



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-780

**Muwambi
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge John Murphy
Case No.:	2017-1061
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Muwambi:	Mariam Munang, OSLA
Counsel for Secretary-General:	Rupa Mitra/Ronja Bandyopadhyay

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/216, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 December 2016, in the case of *Muwambi v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 6 February 2017, and Mr. Ronald Muwambi filed his answer on 13 March 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... Between June 2009 and April 2011, the Applicant served as a Contracts Management Officer at the P-3 level with [the United Nations Mission in the Central African Republic and Chad (MINURCAT)].

... Upon the closure of MINURCAT in April 2011, the Applicant was reassigned to [the United Nations Stabilization Mission in Haiti (MINUSTAH)] as a P-3 level Contracts Management Officer for an initial period of three months. The Applicant's offer of appointment, which he accepted on 4 April 2011, stated that he was "provisionally reassigned" to MINUSTAH "as Contracts Management Officer" for an initial period of three months and that his reassignment was "subject to a competitive selection process". It further stated that "[a]ny subsequent extension [of his appointment]" was "subject to competitive selection endorsed by the relevant central review body". The full text of the offer and acceptance, dated 4 April 2011, is reproduced below:

Dear [Applicant],

I refer to your current letter of appointment [i.e., letter of appointment as a P-3 level Contracts Management Officer with MINURCAT].

I wish to inform you that you are being provisionally reassigned to United Nations Stabilization Mission to Haiti (MINUSTAH) as Contracts Management Officer, subject to a competitive selection process. Your fixed-term appointment will be at your current level and step for an initial period of 3 months. Any subsequent extension is subject to competitive selection endorsed by the relevant central review body. This offer is limited strictly to service with MINUSTAH and is subject to medical clearance.

...

The other items in your current offer of appointment remain unchanged.

¹ Impugned Judgment, paras. 11-33.

Your Sincerely,

[Signed]

Chief of Mission Support

MINUSTAH

ACCEPTANCE

Dear Mr. Secretary-General,

I accept the terms of this offer of appointment on a provisional assignment to the United Nations Stabilization Mission in Haiti (MINUSTAH) as Contracts Management Officer at my current level and step and the conditions as specified herein, subject to any modifications to the Staff Regulations and Rules. I understand that this offer is subject to my medical clearance. I also understand that the offer lapses if I do not, in the opinion of the United Nations Medical Service, meet its medical standards. Should my medical clearance and all other aspects of my reassignment be in order, I will be available to report for duty on or about [blank]

[Signed]

[Applicant]

Date: 4 April 2011 [handwritten]

... On 4 July 2011, the Applicant received a letter of appointment for the position of Contracts Management Officer with MINUSTAH, effective 1 July 2011. The letter of appointment stated that the appointment was for three months and 28 days, until 28 October 2011. The letter of appointment, however, did not contain any references to a provisional reassignment, participation in a competitive selection process, or endorsement by a central review board.

... The Applicant's appointment was subsequently extended until 30 June 2012, on the same terms as the 1 July 2011 appointment. The new letter of appointment did not contain any references to provisional reassignment or appointment being conditional upon the Applicant's participation in a competitive selection process or endorsement by a review body.

... In 2012, MINUSTAH underwent a downsizing exercise. The post encumbered by the Applicant was abolished, following which he was informed as follows by interoffice memorandum, dated 18 June 2012 (emphasis added):

[Y]our profile was considered against suitable vacant positions in the new mission's structure effective 1 July 2012 and you were *recommended to be reassigned* to the Procurement Section as Procurement Officer at your current level, *subject to designation as required*.

...

Your fixed-term appointment in MINUSTAH is therefore expected to be extended through 30 June 2013 subject to mandate and availability of post.

... On 4 July 2012, the Applicant received another letter of appointment for the position of Contracts Management Officer with MINUSTAH. The letter of appointment stated that the appointment was for one year, from 1 July 2012 to 30 June 2013. This letter of appointment also did not contain any references to provisional reassignments, participation in a competitive selection process, or endorsement by a central review board.

... By interoffice memorandum, dated 1 August 2012, the Applicant was informed by the Director of Mission Support, MINUSTAH, that he was being redeployed from Santo Domingo to Port-au-Prince.

... On 15 April 2013, the Administration acknowledged that designation was not required for the Applicant to assume the full responsibilities of a P-3 Procurement Officer and that it was taking steps to formalize his role in carrying out these responsibilities.

... On 3 June 2013, [the Field Personnel Division (FPD)] informed the Director of Mission Support of MINUSTAH that they supported the decision not to renew the Applicant's contract because he did not have the necessary qualifications for the post, nor had been fulfilling the full functions of a P-3 level Procurement Officer. In addition, it was asserted that he was not approved by the [Field Central Review Body (FCRB)] for the post.

