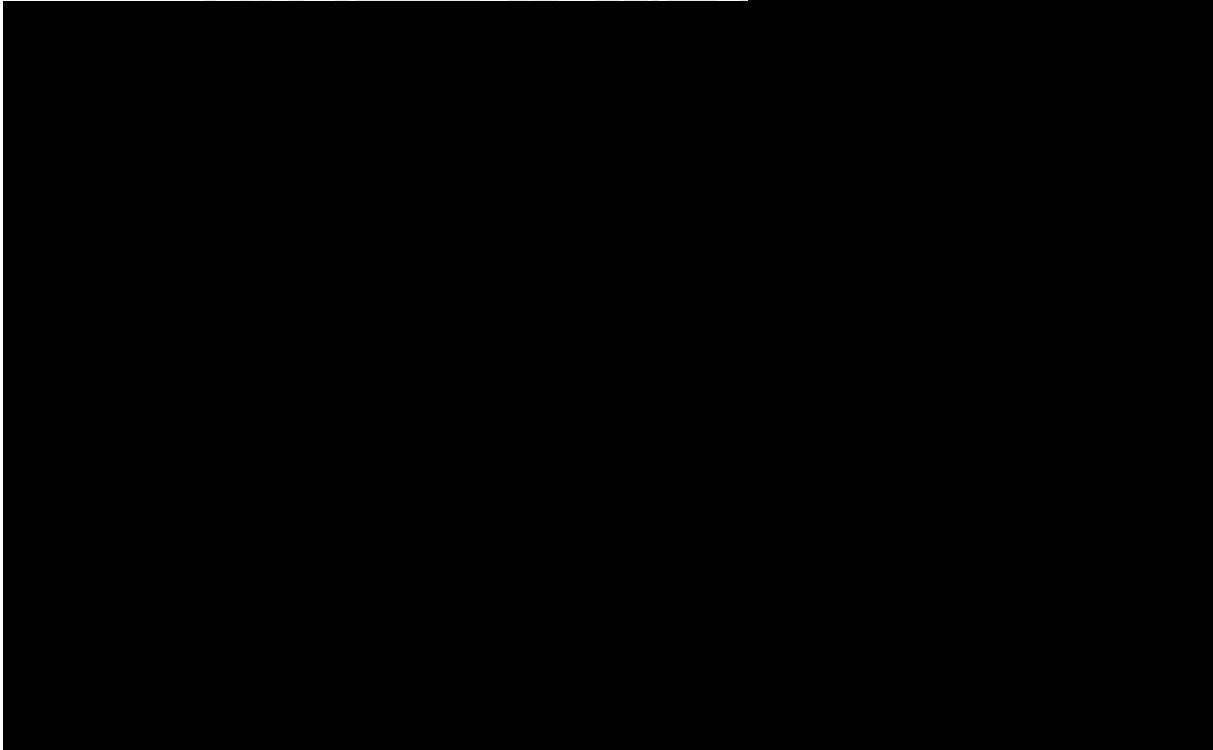




Judgment No. 2019-UNAT-902



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Self-represented

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1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNST/2011/030 rendered by the United Nations Dispute Tribunal (UNST or Dispute Tribunal) in No. 607 on 20 June 2011, in the case of Nouinou v. Secretary-General of the United Nations. The Secretary-General filed the appeal on 23 August 2011, and Ms. Nouinou filed her answer on 29 September 2011.

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2. The following facts are uncontested¹

< The Applicant has been working for the United Nations since 2001 and has served in several departments before joining the Investigations Division in the Office of Internal Oversight Services (IOS); @, "2A.

< ; n 1, January 2011 the Applicant was appointed as Administrative Assistant & 7--& 5 in the Inspection and Evaluation Division in ; @, " 1D/C\$/; @, "E2 on a temporary appointment. ; n 1F . a 2011 the Applicant was reassigned to @\$/; @, ". The Applicant's Personnel Action 10' AE2 issued in connection with her reassignment indicates that the source of funding of her reassignment was extra-budgetary for from the ; @, "6 Reimbursement Support Account (hereafter referred to as D; @A account E2.

