APPLICATION No. 2012/03

J. B., Applicant,
African Development Bank, Respondent

Judgment No. 85 of the Administrative Tribunal rendered on 12 November 2013

I. THE FACTS

1. The Applicant, a British national, joined the Bank on 30 August 2005 as a Senior Environmentalist, at salary grade PL.5. He served with the Operations Departments, specifically with the Department of Infrastructure, Operations North, East and South, ONIN and with the Department of Infrastructure, Operations III, Infrastructure, Private Sector and Regional Integration, OINF before moving to the Results Quality Assurance and Results Department, Compliance and Safeguards Division (ORQR.3). At the time of his separation in August 2010, he held the same position in that Department.\(^1\)

2. The Applicant had an initial fixed term contract of three (3) years with the Bank, which was renewed for a further period of two (2) years from 30 August 2008. However, shortly before the expiry of the second contract, the Applicant received a letter on 27 July 2010, informing him that his contract would not be renewed for a further term.\(^2\) This letter provided the following reasons for the non-renewal of his contract: “\textit{due to your repeated absence from duty without authorization, lack of respect for managerial oversight and unwillingness to accept responsibility for your actions and omissions.}\(^3\)

3. The Applicant challenged the decision and demanded that his contract be renewed because not only had he changed supervisors, but he enjoyed the full confidence of and recognition of his professional competence from the new supervisor.\(^4\) Furthermore, the Applicant notes that when he successfully challenged the first performance evaluation rating of the first supervisor, Mr. Rwamabuga Juste, from Grade “D” “acceptable”, to “C” as “fully Satisfactory” for 2006, the latter refused to give him any further ratings; but had systematically delayed the completion of his annual performance exercise despite repeated requests and reminders. He further alleges that even after initiating the annual performance evaluation exercise, the supervisor, Mr. Rwamabuga consistently failed to take necessary action. As a result, he sought and was granted transfer to ORQR 3. However, as at the time of his transfer to ORQR.3, he had three (3) outstanding performance evaluations for the years 2007, 2008 and 2009 which had yet to be completed by Mr. Rwamabuga.\(^5\)

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\(^{1}\) Application paras.1, 4-6, page.2 part III.
\(^{2}\) Application, Annex 3 (Bundle 2)
\(^{3}\) Annex 3 (Bundle 2) para.1
\(^{4}\) Annex 1 (Bundle 1) pp.1-10; (Bundle 2) Annex 4
\(^{5}\) Application, (Bundle 2) Annexes 16-20
4. In the interim, the Applicant also sought mediation and intervention from the Ethics Officer of the Bank, Mr. Kisubi, to ensure the completion of the outstanding evaluations because of the strained relationship with Mr. Rwamabuga.\(^6\) Even though Mr. Rwamabuga welcomed this initiative, he subsequently withdrew from it.\(^7\) Nevertheless, the Applicant believes that he deserved a better grade than “D” which was given by the supervisor for the second and third year evaluations.\(^8\) The Applicant attributed these ratings to the irreconcilable differences between them and therefore, no objective assessment of his performance was expected.\(^9\)

5. For the second time, the Applicant seized the “Management Review Committee” contesting the award of grade “D” “acceptable” for the year 2007; his relationship with Mr. Rwamabuga did not improve. Instead, while this appeal was pending before that Committee, the Applicant was transferred to ORQR. 3, following a restructuring exercise. Having moved under a new supervisor, Mr. Anthony Nyong, the Applicant continued to entertain hope of renewal of his contract. Furthermore, the Applicant contends that his work was not only appreciated by the new supervisor, but was in fact commended and that he was assured of renewal by him.\(^10\) As such, he had a legitimate expectation that his contract would be renewed for a further period of three (3) years consistent with the practice in the Bank. He firmly attributes this reassurance to Mr. Nyong and Mr. Kisubi.\(^11\) However, contrary to his expectation, the CHRM acting on the recommendation of Mr. Rwamabuga, the former supervisor, wrote to inform him that his contract would not be renewed. The letter further directed him to initiate formal separation from the Bank.\(^12\)

6. According to the Applicant, the letter of non-renewal dated 27 July 2010, came as a complete surprise to him and despite a written appeal to the Vice President, (CSVP) on 19 November 2010, to reconsider the Bank’s decision, his plea failed.\(^13\) The Applicant therefore filed an application before the Staff Appeals Committee, arguing that all the reasons stated in the letter of 27 July 2010, were manifestly ill founded.\(^14\) He further argues that no good reason was given for the non-renewal of his contract, and that he had a legitimate expectation of renewal. Consequently, he sought the following relief from the Staff Appeals Committee:

   b. payment of salary and benefits for a three (3) year period;
   c. the provision of satisfactory references;
   d. an opportunity to work for the Respondent in future; and
   e. Payment of legal fees.\(^15\)