... On 12 June 2013, the Applicant was informed by interoffice memorandum from the Director of Mission Support of MINUSTAH that his appointment would not be extended beyond 30 June 2013. The memorandum recalled that he had been placed against a vacant P-3 post in the Procurement Section "despite not having FCRB clearance to perform as a procurement officer at the P-3 level". The memorandum further stated "[y]our transfer was made possible under the Head of Mission's delegation of authority to laterally transfer staff members within the Mission". The reason provided for the non-renewal of the Applicant's appointment was that he did not have the necessary qualifications for the post, he was not FCRB approved, and he lacked delegated procurement authority.

... On 13 June 2013, the Applicant filed a request for management evaluation and an application for a suspension of action, challenging the decision not to renew his appointment. The application for suspension of action was granted by Order No. 158 (NY/2013), dated 26 June 2013.

... On 1 August 2013, the Applicant was informed that his contract would not be extended beyond 3 September 2013 as another staff member had been recruited for the position of Procurement Officer (P-3 level). On 27 August 2013, the Applicant filed another request for management evaluation challenging the decision not to renew his contract beyond 3 September 2013 and the recruitment to his post.

... The Applicant's appointment was renewed on a monthly basis until October 2014, when it was extended through 30 June 2015.

... From July 2011 to June 2015, the Administration and the Applicant signed a total of twelve letters of appointment covering the following periods:

- a. 1 July 2011 to 28 October 2011[;]
- b. 29 October 2011 to 30 June 2012;
- c. 1 July 2012 to 30 June 2013;
- d. 1 August 2013 to 3 September 2013;
- e. 4 September 2013 to 12 October 2013;
- f. 13 October to 12 November 2013;
- g. 13 November 2013 to 12 December 2013;
- h. 13 December 2013 to 12 January 2014;
- i. 13 January 2014 to 11 February 2014;
- j. 12 February 2014 to 11 March 2014;
- k. 12 March 2014 to 11 April 2014; and
- l. 12 April 2014 to 30 June 2014.

... None of these letters of appointment contained references to the Applicant being on a provisional reassignment status or that his appointment was conditional upon his participation in a competitive selection process or endorsement by a review board.

... On 20 December 2013, a facsimile was sent by the Acting Director, FPD,[Department of Field Services (DFS)], to all Chiefs and Directors of Mission Support to inform of the discontinuance of the policy of provisional reassignments. The facsimile further stated:

... The purpose of this fax is to inform missions about the discontinuation of the practice of provisional lateral reassignments with

immediate effect. Subsequent to contract reform and the promulgation of a unified Secretariat policy on staff selection it has become necessary to review the practice of 90-day provisional reassignment subject to competitive selection.

... The practice of a 90-day provisional reassignment was utilised during situations of post abolishment or liquidation, as temporary measure, to facilitate the movement between missions of staff members with appointment limitations pending competitive selection. Over the years, some of these staff members have remained under provisional reassignment status for an extended period of time without the benefit of a competitive selection process. Such a situation is not in line with the recent human resources reform and the staff selection system which allows reassignment between missions for staff members without appointment limitations or selections under the established mechanism, including review and endorsement by the Field Central Review Body (FCRB).

... For these reasons and after careful analysis and deliberation, the practice of provisionally reassigning staff members pending competitive selection is hereby immediately discontinued.

... Henceforth, reassignment to a different mission will be possible only in instances where the staff member has no appointment limitations in accordance with section 11.2 of ST/AI/2010/3 or where the selection is based on a process in accordance with the provisions of ST/AI/2010/3, including review and endorsement by the FCRB. Posts established for one year or longer must be filled through the regular selection process. In order to facilitate implementation of the above and subject to continued need of the functions and satisfactory performance, the fixed-term appointments of staff members who were provisionally reassigned to another mission and who remain under such status may be renewed for a further period up to 30 June 2014. Renewal of fixed-term appointments beyond 30 June 2014 of staff members on provisional reassignment status shall only be made on the basis of selection through the regular process under the staff selection system.

... On 4 June 2014, a facsimile was sent by the Director, FPD, DFS, to all Chiefs and Directors of Mission Support with a subject line reading: "Staff members on provisional reassignment status". The facsimile stated, *inter alia*:

... Following careful analysis of the generic job opening schedules for 2014 and projected timeline for completion of the process, and in order to provide staff members with additional opportunities for regularisation, as an exceptional measure, the appointments of staff members currently on provisional reassignment status may be considered for renewal for any period up to 30 June 2015, subject to continued need of their services,

satisfactory performance and provided the post currently encumbered continues to be vacant. Renewal of appointments beyond 30 June 2015 shall be made on the basis of selection through the regular selection process and this deadline is not subject to further extension.