< ; n 29 September 2011 the Applicant was granted a fixed-term appointment for one year. ; n 29 September 2011 her appointment was renewed for two years until 2 ; ; cto)er 2010.

< ; n 2B July 2011 ; @, " received funds for four years to be placed in the ; @, " Trust Fund for Encouraging Professional Capacity (the Trust Fund) to cover the existing posts and < it was confirmed with the Executive Office that the existing staff members should get two-year appointments and the new staff should get one-year appointments.

< @n December 2011 the Office of Programme Planning, Budget and Accounts (OPB) advised the Executive Office ; @, " 10C;

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Administration and information ; ffice of CTC\$ informed t!e Applicant t! at D?<A decisions are made)4 CTC\$& senior management and it is ?t! e ; ffice&A responsi)ilit4 to allo5 t! em to ! a=e a furt! er discussion and ?t! at t! e ; ffice 5ouldA re=ertE.

< ; n 1- ; ct)er 2010& t! e Applicant filed a reI uest for management e=aluation of t! e decision of t! e U"7/; @; " to refuse Dto e+tend ?! erA t5o-4ear fi+ed-term contract for t5o mont! sKunder a 9ero-dollar incum)enc4Kto reassign ?! erA on a s! ort-term position 5it! 1<2 CTC\$ until B1 \$ecem)er 2010E.

< ?; n 13 ; ct)er 2010& t! e Applicant 5ent on certified sic% lea=e.A ; n 19 ; ct)er 2010& t! e Applicant filed an application for suspension of action registered under Case No. UN\$T/N6/2010/0F-. #4 ; rder No. 2F1 1N6/20102 issued on

Consequently, the UNAT concluded that the lack of funds in ; @A 5as not relevant and could not constitute a reason for the abolition of her post.

0. The UNAT found that . s. Nouinou had a legitimate expectation for renewal of her

. s. Nouinou's appointment was not terminated. Rat'er's appointment was not renewed and it expired in accordance with its terms.

13. The UNST erred in fact and law in concluding that it was unlawful not to renew . s. Nouinou's fixed-term appointment for 15 months so that she could be reassigned to CTC\$ 51ere she had been selected for a short-term position until 31 December 2010. ; @, " was under no obligation to renew . s. Nouinou's fixed-term appointment for 15 months so that she could be reassigned. . s. Nouinou's reassignment should not have been in accordance with the ; @, " guidelines for temporary posts and secondments according to Article 11 of the minimum duration of an assignment outside of ; @, " at the same duty station must be six months

17. It is not the function of the Appeals Tribunal to determine that the UNST's findings had not been made in error and the UNST erred in law and exceeded its jurisdiction in making its awards for loss of employment in addition to the amount of compensation that it ordered be paid as an alternative to the rescission of the contested decisions and to the specific performance ordered. The purpose of compensation is to place a staff member in the same position in which she or he would have been and his or her rights be respected. There was no legal basis for the UNST to order payment of additional compensation for loss of employment once it had set an amount of compensation to be paid in lieu of rescission. Yet the UNST erroneously ordered the payment of additional amounts beyond what it had ordered in lieu of rescission.

19. Pursuant to the sum of US\$ 10,000 awarded as compensation in lieu of rescission and the additional compensation in the amount of six months' net base salary for loss of employment exceeds the amount of net base salary that . s. Nouinou should have received had she been continuously employed by the ; rganization. The sum is equivalent to . s. Nouinou's net base salary for a period of more than eight months. . s. Nouinou had been unemployed for a period of less than seven months at the date of the Secretary-General's answer. Thus the sum of these awards of compensation should result in . s. Nouinou's unjust enrichment. Additionally the UNST erroneously awarded compensation in the amount of what should have been not the ; rganization's and . s. Nouinou's contributions to the UNJ * during a period of six months. A staff member's contributions to the UNJ * are deducted from the staff member's salary. Thus as . s. Nouinou had been awarded six months' net base salary without deductions the UNST's award of compensation in the amount of what should have been . s. Nouinou's contributions to the UNJ * should also result in unjust enrichment.