7. For its part, the Bank argued before the Appeals Committee that: “the Appellant’s absences were so frequent and unpredictable that it became difficult to rely on him to be present to participate in the work of the Division”, and “the difficulties and delays in carrying out the Performance Evaluation

\(^{6}\) Application, paras.47-48.
\(^{7}\) Reply, para.9 (a)
\(^{8}\) Application, paras. 47-51 (Bundle 2) Annex. 25
\(^{9}\) Application, paras.56-61
\(^{10}\) Application, paras.73-79
\(^{11}\) Application, paras, 77-79
\(^{12}\) Application, (Bundle 2) Annex 3
\(^{13}\) Application, Annex 4
\(^{14}\) Statement of Appeal dated 18 January 2011
\(^{15}\) ibid, paras. 21, 21.1-21.6.
exercise for the year 2007, 2008 and 2009 were primarily due to the repeated and unpredictable absences of the Applicant.”\textsuperscript{16}

8. On the Applicant’s plea of legitimate expectation, the Respondent argued before the Appeals Committee that: “given the performance issues which the Appellant had, there was no basis for him to have a legitimate expectation of a renewal of his contract.”\textsuperscript{17} On 25 May 2012, the Staff Appeals Committee gave its decision in which it agreed with the Bank that this plea could not succeed. It stated:

“Committee members do not find any facts or conduct that could be construed as a promise or commitment reinforcing the Appellant’s claims. However, they noted with regret that the Appellant’s transfer to a new division, following the restructuring described above, was not used as an opportunity to give him another chance. Indeed, given the evidence, it appears that his skills could have been profitably utilized by the Bank.”\textsuperscript{18}

9. However, the Staff Appeals Committee rejected the three reasons cited by the Bank for non-renewal of the Applicant’s contract. Not only did the Committee find for the Applicant, but it also noted that:

“The Respondent [bank] failed to follow its own regulations and did not follow due process in managing the Appellant’s case. It thus failed in its duty of sound management ...the Appellant was not treated in accordance with normal conditions of employment ...the Respondent is not justified to negate its responsibility for handling the Appellant’s leaves of absence and state in the letter notifying of appointment that his repeated and unjustified absences were one of the grounds for not renewing his appointment.”\textsuperscript{19}

10. Regarding the issue of the Applicant’s performance, the Appeals Committee noted that the Respondent had: “violated the rights attached to the Appellant’s appointment by denying him the benefits of periodic evaluation during his period of service ...[and]...failed to comply with its own regulations.” In addition, the Committee concluded that the Respondent’s decision not to renew the Appellant’s contract was: “taken in violation of the principle of good faith and duty of care that behaves an international organization with respect to its staff.”\textsuperscript{20}

II. **ARGUMENT OF THE PARTIES**

The Applicant

11. Not entirely satisfied with the recommendations of the Appeals Committee, the Applicant now challenges the Bank’s decision not to renew his fixed term contract of employment conveyed in the letter dated 27 July 2010, and which took effect on 30 August 2010. The Bank asserts that the Applicant did not respect managerial oversight and has failed to take responsibility for his actions and omissions. Although the Applicant accepts the finding made by the Staff Appeals Committee, he did not agree with its awards which according to him, do not reflect loss of future earnings, as well

\textsuperscript{16} Application Annex 4 (bundle 1) paras.11-12.
\textsuperscript{17} Application Annex 2 paras. 16-33 and; Annex 4 paras.33-39 (bundle 1).
\textsuperscript{18} Application Annex 20 (Bundle 1). Decision of Staff Appeals Committee, para.46.
\textsuperscript{19} Application, Para.15.
\textsuperscript{20} Application, paras.16-18.
as the incremental loss in salary arising from the Respondent’s failures in conducting his performance evaluations.\textsuperscript{22} He now seeks to impugn these findings before this Tribunal.

12. The Applicant submits that whilst the Staff Appeals Committee was entirely correct in establishing the unlawfulness of the Respondent’s conduct, it erred or misconstrued the law regarding legitimate expectation, as well as the awards it recommended. Among its recommendations were:

a. the quantum of the award of six (6) months of salary for moral damages, and one (1) month of salary for mental distress, instead of granting his claim of three (3) years of salary;
b. the request to augment his performance rating to C: as fully satisfactory; and for the award of the consequential benefits thereof; and,
c. the finding that there was no reasonable basis for legitimate expectation of the renewal of his contract by the Bank.\textsuperscript{22}

13. In short, the Applicant submits that the Tribunal should find and uphold that the Respondent’s failure to renew his contract was unlawful, and in addition, that he had a legitimate expectation of renewal. Lastly, the Applicant asks that the Tribunal grant him fair and effective redress as stated below.\textsuperscript{23}