... On 13 November 2014, the Applicant received the delegation of procurement authority.

... On 1 May 2015, the Applicant received a letter informing him that his fixed-term appointment would not be extended beyond 30 June 2015 as his post was being abolished pursuant to the downsizing of MINUSTAH.

... On 8 May 2015, the Applicant received an email stating that because he had not been cleared by the FCRB, he would not be eligible to apply for Expressions of Interest, and therefore his appointment would not be renewed beyond 30 June 2015.

... On 24 June 2015, the Applicant received another letter, which “supersedes the one ... dated 1 May 2015.” The Applicant was informed that “the non-extension of [his] contract is not subject to the MINUSTAH retrenchment exercise, however, it is related to the fact that [he is] currently on Provisional Lateral Reassignment from MINURCAT to MINUSTAH and the limitation of [his] reassignment has not been lifted”.

... By letter dated 22 June 2015, followed by communications on 23 and 24 June 2015, the Applicant filed a request for management evaluation of the decision not to extend his contract beyond 30 June 2015. By letter dated 11 August 2015, the Management Evaluation Unit upheld the decision not to renew his appointment.

... The Applicant was separated effective 30 June 2015.

3. On 6 November 2015, Mr. Muwambi filed an application with the UNDT contesting the decision not to renew his fixed-term appointment beyond 30 June 2015. The Secretary-General filed his reply on 10 December 2015.

4. On 8 December 2016, the UNDT issued Judgment No. UNDT/2016/216. The UNDT noted that Mr. Muwambi’s initial offer of appointment for MINUSTAH, dated 4 April 2011, stated that he was “being provisionally reassigned”, “subject to a competitive selection process”, and that “[a]ny subsequent extension [of his appointment]” was “subject to competitive selection endorsed by the relevant central review body”.² The 12 subsequent letters of appointment signed between July 2011 and June 2015, however, contained no references to any of the special conditions mentioned in the 4 April 2011 offer of appointment.

² *Ibid.*, para. 38.

5. The UNDT considered that if a certain material provision was not incorporated into the letter of appointment, it follows from Staff Rule 4.1 and Annex II to the Staff Regulations that it did not form part of the contract of employment. The UNDT therefore found that there was no legal basis for the Organization to assert that Mr. Muwambi remained subject to the conditions and limitations of the April 2011 exchange. It concluded that the non-renewal of Mr. Muwambi's appointment on the basis that he was only provisionally assigned and had not received FCRB clearance was unlawful.

6. By way of remedies, the UNDT found that, taking into account Mr. Muwambi's good performance record, had the Organization complied fully with Staff Rule 9.6(e), it could be reasonably expected that his employment would have continued for one year after 30 June 2015. The UNDT therefore awarded Mr. Muwambi one year's net base salary at the salary scale in effect as of the date of separation.

Submissions

The Secretary-General's Appeal

7. The UNDT erred in law by finding that clearance by a central review body was a "special condition" that had to be expressly provided for in Mr. Muwambi's letters of appointment. Staff Rule 4.1 provides that a letter of appointment "contains expressly or by reference all the terms and conditions of employment". Annex II(a)(i) to the Staff Regulations further provides that the letter of appointment shall state that the appointment "is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question". As such, all letters of appointment expressly provide that the appointment is subject to the Staff Regulations and Rules. Staff Rule 4.15 and Administrative Instruction ST/AI/2010/3 (Staff selection system) set out the requirement for central review body clearance as part of the selection process. Accordingly, the requirement for central review body clearance was incorporated by reference into each of Mr. Muwambi's letters of appointment.

8. Furthermore, clearance by a central review body is not a "special condition" of an appointment, but rather an underlying requirement for a staff member to be selected for a position. No letters of appointment for fixed-term contracts make reference to the requirement for review or endorsement by a central review body as a "special condition" of the appointment,

since any required clearance would be obtained prior to the issuance of the letter of appointment. As correctly noted by the UNDT, letters of appointment contain the “terms and conditions of employment” of that particular appointment. However, letters of appointment do not set out as “special conditions” the criteria and requirements that need to be met for selection to that particular appointment.