Merits

B0. Based on the review of the record and the applicable legal instruments and authorities, the Tribunal made numerous errors of fact and law in reaching its conclusions and its Judgment should be reversed for the reasons set out below.

B1. At the outset, the Tribunal made a grave error of law in terms of the basic legal position. It defined the subject of the litigation before it and corresponding legal principles. It found that the legal nature of the contested decision is a termination since the abolition of post was initiated before the expiration of the contract² and based on this false conclusion applied the legal framework for termination of a fixed-term appointment to the instant case. It concerns non-renewal of a contract. On this regard, the Tribunal stated³

The Tribunal considers that the Applicant was officially notified on 3 September 2010 of the decision to abolish her post starting from 2, October 2010 resulting in the non-renewal of her contract after this date. On 3 September 2010, the Applicant filed a request for management evaluation of the decision. She was notified to her on that date not to renew her contract. The Tribunal considers that in the request for management evaluation, she clearly referred to the contested decision as being the decision not to renew her contract. It was determined and therefore was the consequence of the abolition of her post starting on 2, October 2010. This reason of non-renewal of the Applicant's contract was confirmed in the management evaluation response. It stated that the decision not to renew the Applicant's appointment was the natural consequence of the lack of identification of additional funding since November 2010 and concluded that the Applicant's contract was not renewed due to lack of funds. The Tribunal considers that it results that

letter of appointment. It is a matter of record that the decisions contested by Ms. Nouinou before the UNAT were, inter alia, the decisions not to renew her five-year fixed-term contract ending on 2 October 2010 and not to renew the above contract for five months until 31 December 2010 so that she could be reassigned to CTC. These were also among the

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10. As provided in Staff Regulation 5.1(c) and Staff Rule 11.1(c) respectively, a fixed-term appointment does not carry an expectation of renewal or conversion and irrespective of the length of service, and a fixed-term appointment does not carry an expectation of legal or other consequences of renewal or conversion, irrespective of the length of service, except as provided under staff rule 11.1(d).

13. 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 if the staff member or his motivated basis, prejudice or improper motive.¹⁶ The staff member has the burden of proving such factors played a role in the administrative decision.¹⁰

14. The Appeals Tribunal has consistently held that¹³

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

Tribunals may examine the circumstances surrounding the abolition of the staff members post to determine whether the impugned decision was tainted by abuse of authority.

F0. As stated in *Obdein & D?an* 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 a 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.^{E19} *D?atler & the Administration* is 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.^{E20}

F1. In the present case, *s. Nouinou* was advised on 19 November 2016 that the Executive Officer of the United Nations Office at Vienna at the time would honour her appointment until 2, October 2010 but that any further extensions would be subject to available funding. In all of the months of 2010, the Chief of the Office of the Executive Officer of the United Nations Office at Vienna met *s. Nouinou* and informed her that her fixed-term contract would not be extended and on the same date she rec

FB. Nevertheless, the financial difficulties ; @, " 5as faced 5it! did not disappear& and t! is fact is undisputed!4)orne out)4 t!e document issued in tempore non suspecto)4 ; ' ' #A 1in \$ecem)er 201-2& 5! ic! advised t!e C; /; @, " t!at t!ere 5ere insufficient resources in t!e Trust *und to fund all planned acti=ities. *ollo5ing 5! ic! & ; ' ' #A issued allotment advice t!at 5ould allo5 @\$/; @, " to fund . s. Nouinou's salar4 and t!at of anot!er 7eneral "er=ice staff mem)er& 5! ic! 5as funded)4 t!e same Trust *und t! roug! B1 August 201F. T!ereafter& in . arc! 201F& @\$/; @, " identified some unused funds 5! ic! could)e used to fund t!e t5o appointments t! roug! \$ecem)er 201F.