14. As a consequence, whilst the Staff Appeals Committee’s recommendation stands, the Applicant seeks to pursue two aspects of his original claim before the Tribunal. These are his original request for an award of three (3) years’ salary to reflect his loss of future earnings based upon his legitimate expectation that his contract would be renewed. Secondly, he seeks an award of the benefits incidental to a successful revision of his performance evaluation from grade “D” to “C”; with a retrospective compensation of all benefits that a “C” rating should attract.\textsuperscript{24} He also asks for costs before the Appeals Committee and the Tribunal.\textsuperscript{25}

15. The Applicant contends that: “throughout his engagement with the Respondent [Bank], it was the Respondent’s practice to renew fixed term contracts as matter of course. As such, all initial appointments by the Respondent were for three (3) years, followed by a two (2) years contract, and subsequently for three (3) years fixed term contracts.\textsuperscript{26} As such, he submits that: “the practice of the Respondent to renew fixed term contracts as matter of course became part of the general law of the Respondent and/or created a legitimate expectation of renewal on the part of the Appellant as holder of a fixed term contract that his contract would be renewed.”\textsuperscript{27}

16. Apart from being the usual practice according to the Applicant, his own performance over the years has strengthened his conviction that his contract would be renewed. Furthermore, the fact that the Applicant had succeeded in having his supervisor’s rating upgraded from a “D” grade to a “C” grade in 2006, had led to a less congenial working relationship with the latter. Thus, he requests that the award of “D” grade for 2007 and 2008 evaluations be set aside.\textsuperscript{28} The Applicant also contends that the Bank’s Performance Guideline states that: “It is the policy of the Bank that every staff member and every team are accountable for their performance and are, therefore, entitled to a fair

\textsuperscript{21} Application, paras.19-21.
\textsuperscript{22} Application, paras. 22,24.
\textsuperscript{23} Application, paras.23-24.
\textsuperscript{24} Application, para.24.
\textsuperscript{25} Application, paras.25-26 [Annex A – Schedule of Loss].
\textsuperscript{26} Application paras.33-35.
\textsuperscript{27} Application, para.36.
\textsuperscript{28} Application, paras. 46-48,50-52, 103.
assessment of their performance. Excellence will be rewarded while poor performance will be identified and remedied through coaching and training...” 29

17. The Applicant further argues that when he completed his first Staff Evaluation Form in January 2007, no supervisor interview was held until November 2008. Given his subsequent challenge of the Mr. Rwamabuga’s first evaluation of his performance before the Management Review Committee, which was revised to grade “C” in June 2009, all other performance evaluations became problematic. 30 For example, in January 2008, he completed his staff evaluation for the year 2007. In November 2008, January 2009 and March 2009, he made formal requests for his supervisor Mr. Rwamabuga, to complete the process. A supervisor’s interview was convened in November 2009, and once again, he was graded “D” by the supervisor, despite earlier mediation efforts to award a better grade than a “D”. 31

18. Regarding his alleged repeated absences from duty without authorization, the Applicant states that CHRM was aware that he was unable to log into the SAP portal to lodge his requests at various times during his stint with the Bank. Secondly, on 24 September 2009, he received a message from his Supervisor inviting him to discuss his performance evaluation for 2007, on Friday 25 September 2009, on which date he fell ill, but nevertheless sent a message to the Division Secretary that he was indisposed. Thirdly, that he had already applied for three (3) working days leave from the Monday 28 to Wednesday 30 September 2009, which was not approved as at the time he returned to work. Instead, he received two formal warnings for non-attendance at the scheduled meeting of 25 September. 32

19. The Applicant also contends that flowing from his legitimate expectation of renewal, the unexpected decision not to renew his contract caused him moral prejudice for which he is entitled to compensation. He argues that Staff Rules 6.10.3 requires three (3) months’ notice for non-renewal, ostensibly to give a chance to the staff member to challenge the decision and possibly have it rescinded. 33 In his case, however, he received the non-renewal letter barely ten (10) days before the end of his second contract. The Applicant argues that in accordance with Staff Regulation 6.10.3 of the Staff Rules, the provision of three (3) months’ notice was a condition precedent to the non-renewal of his contract. Having failed to provide him with the requisite notice, the Applicant submits that the Bank was precluded from failing to renew his contract. Furthermore, the Applicant says that the failure of the Bank to provide him with timely notice further reinforced his legitimate expectation that his contract would be renewed. He therefore invites the Tribunal to reject the Respondent’s arguments. 34

20. Furthermore, he alleges that the Bank did not act in good faith or indeed with the duty of care that behoves an international organization with respect to its staff. Therefore, the Applicant urges the Tribunal to adopt and concur with the finding of the Staff Appeals Committee to the effect that: “...decision by the Respondent not to renew,... was taken in violation of the principle of good faith and the duty of care that behoves an international organisation with respect to its staff.” 35