9. The UNDT erred in law by finding that there was no legal basis for the Administration to require Mr. Muwambi to be subject to clearance by a central review body. Staff Rule 4.15 and ST/AI/2010/3 on the staff selection system set out the requirement for central review body clearance as part of the selection process. As a requirement imposed by the legislative framework of the Organization, the Administration must comply with this obligation when conducting a selection exercise. While Mr. Muwambi claims that his letters of appointment gave him no indication that he was required to obtain central review body clearance, the record indicates that he was, in fact, well aware of this ongoing requirement.³

10. Mr. Muwambi’s previous extensions of his fixed-term appointment were part of the Administration’s generous practice of temporarily reassigning staff from one mission to another in order to allow them further time to apply for vacant positions. With the discontinuation of this practice as of 30 June 2015, in alignment with the staff selection contractual reforms set forth in ST/AI/2010/3, there was no basis on which Mr. Muwambi’s fixed-term appointment could be extended, since he had not been selected for another position in accordance with the requirements of Staff Rule 4.15 and ST/AI/2010/3. The fact that he was exempted from the requirements of the staff selection system for a period of time does not mean that the Organization was then estopped from applying the legal framework to his situation thereafter. Moreover, the non-renewal of Mr. Muwambi’s fixed-term appointment did not limit his rights in any way, since he was not entitled to any expectation of renewal, as expressly stipulated in the Staff Regulations and Rules.

11. The UNDT erred by awarding compensation in the amount of one year’s net base salary to Mr. Muwambi on the ground that, had the Organization complied with Staff Rule 9.6(e), it could be reasonably expected that his employment would have continued for one year after 30 June 2015. Staff Rule 9.6(e) applies in cases where a staff member has been terminated as a

³ In support of this contention, the Secretary-General points to an e-mail from Mr. Muwambi in response to the first decision of the Administration not to extend his appointment as well as his request for management evaluation of June 2015.

result of the abolition of a post or the reduction of staff. It does not apply in situations where a fixed-term appointment is not renewed beyond its end date. Mr. Muwambi's appointment was not terminated, but instead was not renewed beyond its expiry date. The Staff Regulations and Rules expressly provide that a fixed-term appointment carries no expectation of renewal and expires automatically at the end of its term. That was the situation in Mr. Muwambi's case. The UNDT therefore erred in law by awarding compensation.

12. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

Mr. Muwambi's Answer

13. The UNDT did not err in finding that clearance by a central review body was a special condition that had to be expressly provided for in Mr. Muwambi's letters of appointment.

14. "Provisional status" was not a term or condition of Mr. Muwambi's appointment. By deciding not to renew Mr. Muwambi's appointment on the basis that he was on a provisional reassignment status, purporting there were limitations on his reassignment, the Secretary-General seeks to rely on a term that does not form a condition of his employment, either expressly or by reference.

15. It is the practice of the Organization to state any restrictions in its letters of appointment. In the case of *Corna*,⁴ for example, all eight letters of appointment and personnel action forms contained provisions referring to the exceptional renewal of the appointment pending authorization. As correctly identified by the UNDT, since all letters of appointment issued to Mr. Muwambi from July 2011 onwards failed to reference any special conditions in relation to Mr. Muwambi's employment, the previous restrictions had effectively been superseded once his contract was renewed and new letters of appointment were issued.

16. Moreover, contrary to the Secretary-General's contention, the restriction was not incorporated by reference such that it did not need to be expressly stated as a condition of Mr. Muwambi's employment. In fact, nowhere in the provisions cited by the Secretary-General does it state that all appointments carry with them inherent restrictions regarding being on provisional status.

⁴ *Corna v. Secretary-General of the United Nations*, Order on Suspension of Action No. 90 (GVA/2010), para. 11.

17. Indeed, letters of appointment for fixed-term contracts do not typically make reference to the requirements for review or endorsement by a central review body as a “special condition”, since any required clearance would be obtained prior to the issuance of the letter of appointment. It would thus be reasonable to expect that such an unusual departure from the Staff Rules and staff selection system would be mentioned in the letter of appointment.

18. Furthermore, even if the Appeals Tribunal finds that as a matter of fact, implicit in Mr. Muwambi’s subsequent letters of appointment, a condition existed which referenced the term “provisional reassignment status”, such a contractual condition does not exist under the Staff Regulations and Rules. The decision to deny Mr. Muwambi’s renewal of contract on the basis that he only had “provisional reassignment status” is therefore unlawful.

19. The UNDT did not err in finding that there was no legal basis for Mr. Muwambi to be subject to clearance by a central review body. ST/AI/2010/3 which the Secretary-General, *inter alia*, relies on as the legal basis for requiring Mr. Muwambi’s renewal of appointment to be subject to clearance by a central review body entered into force on 22 April 2010. When Mr. Muwambi was made the offer, almost a year later on 4 April 2011, to be provisionally reassigned without having received prior clearance from a central review body, the Secretary-General granted him an exception from ST/AI/2010/3. The subsequent renewals of his appointment are a further validation of that exception which the Secretary-General continued to grant over the next four years. Under the jurisprudence of the former United Nations Administrative Tribunal, the Secretary-General is estopped from enforcing an existing administrative rule where it had previously waived its application by granting successive contract renewals.