F-. T!e lac% of resources in t!e ; @A account 5as due to a reduction of ; @, "Gacti=ities in t!e area of it pro=iding ser=ices to t!e *unds and ' rogrammes& 5! ic! pro=ided mone4 to t!e ; @A account t! roug! reception of cost reim)ursement for t!ese ser=ices. / !ereupon& . s. Nouinou 5as informed)4 t!e Administrati=e . anagement ; fficer& @\$/; @, " & in t!e first place in late 201- t!at t!e ; @A account D5as unli%el4 to)e a)le to continue to fund !er positionE& and t!en on 19 No=em)er 201F)4 t!e C+ecuti=e ; fficer of ; @, " & as rel uested)4 t!e \$\$\$ @\$/; @, " /Hienna& t!at @\$/; @, " D5ould !ono?uAr !er appointment until 2, ; cto)er 2010)ut t!at an4 furt!er e+ensions 5ould)e su)ect to a=aila)le fundingE.²² Ultimate4& as of B0 June 2010& t!e ; @A account 5as depleted and could no longer fund . s. Nouinou's position& 5! ic! 5as a)olis!ed and . s. Nouinou's fi+ed-term contract 5as not rene5ed)e4ond its e+piration on 2, ; cto)er 2010.

FF. T!e "ecretar4-7eneral su)mits t!at t!e UN\$T erred in fact and la5 in concluding t!at t!e decision not to rene5 . s. Nouinou's fi+ed-term appointment 5as unla5ful& since t!e reason for ; @, "Gdecision not to rene5 !er appointment 5as t!at t!e ; @A account t!at !ad financed !er position !ad)een depleted& to 5it& t!e account no longer !ad sufficient resources in it to continue to finance !er position and& t! us& in accordance 5it! t!e Appeals Tri)unal's >urisprudence& ; @, " !ad a =alid reason for not rene5ing . s. Nouinou's fi240. 992(c)19. 21814T19. 218811. 652(o)17. 261(s)1&259,5

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Ms. Nouinou's position was funded from the ; @A account until its depletion at 5:00 p.m. point 7TA funds were exceptionally used to continue her appointment from 1 July 2010 to the date of expiration on 2, October 2010. Apparently the UN\$T's finding was based on an erroneous interpretation of an e-mail message dated 28 July 2011 from the Administrative Officer ; @\$/; @, " to the Deputy Director ; @\$/; @, ". Clearly on its face that e-mail message discussed a four-year contribution from Norway to the United Nations in support of ; @, " activities. That contribution is also not related to the ; @A account as the UN\$T incorrectly found and relied upon in framing its analysis and reaching its conclusions.

OB. Thirdly as a matter of law the Dispute Tribunal erred outright in the Judgment)4 failing to recognize and respect and abide by the Appeals Tribunal's jurisprudence as it must. Specifically the UN\$T's findings that the Tribunal is of the view that the information related to the ; @A account as being the source of funding for the Applicant's post until 2010 is contradicted)4 the fact that since November 2011 ; @, " used funds from the ; @, " Trust Fund for all the existing posts in 2011-12.

against her resulting in the non-renewal of her appointment. The mere allegation is not a proof. Nor has the UNST made any specific finding in that regard.

OF. Justice has stated that the Appeals Tribunal's jurisprudence places that burden on the staff member to show, not on the Administration. Erroneously shifting the burden to the Administration tainted the UNST's findings of unlawfulness. "Since these findings are based on an error of law, they cannot support the UNST's ultimate conclusion that the non-renewal decision was unlawful. / We hold the same in respect to the rest of the UNST's findings in that ; @, " had the funds on 21 February 2013 to employ a new temporary staff member in a different section of ; @, " at the 7-level level! had similar functions as the Applicant's.^{B1} Thus, the Tribunal finds that the UNST erred on a question of law and fact resulting in a manifestly unreasonable decision when it concluded there was no valid reason for the non-renewal of . s. Nouinou's appointment.

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No legitimate expectancy of renewal

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cannot be awarded since no illegality has been established, it cannot be granted since there is no breach of the staff member's rights or administrative wrongdoing in need of repair.^{BF}

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