30 Application, paras.69-71.
31 Application, paras.46-51, 56-61.
32 Application, paras.62-66.
33 Applicant’s Reply, paras.21-23.
35 Reply, para.11; [see paras. 45-48 of SAC Report/decision No.212 of 25 May 2012] [Re-echoing the general principle that no right of automatic renewal exists].
21. To that end, the Applicant contends that when he officially moved to ORQR.3 on 16 May 2011, his new Supervisor Mr. Nyong did not have any negative perceptions about his performance. In fact according to the Applicant, not only did he enjoy a good working relationship with the new supervisor, but the latter made numerous representations to the Applicant that he would continue to work in his Division. Moreover, the Applicant was specifically told by the new supervisor that the former Supervisor did not recommend the renewal of his contract, but reassured him that the contract would be renewed.37

22. In particular, the Applicant stated that Mr. Nyong assured him that he need not be concerned with the renewal of his contract. Mr. Nyong also advised the Applicant at one point that his contract had in fact already been renewed for a further year, albeit in a probationary basis.

23. The Applicant stated that when he raised the issue of his new probationary status with Mr. Kisubi the Head of Ethics Office, Mr. Kisubi assured him that no such probationary period was permitted under the Staff Rules, and that the Applicant’s contract had already been renewed.

24. Further, the Applicant strongly disagrees with the assertion that no legitimate expectancy of renewal is available to him. He rebuts the Respondents argument that his “persistent performance issues” were incompatible with expectancy as unsustainable especially in circumstances where no performance evaluation process was in fact completed for the period from 2007 to 2009, and in light of the findings of the Staff Appeals Committee.

25. Lastly, the Applicant also detailed several heads of damage that he is entitled to, and therefore urges the Tribunal to uphold the appeal as well as grant him the reliefs sought.

The Respondent

26. The Respondent sought to narrow the issues between the parties, by urging the Tribunal to consider the two key issues raised by the Applicant. These issues include: (i) legitimate expectation of contract renewal; (ii) the right to a fair and effective remedy in respect of losses following the non-renewal of his contract, performance related pay and legal costs. It contends, therefore, that all other issues raised by the Applicant be disregarded.

27. On the issue of legitimate expectation, the Respondent submits that the Applicant was on a fixed term contract and thus no legitimate expectancy of renewal is contemplated by the internal Rules and Regulations of the Bank. Secondly, the Respondent argues that Staff Regulation 6.4.3 and Staff Rule 64.01(b) apply to the Applicant’s fixed term contract which runs from 20 August 2008 to 30 August 2010. Thirdly: “that by accepting the terms and conditions of his appointment, the Applicant was subject to the Rules and regulations of the Respondent, which clearly state that fixed-term contracts shall carry no expectancy of renewal.” Finally, that: “the Applicant could not have had a

36 Application, paras.73-76, 79.
37 Application, paras.77-78, [see: principles of legitimate expectation at common law] E.g. Schmidt v Home Secretary [1968] 3 ALL ER 855; Ng Yuen Shiu v AG Hong Kong [1983] 2ALL ER 346; – either express promise or existence of a regular practice
38 Reply, paras.46.
39 Application, paras. 96-107.
40 Application, para. 108.
41 Answer, para.21.
42 Ibid.
43 Answer, paras.24-27.
legitimate expectation of renewal and should not have relied on any alleged representations from colleagues to build such an expectation as they did not have the discretionary authority to renew his appointment.44

28. Regarding the true legal import of the principle of legitimate expectation; the Respondent maintains that the principle does not form part of the “general law” of the Bank as suggested by the Applicant.45 It also argues that the Applicant has failed to prove that there was a promise from the Respondent to renew the Applicant’s appointment.46 Instead, it submits that re Del Valle Franco Fernandez, ILOAT judgment No.1610 [1997] supports the Respondent’s position that it has discretion not to renew appointments.47

29. The Respondent further avers that the performance evaluations of the Applicant do not support his claim to legitimate expectation because prior to receiving the letter informing him of the non-renewal dated 27 July 2010, he was sent an email by the Director CHRM on 3 May 2010 requesting him to provide a written explanation for his unauthorized absences and his refusal to complete the 2007 and 2008 performance evaluations in contravention of the Respondent’s Rules and procedures.48 It also argues that any decision with respect to contract renewal should be contingent on ‘satisfactory performance’.49 Similarly, the Respondent argues that neither the re Rebeck (1964) decision No. 77 of the ILOAT nor this Tribunal’s decision in K.S. v ADB, Application No. 2004/09, assists the Applicant’s case. In the latter case, the Respondent argues that the Applicant failed to prove the existence of a promise of renewal or elements of facts to support a legitimate expectation of renewal of his contract. Instead, the Tribunal only awarded damages due to the Bank’s failure to give reasons for non-renewal.50