20. Moreover, none of the 12 letters of appointment signed by Mr. Muwambi between 2011 and 2014 contained references to any restrictions. By suddenly denying him legitimacy on the basis that he is still subject to clearance from a central review body, the Secretary-General is not acting in good faith.

21. Finally, the Secretary-General is seeking to apply a policy which is contained in the facsimiles dated 20 December 2013 and 4 June 2014. These documents have not been duly promulgated by the Secretary-General as a bulletin or an administrative issuance and thus have no general application. In accordance with the Appeals Tribunal’s jurisprudence, they have no legal authority and accordingly, their application to Mr. Muwambi is unlawful and arbitrary.

22. The UNDT did not err in awarding compensation. The decision not to renew Mr. Muwambi's appointment was unlawful and as a consequence of this unlawful decision, he was deprived of his livelihood. The UNDT was correct in holding that it could reasonably be expected that his employment would have continued for one year after 30 June 2015 and the UNDT's award of one year's net base salary was reasonable.

23. Mr. Muwambi requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

24. In our view, the UNDT erred in finding that the Administration failed to provide a valid justification for its decision not to renew Mr. Muwambi's fixed-term appointment.

25. It is a well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.⁵ Even the 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.⁶

26. As provided in Staff Regulation 4.5(c) and Staff Rule 4.13(c), respectively, "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service", and "[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)".

27. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive.⁷

⁵ *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33; *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216, para. 3; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 39-42; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061, para. 13.

⁶ *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

⁷ *Obdejn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 45-46.

The staff member has the burden of proving such factors played a role in the administrative decision.⁸

28. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.⁹

29. As stated in *Obdeijn*:¹⁰

... An administrative decision not to renew [a fixed-term appointment] must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment.

30. Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals' ability to judicially review the validity of the Administration's decision.¹¹

31. In the present case, Mr. Muwambi was advised (on 8 May 2015 and 24 June 2015) that the non-renewal of his appointment beyond 30 June 2015 was due to the fact that he had not been cleared by the FCRB, and "[he is] currently on Provisional Lateral Reassignment from MINURCAT to MINUSTAH and the limitation of [his] reassignment has not been lifted".

⁸ *Kacan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-426, para. 20; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 33; *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

⁹ *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹⁰ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 32.

¹¹ *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 17, citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201.

32. The non-extension of Mr. Muwambi's contract came on the heels of a change in policy as contained in the facsimiles dated 20 December 2013 and 4 June 2014. According to these documents, staff members on provisional reassignment status could have their appointments renewed only up to 30 June 2015, while further renewals were to be made exclusively through the regular selection process.

33. In fact, the first facsimile (dated 20 December 2013), which was sent by the Acting Director, FPD, DFS, to all Chiefs and Directors of Mission Support stated, *inter alia*, that the practice of provisional lateral reassignments would be discontinued with immediate effect since it was originally construed as "temporary measure, to facilitate the movement between missions of staff members with appointment limitations pending competitive selection" but instead created a situation in which some staff members remained under provisional reassignment status for an extended period of time, which was not in line with the recent human resources reform and the staff selection system. The facsimile announced the following approach:

... Henceforth, reassignment to a different mission will be possible only in instances where the staff member has no appointment limitations in accordance with section 11.2 of ST/AI/2010/3 or where the selection is based on a process in accordance with the provisions of ST/AI/2010/3, including review and endorsement by the FCRB. Posts established for one year or longer must be filled through the regular selection process. In order to facilitate implementation of the above and subject to continued need of the functions and satisfactory performance, the fixed-term appointments of staff members who were provisionally reassigned to another mission and who remain under such status may be renewed for a further period up to 30 June 2014. Renewal of fixed term appointments beyond 30 June 2014 of staff members on provisional reassignment status shall only be made on the basis of selection through the regular process under the staff selection system.

34. While the second facsimile (dated 4 June 2014), which was sent by the Director, FPD, DFS, to all Chiefs and Directors of Mission Support with a subject line reading: "Staff members on provisional reassignment status", stated, *inter alia*:

... Following careful analysis of the generic job opening schedules for 2014 and projected timeline for completion of the process, and in order to provide staff members with additional opportunities for regularisation, as an exceptional measure, the appointments of staff members currently on provisional reassignment status may be considered for renewal for any period up to 30 June 2015, subject to continued need of their services, satisfactory performance and provided the post

currently encumbered continues to be vacant. Renewal of appointments beyond 30 June 2015 shall be made on the basis of selection through the regular selection process and this deadline is not subject to further extension.

