed)* [Signature] - [Name] (la) [Signature] [Signature] - (lis(g) [Signature] - thraSigne