30. The Respondent asserts that its internal Rules and Regulations unequivocally state that fixed term contracts carry no such expectancy of renewal; shall be limited to the period stated in the appointment letter; and are renewed at the sole discretion of the Respondent.51 It further avers that the “promises” of renewal by Mr. Kisubi and his new Manager, who was his supervisor for only four (4) months, cannot form the basis of legitimate expectation. Therefore, neither the alleged “promise” nor the purported “settled practice” apply in the Applicant’s case. Similarly, in responding to paragraph 35 (a) and (b) of the Applicant’s reply, the Respondent argues that the Applicant’s assertion that “he had not known of a single case of non-renewal”52 and that the alleged

44 Answer, para.27.
45 Application, para.36.
46 Answer, para.35.
47 Respondent’s Answer, para.30. Legitimate expectation or reasonable expectation (substantive and/or procedural See: K.S. v ABD Application No. 2004/09 at paras. 21 -22; paras.38-43; 64-67 especially at 67 which is consistent with the trend of modern administrative law regarding the duty to give reasons as opposed to the argument that the employer is not obliged to give reasons “unfettered discretion” will be a recipe for abuse of power]. However in B., the Bank gave reasons although debunked by the Applicant at paras 92-94 & by the SAC. [Unlike in K.S., where no reason was given, which therefore vitiated the decision in form] two statements which underpin the principle of legitimate expectation at common law, i.e.; [promise and consistent practice] see: dictum of Lord Fraser of Tullybelton in the English case of GCHQ case [1985] AC 374(H.L.); that legitimate expectation arises "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue". See also: D. Wright, “Rethinking_ Legitimate Expectations in Canadian Administrative Law”,[1997], Vol.35 No.1 Osgoode Hall Law Journal, 140.
48 Answer, paras.28-29.
49 Answer, para.30.
50 Answer, paras.31, 34; Application, paras.87-91.
51 Rejoinder, paras.20-24.
52 Rejoinder, paras. 25-26.
corroboration by the President of the Staff Association has no basis. In the case of the former, the Respondent argues that he did not work in the Human Resources Department, while the information attributed to the latter is at best hearsay and devoid of probative value.\(^{53}\)

31. The Respondent nevertheless reiterates its arguments that it was the Applicant who was responsible for all the delays in his performance appraisals.

32. Finally, the Respondent opposes all heads of damages claimed by the Applicant. The Respondent reminds the Tribunal that the Applicant already accepts the findings of the Staff Appeals Committee that the non-renewal decision was unlawful; consequently, the award recommended to the President of the Bank,\(^ {54}\) and the sum of Euro 5000 awarded as costs was reasonable for proceedings before the Staff Appeals Committee and the Tribunal. Therefore, no further costs should be allowed.\(^ {55}\) The Banks has, moreover, acknowledged that these amounts remain payable to the Applicant and that he remains entitled to receive them.

III. **REQUESTS OF THE PARTIES**

33. The Applicant requests the Tribunal to:

a) Find and uphold the Staff Appeals Committee’s findings that the Respondent’s non-renewal of his contract was unlawful;
b) Declare that he had a legitimate expectation that his contract would be renewed;
c) Grant him a fair and effective remedy in moral damages;
d) Grant him an effective remedy for mental distress;
e) Provide him with satisfactory references both oral and written with fully satisfactory ratings;
f) Compensate him for loss of salary and benefits for three (3) years;
g) Compensate him for loss of incentive pay increments which would have ensued from evaluation of his performance as “C: Fully Satisfactory” for the years 2007, 2008 and 2009;
h) Compensate him for his reputational damage;
i) Award him costs including those incurred before the Staff Appeals Committee.

34. The Respondent requests the Tribunal to dismiss this Application No. 2012/03 in its entirety as lacking in merit.

IV. **THE LAW**

35. The main issues raised in this Application are: (i) whether the Staff Appeals Committee erred in finding that the Applicant did not have a legitimate expectation of renewal of his contract and (ii) whether the Staff Appeals Committee erred in failing to award the Applicant an effective remedy in respect of losses following the non-renewal, and losses in respect of performance related pay.

36. At the commencement of the hearing of this Application, the Respondent sought to narrow down the issues to exclude consideration of losses in respect of performance related pay because the Applicant had not raised a specific ground challenging the failure by the Staff Appeals Committee to review performance evaluations of the Applicant on the basis that it was not competent to do so. An attempt was made by the Respondent to submit that the issue relating to performance


\(^{54}\) *Answer, para.55.*

\(^{55}\) *Answer, para.62.*
evaluation was inadmissible since the Applicant had not exhausted the internal procedures of the Respondent in accordance with Article III – 2 of the Statute of the Tribunal.

37. The Tribunal is satisfied that the issue regarding the losses relating to performance pay is adequately raised in the Application by the Applicant, in particular in paragraphs 22 (b) and 24 (b) thereof. The objection relating to admissibility was raised too late at the end of the hearing, but should have been raised earlier to enable both parties and the Tribunal to address it before the hearing of the Application.

38. The Tribunal will first deal with the issue of whether the Applicant was entitled to have a legitimate expectation that his contract would be renewed.

39. In July 2005 the Applicant was appointed for an initial term of three (3) years. His contract provided that it “may be renewed for a further period thereafter.” The contract further provided that the Applicant’s appointment would be governed by the provisions of the Bank’s Staff Rules and Regulations. In August 2008, the Applicant’s contract was renewed for a further period of two (2) years. All conditions relating to his contract remain the same.

40. Staff Regulation 6.4.3 provides “A temporary appointment, which may also be referred to as a fixed-term appointment, shall be for a definite period specified in the relevant Letter of Appointment or service contract. Such appointments shall not be less than six months nor exceed five years in duration. Temporary appointments may be renewable, and shall be subject to a probationary period and to performance evaluation as prescribed in the Staff Rules.”

41. Staff Rule 64.01 (b) further provides that “all temporary appointments shall be only for the period specified in the letter of appointment and shall carry no expectancy of renewal”. As the Respondent submits, the Applicant was therefore not entitled to automatic renewal of his appointment and by accepting the terms and conditions of his appointment, the Applicant was subject to the Rules and Regulations of the Respondent which clearly state that fixed term contracts shall carry no expectancy of renewal.

42. However, notwithstanding the clear provisions of Staff Rule 64.01 (b) of Staff Regulations of the Respondent and Rules of similar organizations, international administrative jurisprudence recognizes that there may be exceptional circumstances where the conduct of the organization may give rise to a legitimate expectancy on the part of a staff member that his contract will be renewed.

43. In his book of The Law of International Civil Service, Vol. II, 1994, page 93, C. F. Amerasinghe states, “Expectancy is a state of mind which has been created by positive action taken by the holder of a contract coupled with specific behavior on the part of the administrative authority. The concept of legitimate expectancy has been created in spite of the fact that in general the written law of organizations explicitly excludes any expectancy of continued employment for holder of fixed-term contract. Hence as a result of the creation of the concept of expectancy, the written laws prevail only in the absence of any countervailing circumstances, surrounding facts or behavior on the part of the authority, which could have created in the mind of the holder of the contract an expectancy of continue employment. Where the required expectancy can be shown to exist, the holder of the contract has certain rights in respect of the renewal or conversion of his contract resulting from such expectancy.”

44. The above passage was referred to by this Tribunal in K. S. vs. African Development Bank, Judgment No. 44 of 1 December 2005, Application No. 2004/09. In that Application, the Applicant
sought to contest the non-renewal of his temporary contract which he considered to amount to a dismissal. The Tribunal noted that in principle the Bank has discretionary powers in deciding whether a contract should be renewed, converted into a permanent contract or terminated with three (3) months’ notice. However, the decision not to renew should be clear of any element of abuse with regard to substance or form, or any arbitrary element.

45. The Tribunal concluded, “The Applicant has failed to prove in his submissions and during the Tribunal hearing that the Bank had promised to renew his contract or that certain elements of fact had given him legitimate confidence in that regard. In itself, the duration of his service with the Bank does not justify any such expectation. During the first five (5) years of a temporary contract, the links with the Bank are not yet solid enough to be considered as a bridge to permanent employment. Moreover, Staff Rule 64.01 (b) clarifies the legal position when it states that temporary contracts shall carry no expectancy of renewal.”

46. The Applicant’s claim of legitimate expectation was rejected in the Staff Appeals Committee which stated that it did not find any facts or conduct which could be construed as a promise or commitment reinforcing his claims.

47. In the present Application, the Applicant relies on several grounds as a basis for justifying his legitimate expectation of renewal of his contract. These are:

(i) The Respondent’s established practice of renewing fixed term contracts as a matter of course.

(ii) Specific representations and promises made to him by Mr. Nyong and Mr. Kisubi that his contract would or had already been renewed.

(iii) The Respondent’s conduct by moving him to a new Division and representations to the Applicant of his continued stay in the Division.

(iv) Failure by the Respondent to comply with its own Rules by not giving three (3) months’ notice.

48. The Tribunal will deal first with the ground based on the Respondent’s settled practice. The Applicant states that in his five (5) years of service with the Respondent he has not known of any case of non-renewal of fixed contract. He also relies on information obtained from the Chairman of the Staff Council that among the 1500 employees in the Bank, she was aware of only one (1) other case of non-renewal of contract in 2010.

49. The Respondent submits that such evidence is insufficient to support the claim of a general practice within the Bank. It argues that the best evidence should have been obtained from the Human Resources Department which deals with such cases.

50. The Respondent relies on the case of re del Valle Franco Fernandez, ILOAT Judgment No. 1610 (1997) for the view that “to be binding in law a practice must be so constant and consistent as to reflect a general rule”. The Respondent further contends that such practice has not developed and the Respondent continues to use its discretion not to renew appointments. The Respondent cites several cases of non-renewal such as Applications No. 2000/01, 2004/09, 2006/01 and 2006/02.

51. The important principle to emphasize is that the practice must be constant and consistent in order to give rise to a general rule or practice. It must be well established and accepted by the organization. The evidence establishing it must be clear and compelling to leave no doubt that the practice exists and is observed. Such evidence has not been adduced in this Application. Therefore the Applicant has failed to establish a practice of automatic renewal of fixed contracts as matter of course in the Bank.

52. The Tribunal will deal next with the ground based on promises or representations by Mr. Nyong and Mr. Kisubi. Both were Senior Officers of the Respondent. Mr. Nyong was the Applicant’s last Supervisor, and Mr. Kisubi was Head of the Ethics Office at the time and formerly worked in the Human Resources Management Department. Both informed the Applicant that his contract would be renewed or that it had in fact already been renewed. The Respondent has not denied that these representations were made but it submits that they are hearsay and the officers making them did not have authority to make them on its behalf as they did not work in the Human Resources Department.

53. The Tribunal finds that the Applicant has established that the promises or representations by Mr. Nyong and Mr. Kisubi were made to him and were capable of giving rise to a legitimate expectation on the part of the Applicant that his contract would be renewed.

54. As regards the conduct of the Respondent in transferring the Applicant to a new Division, this was done as a result of restructuring but it also gave the Applicant relief from working under a supervisor with whom he was not on good terms. It is this bad relationship with his supervisor Mr. Rwamabuga which gave rise to a failure to complete performance evaluations for three (3) years, and other problems giving rise the non-renewal of his contract, matters which the Staff Appeals Committee determined were the fault of the Bank. The Applicant got on well with his new supervisor.

55. The Staff Appeals Committee had occasion to comment on the transfer of the Applicant to the new Division as a missed opportunity as follows:

“However they noted with regret that the Appellant’s transfer to a new division, following the restructuring described above, was not used as opportunity to give him another chance. Indeed, given the evidence, it appears that his skills could have been profitably utilized by the Bank. The Committee noted that in the new department, the Appellant seemed able to take a fresh start with his new Division Manager and regrets that the Respondent did not define an observation period during which to study the outcome of his professional assignment by suspending the procedure against the Appellant.”

56. There were other representations in statements made to the Applicant by his supervisors and colleagues about his performance and his participation in projects and meetings and as being good team player. These statements may have been encouraging but on their own they cannot be taken to have given the Applicant legitimate expectation of a renewal of his contract.

57. The last ground as a basis for legitimate expectation is the failure to give three (3) months’ notice before the non-renewal of contract. Regulation 6.10.3 of the Staff Regulations provides that “a temporary appointment shall terminate at the end of the period specified in the letter of appointment, provided that such termination shall be subject to at least three months prior notice by the Bank.”
58. The Applicant submitted that giving notice to him was a condition precedent to non-renewal of his contract. The Applicant was notified of the non-renewal of his contract about ten (10) days before its expiry. The Applicant therefore contends that he was led to believe that his contract would be renewed. The Respondent argues that the Applicant knew when his contract would end therefore he was not justified in entertaining hope of the renewal of his contract. In any case, the Respondent maintains, the remedy for failure to give notice is compensation given in lieu of notice.

59. The Tribunal finds that the Respondent was not justified in failing to give the required notice to the Applicant informing him of non-renewal of his contract. The purpose of such notice was to prepare the Applicant to find alternative employment or even challenge the non-renewal.

60. The Tribunal agrees with the observations made by the Staff Appeals Committee. While the Tribunal is not persuaded that the provision of three (3) months notice constituted a condition precedent to a non-renewal, the Tribunal finds that failure to give appropriate notice was not merely a violation of the Applicant’s rights but also contributed to a legitimate expectation of renewal of his contract.

61. The Staff Appeals Committee concluded that “the procedures as laid down by the Bank’s internal rules were not properly and objectively applied to the Appellant. The Respondent did not take into account the Appellant’s individual rights.”

62. The Staff Appeals Committee also observed that the decision not to renew the Applicant’s fixed term contract “was taken in violation of good faith and duty of care that behaves an international organization with respect to its staff.”

63. On the first issue, the Tribunal concludes that given the special circumstances of this Application and taking into consideration the totality of the evidence accepted by the Tribunal on the issue, the claim of legitimate expectation has been established.