35. The Secretary-General submits that the UNDT's finding that there was no legal basis for the Administration to assert that Mr. Muwambi was subject to the requirement of clearance by a central review body constitutes an error of law, since such clearance is a requirement clearly established by the legal framework of the Organization. Mr. Muwambi's previous extensions of his fixed-term appointments were part of the Administration's generous practice of temporarily reassigning staff from one mission to another in order to allow them further time to apply for vacant positions. This practice was discontinued as of 30 June 2015, in alignment with the staff selection contractual reforms set forth in ST/AI/2010/3. With the end of this practice, there was no basis on which Mr. Muwambi's fixed-term appointment could be extended, since he had not been selected for another position in accordance with the requirements of Staff Rule 4.15 and ST/AI/2010/3. Consequently, Mr. Muwambi's fixed-term appointment could not be renewed.

36. We agree. The reasons proffered by the Administration for not renewing Mr. Muwambi's appointment beyond 30 June 2015 are valid reasons. Indeed, between June 2009 and April 2011, Mr. Muwambi served as a Contracts Management Officer at the P-3 level with MINURCAT. In April 2011, upon closure of the MINURCAT mission, he was reassigned to MINUSTAH in a position with the same title and functions. The offer of appointment, signed by him, stated that he had been provisionally reassigned and that any subsequent extension of his provisional reassignment would be subject to competitive selection endorsed by the relevant central review body.

37. As correctly contended by the Secretary-General in his appeal, Mr. Muwambi's provisional reassignment to MINUSTAH was based on a practice which allowed staff affected by downsizing in a peacekeeping mission to be temporarily placed in another mission, thereby affording them time and an opportunity to seek positions through the regular selection process.

38. However, in mid-2010, the Secretariat's implementation of a new staff selection system, as detailed in ST/AI/2010/3, required that any staff appointments of one year or longer be reviewed by a central review body.

39. Mr. Muwambi's fixed-term appointment was extended on several occasions. Specifically, from July 2011 to June 2015, the Administration and Mr. Muwambi signed a total of twelve letters of appointment. As of 30 June 2015, subsequent to the policy contained in the aforementioned facsimiles, the practice of extending the appointments of staff who had not been vetted by a central review body following a regular selection process was abolished.

40. Despite the validity of the reasons proffered by the Administration for not renewing Mr. Muwambi's fixed-term appointment, the UNDT determined that,¹²

... at the time of the contested decision, and indeed for four years prior to that, the Applicant was not on a "provisional reassignment" with appointment limitations requiring review and endorsement by a review body. Therefore, the reason proffered by the Administration could not have formed a lawful basis for the non-renewal of his contract.

41. This ruling of the UNDT was based on its finding that none of the twelve letters of appointment "contained references to the Applicant being on a provisional reassignment status or that his appointment was conditional upon his participation in a competitive selection process or endorsement by a review board".¹³

42. In this regard, the UNDT opined:¹⁴

... The Applicant's initial offer of appointment for MINUSTAH, dated 4 April 2011, stated that he was "being provisionally reassigned", "subject to a competitive selection process", and that "[a]ny subsequent extension [of his appointment]" was "subject to competitive selection endorsed by the relevant central review body". However, these conditions were not included when the Applicant received a new letter of appointment in July 2011. The [Dispute] Tribunal has considered whether the conditions contained in the offer of appointment of 4 April 2011 remained valid on the signing of the new letter of appointment that went into effect on 1 July 2011. That letter of appointment contained no references to any of the special conditions mentioned in the earlier offer. If a certain material provision was not incorporated into the letter of appointment, expressly or by reference, it follows from staff rule 4.1 and Annex II to the Staff Regulations that it did not form part of the contract of employment between the Applicant and the Organization. The

¹² Impugned Judgment, para. 42.

¹³ *Ibid.*, para. 25.

¹⁴ *Ibid.*, para. 38.

signing of the letter of appointment by both parties subsequently to the initial offer demonstrates, in and of itself, the parties' intent to supersede any prior agreed terms.

43. The UNDT went on to state:¹⁵

... Notably, the conditions on which the Administration seeks to rely were not included in any letters of appointment subsequent to July 2011. It is one of the Applicant's principal submissions that, after he arrived at MINUSTAH, none of the subsequent communications or contractual documents indicated that he remained "provisionally reassigned" or that his appointment was contingent upon further endorsement by a central review board. This contention has not been disputed by the Respondent and is substantiated by the twelve letters of appointment filed with the [Dispute] Tribunal for the period 2011 to 2015.

.... After the Applicant had been employed on twelve letters of appointment in the four years after April 2011 containing no special conditions or restrictions, the Administration's proposed imposition of such special conditions and restrictions amounts to a unilateral decision to vary the terms of the Applicant's contract of employment. It would be untenable to suggest that the Administration may unilaterally impose certain unstipulated contractual terms limiting the Applicant's rights and interests when such conditions were not included in any of the numerous letters of appointment signed over a four-year period. Nor can it be accepted that policy considerations override express contractual terms.

44. This Tribunal finds that the UNDT's conclusion is legally and factually incorrect for the reasons set forth below.

45. Specifically, the UNDT erred in that it relied exclusively on the content of Mr. Muwambi's relevant letters of appointment to determine that he was not on a provisional reassignment status and that his appointment was not conditional upon his participation in a competitive selection process or endorsement by a review board.

46. Indeed, the issuance of a letter of appointment signed by the appropriate United Nations official or someone acting on his or her behalf is more than a mere formality.¹⁶ However, the letter of appointment governs the conditions of the employment

¹⁵ *Ibid.*, paras. 40 and 41.

¹⁶ *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-279, para. 28; *Gabaldon v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-120; *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-029.

relationship along with the Rules and Regulations of the Organization which are incorporated into the contract.¹⁷

47. To begin with, the language of Mr. Muwabmi's letter of appointment dated 4 April 2011, which is the controlling documentary evidence, is clear and unambiguous and easy to understand. It establishes Mr. Muwambi's appointment was for a fixed term of three months (from 4 April 2011 to 3 July 2011).

48. Furthermore, as set forth in it, Mr. Muwambi was provisionally reassigned to MINUSTAH as Contracts Management Officer, subject to a competitive selection process, and any subsequent extension was subject to competitive selection endorsed by the relevant central review body.

49. Mr. Muwambi's appointment was subsequently extended several times for the same position of Contracts Management Officer with MINUSTAH until 30 June 2015, when he was separated from service.

50. It is true that, as found by the UNDT, the subsequent letters of appointment (from 4 July 2011 onwards) did not contain any references to his provisional reassignment or appointment being conditional upon his participation in a competitive selection process or endorsement by a review body.

51. Nevertheless, it is not disputed that the Administration's extension of Mr. Muwambi's initial fixed-term appointment beyond 4 July 2011 did not change the nature of his appointment and did not convert his appointment into another type of appointment. His appointment remained an appointment of limited duration in nature and as such, pursuant to the aforementioned well-settled position of the law, carried no expectancy of renewal even though this exclusion of an expectancy of renewal was not expressly stated on the face of every fixed-term contract that Mr. Muwambi signed.

¹⁷ *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 28, citing *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100.

52. Rather, what is disputed in the present case—as agreed by the parties before the UNDT Judge¹⁸—is the lawfulness of the reasoning of the Administration’s non-renewal of Mr. Muwambi’s appointment beyond 30 June 2015, with regard to the provisional status of his reassignment and the need for further review clearance.

53. In this respect, the UNDT held that,¹⁹

... [o]nce the parties in this case agreed on a new contract of employment, the terms stipulated in the new letter of appointment superseded any prior agreement between them Therefore, there is no legal basis for the Organization to assert that the Applicant remained subject to the conditions and limitations of the April 2011 exchange, including the provisional status of his reassignment and the need for further review board clearance.

54. Mr. Muwambi submits in his answer to the appeal that even if this Tribunal finds as a factual matter that in Mr. Muwambi’s subsequent letters of appointments there was an implicit condition which referenced the term “provisional reassignment status”, such a contractual condition does not exist under the Staff Regulations and Rules. Pursuant to Staff Regulation 4.5 and Staff Rule 4.11, a staff member may be appointed on either temporary, fixed-term or continuing appointments. Some staff members hold permanent appointments and they are regulated under Staff Rule 13.1. No reference is made to the term “provisional reassignment status” in any of the Staff Regulations and Rules. As such, it is submitted that “provisional reassignment status” has no legal basis in the Staff Regulations and Rules. The decision to deny Mr. Muwambi a renewal of contract on the basis that he only had “provisional reassignment status” must, as a result, be unlawful.

55. We agree with Mr. Muwambi that the term “provisional reassignment status” does not correspond to a specific contractual condition under the existing Staff Regulations and Rules according to which a staff member may be appointed on either temporary, fixed-term or continuing appointment.

56. Rather, in the context of the facsimiles dated 20 December 2013 and 4 June 2014, as well as of the letter dated 24 June 2015 that advised Mr. Muwambi of the non-renewal of his appointment beyond 30 June 2015, the phrase staff members on “provisional status” has the meaning of staff members serving for the time being only, or hired temporarily, or for a

¹⁸ Impugned Judgment, para. 34.

¹⁹ *Ibid.*, para. 39.

short-term, for a job before having taken an examination qualifying for selection.²⁰ In other words, the term “provisional status” of Mr. Muwambi’s refers to the limited duration of his appointment.

57. Therefore, there was no unilateral imposition by the Administration of unstipulated contractual terms limiting Mr. Muwambi’s rights and interests, that could have formed an unlawful basis for the non-renewal of his contract, as erroneously determined by the UNDT.