64. The second issue concerns the question of appropriate damages or compensation that would flow from the claim of legitimate expectation. The question of legal costs will be also considered under this issue.

65. The Applicant claims compensation for the three (3) years he would have worked had his contract been renewed. The Respondent maintains that the Applicant should not be entitled to any damages, but in the alternative he should be entitled to only one (1) year compensation because that is what he was promised by one of those who made the representation to him that his contract was or would be renewed.

66. The Tribunal would like to observe that the measure of damages for unlawful non-renewal or termination of contract is well settled. It is the number of years the Applicant’s contract would have been renewed. The Tribunal is of the view that the Applicant’s new contract would have run for three (3) years. The Applicant would therefore be entitled to salary, allowances and other benefits which would have been due to him during his period of employment. Earnings already made or received by the Applicant over this three (3) year period should be deducted. Any expenses incurred by the Applicant out of office such as medical or educational expenses would have to be specifically proved. The Respondent should be in a position to calculate the amounts due to the Applicant.
67. Finally, there is the issue of the claim for performance related pay. It seems to the Tribunal that the Applicant is not requesting the Tribunal to review his performance evaluations for the period he was not evaluated but to find that had he been fairly evaluated he would have received at least grade “C” and entitled to a bonus like his colleagues.

68. The Staff Appeals Committee found that the performance evaluations in respect of the Applicant were problematic in that during the period in which the Applicant was in the Respondent’s employment, from July 2005 to July 2010, the professional evaluation of his performance was conducted in violation of the Respondent’s Rules. The evaluation of 2006 was the only one concluded in June 2009, three (3) years after the prescribed period.

69. The Staff Appeals Committee admitted that the Applicant had a duty of good faith and in this case this included not only the duty not to obstruct or impede the functioning of the performance evaluation, as he did by refusing to sign the evaluation forms but also the duty to actively collaborate with the supervisor in this exercise.

70. However, the Committee found that it was “clear from the Respondent’s Regulations relating to performance evaluations that it is the latter’s duty to ensure the smooth running of this important exercise which is staff performance evaluations. In the circumstances of this case, that by its negligence and omission, the Respondent unreasonably delayed the finalization of the Appellant’s performance evaluation process.”

71. While concluding on this issue, the SAC found that the “Respondent violated the rights attached to the Appellant’s appointment by denying him the benefit of periodic performance evaluation during his period of service. It is very clear from the exchanges of communication and documents submitted in evidence that the Respondent failed to comply with its own regulatory requirements.”

72. The findings of the Staff Appeals Committee clearly recognized that the Applicant was a victim of an injustice in respect of his performance evaluations. After his successful appeal to the Management Review Committee, the Applicant received a “C” rating for 2006.

73. The evidence shows that 80% of the Bank’s Staff receives ratings of “C” or better. Moreover, evidence was adduced that the Applicant had improved in his performance since 2006. It is therefore probable that had his performance been properly evaluated, it would have been graded at least to “C”. As a result, he would have been entitled to an annual bonus for the years 2007, 2008 and 2009. This is the compensation the Applicant now seeks. The Tribunal is of the view that he is entitled to claim it.

74. The Staff Appeals Committee awarded the Applicant six (6) months’ salary in compensation for moral damage resulting from mental distress suffered. The Applicant was also paid compensation of three (3) months’ salary for lack of notice not to renew his contract. The Applicant stated that he was prepared to accept the Staff Appeals Committee’s award for moral damages.

75. The Tribunal confirms the awards made by the Staff Appeals Committee and has taken them into consideration in awarding compensation to the Applicant. These amounts remained to be paid to the Applicant.

76. Regarding legal costs, the Applicant claims a figure of £78,000. Although the Applicant has succeeded in this Application, he should be paid a reasonable amount in a part contribution to his
legal costs in the amount of €15000 in addition to the €5000 awarded by the Staff Appeals Committee.

V. **THE DECISION**

77. For the foregoing reasons:

(i) The Application succeeds;

(ii) The Applicant shall be paid three (3) years’ salary less income earned during the period covered by the award;

(iii) The Applicant shall be paid the allowances and benefits he would have received had his contract been renewed for three (3) years;

(iv) The Applicant shall be compensated for any medical and educational expenses incurred over the three (3) year period subject to providing specific proof thereof;

(v) The Applicant shall be paid performance related pay incentives he would have received for 2007, 2008 and 2009 had he received a fully satisfactory “C” rating;

(vi) The Applicant shall be paid legal costs of €15000 in addition to the €5000 awarded by the Staff Appeals Committee;

(vii) All other claims are rejected.

Yadh BEN ACHOUR

President

Albertine LIPOU MASSALA

Executive Secretary

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