58. In our view, the challenged administrative decision not to renew Mr. Muwambi’s appointment was based on the existing Staff Regulations and Rules, which formed part of his contract(s) and governed the conditions of the employment relationship along with the letter(s) of appointment, providing for the requirement of central review body clearance as part of the selection process. Since such clearance was a requirement established by the legal framework of the Organization, it constituted a lawful basis for the Administration to assert that Mr. Muwambi was subject to the requirement of clearance by a central review body, in the context of implementing the policy contained in the aforementioned facsimiles dated 20 December 2013 and 4 June 2014. Consequently, we find merit in this ground of appeal raised by the Secretary-General.

59. Mr. Muwambi submits that none of the 12 letters of appointment between 2011 and 2014 contained references to his still being on provisional reassignment status or that his appointment was conditional upon his participation in a competitive selection process or endorsement by a review board. By suddenly, in 2015, denying him legitimacy on the basis that he was still subject to clearance from a central review body, Mr. Muwambi submits, the Administration did not act in good faith.

60. The Appeals Tribunal does not find merit in this submission. We note that the former Administrative Tribunal in *Masri*, invoked by Mr. Muwambi, held as follows:²¹

... The [Administrative] Tribunal finds that the Administration has not proceeded in good faith. It has treated the Applicant badly. Suddenly denying him his legitimacy as a staff member, after having considered him as an employee and periodically renewing his employment for four years, is indeed bad faith. The improper motivation and the arbitrariness of the Administration are evident from the reasons given to the Applicant for not renewing his contract.

²⁰ See Collings English Dictionary, Oxford English Living Dictionaries, Cambridge Dictionary.

²¹ Former Administrative Tribunal, Judgment No. 981, *Masri* (2000), para. VIII.

61. However, apart from the fact that the jurisprudence of the former Administrative Tribunal, though of persuasive value, cannot be binding precedent for the new Tribunals to follow,²² no similar circumstances were present in the instant case. In *Masri*, the former Administrative Tribunal was seized of the claim by Mr. Masri against the Administration's decision not to renew his fixed-term contract due to the fact that he did not reveal in his Personal History form that his brother was a United Nations Disengagement Observer Force (UNDOF) staff member at the time, though the Administration had accepted the relevant applications and had not followed the proper procedure in the recruitment of Mr. Masri and in the retention of his service for four years. This situation created a reasonable belief in his mind that, pursuant to the exception contained in former Staff Rule 104.10(a), he was eligible for employment with the United Nations, his brother's employment notwithstanding.

62. Besides, in the present case, the fact that the Administration had granted Mr. Muwambi successive contract extensions does not give grounds for an expectancy of renewal, unless the Administration had made him an express promise in writing, which is not the case here.

63. Further, Mr. Muwambi contends that, in so far as the Administration relies on the facsimiles dated 20 December 2013 and 4 June 2014, they have no legal authority. He claims that this Tribunal has previously held in *Charles*,²³ that only duly promulgated bulletins and administrative issuances have legal authority for application. These facsimiles from the Director of the FPD, however, were addressed to "all CMS [Chiefs of Mission Support] and DMS [Directors of Mission Support]" only. They have not been duly promulgated by the Secretary-General as a bulletin or administrative issuance and thus have no general application. Lacking in any legal authority, he claims, their application to his case is unlawful and arbitrary, in the sense that they could not constitute a legal basis for the non-renewal decision to rest upon.

²² *Baracungana v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-725, para. 27, citing *Leal v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-337, para. 18, and citations therein.

²³ *Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-286, para. 23.

64. We do not agree with Mr. Muwambi. Since this policy of discontinuance of provisional reassignments was intended only for the staff at MINUSTAH, we reject Mr. Muwambi's submissions on this point. We accordingly hold that the Acting Director, FPD, DFS, had authority to issue the relevant policy and that issuance was a proper exercise of his authority. In any case, as a result of the Secretary-General's broad discretion in relation to decisions on internal management, this measure is subject to limited review by this Tribunal.²⁴

65. For all these reasons, the Appeals Tribunal finds that the UNDT made errors of law and fact resulting in a manifestly unreasonable decision when it concluded that there was no valid reason for the non-renewal of Mr. Muwambi's appointment.

66. Since the UNDT based its award of damages on the erroneous and unsupported conclusion that the Administration's decision not to renew Mr. Muwambi's appointment was unlawful, that award must be vacated. Because no illegality was found, there is no justification for the award of any compensation or moral damages. As this Tribunal stated before,²⁵ "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrong doing in need of repair".

67. Accordingly, the Secretary-General's appeal should be granted and the impugned Judgment should be vacated.

²⁴ See *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-234, para. 39.

²⁵ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

Judgment

68. The Secretary-General's appeal is granted. Judgment No. 2016/UNDT/216 is vacated.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar