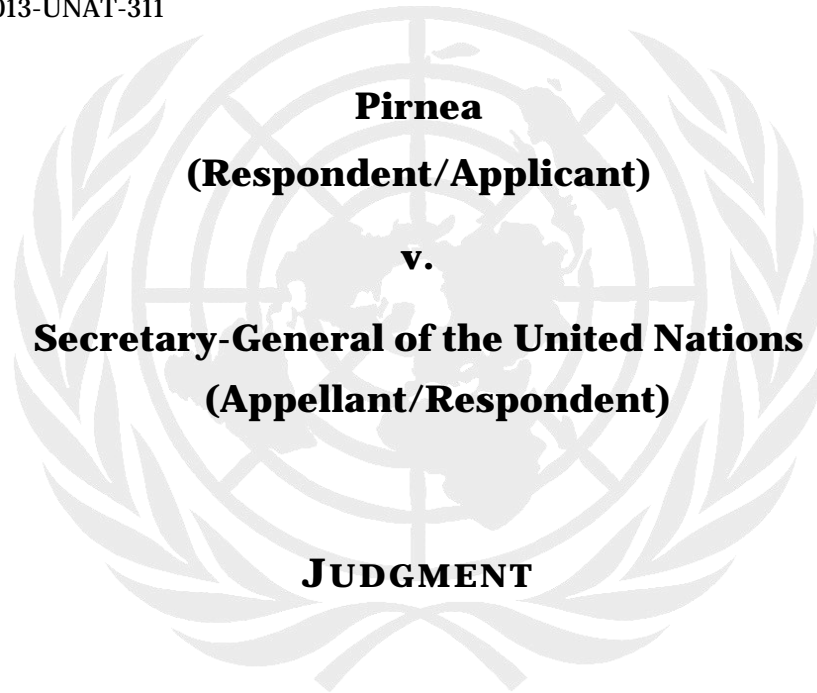




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-311



**Pirnea  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Rosalyn Chapman, Presiding Judge Luis María Simón Judge Inés Weinberg de Roca
Case No.:	2012-347
Date:	28 March 2013
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant: Gavin Irwin

Counsel for Appellant/Respondent: Wambui Mwangi

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2012/068, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 10 May 2012 in the case of *Pirnea v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 13 July 2012, and Mr. Vasile Pirnea answered on 14 September 2012.

### **Facts and Procedure**

2. On 26 February 2007, Mr. Pirnea joined the United Nations Department of Safety and Security (DSS) in Côte d'Ivoire as Field Security Coordination Officer (FSCO) at the L-3 Level on a 200-series appointment issued by the United Nations Development Programme (UNDP). In July 2009, Mr. Pirnea's appointment was converted to a fixed-term appointment at the P-3 level.

3. On 30 June 2008, the Chief Security Advisor (CSA) of the DSS Office in Côte d'Ivoire sent Mr. Pirnea copies of complaints against him alleging "racist and further improper behavior" and ordered an investigation. A preliminary investigation was completed on 30 August 2008, and the CSA forwarded the results of the investigation to the UNDP Office of Audit and Investigations (OAI) for a formal investigation. On 19 March 2009, the OAI notified Mr. Pirnea that a formal investigation had been launched, and he was interviewed shortly thereafter. On 10 April 2009, Mr. Pirnea sent a written response to the OAI. On 16 July 2009, Mr. Pirnea received the OAI's Investigation Report, with a cover letter stating that "at this stage there is no disciplinary case" against him.

4. On 5 August 2009, Mr. Pirnea's contract with UNDP was extended until 26 February 2010. He was reassigned, effective 7 October 2009, to the DSS Office for Somalia as a Security Analyst at the P-3 level. Due to security problems in Somalia, however, he was temporarily based in Nairobi until 12 May 2010, when he was reassigned as FSCO to Hargeisa, Somalia.

5. On 23 July 2010, the management of the hotel in which Mr. Pirnea resided in Hargeisa contacted UNDP alleging that Mr. Pirnea had sexually assaulted a cleaning woman. Because of the nature of these allegations, DSS became concerned about Mr. Pirnea's safety in Somalia and immediately relocated him to Nairobi, where he assisted DSS staff. After Mr. Pirnea returned to Nairobi, DSS determined he could not safely, without

endangering his life, continue to be posted in Somalia -- even outside Hargeisa. As a consequence, DSS had only 10 FSCOs operating in Somalia, rather than the authorized number of 11, which made it difficult for DSS to fulfill its mandate to protect Organization personnel in Somalia.

6. DSS referred the allegations by the Somali woman to the OAI to investigate. The OAI determined a formal investigation could not be opened since the culture in Somalia, among other things, made it impossible to interview the complainant. The OAI case was closed on 23 October 2010.

7. On 5 October 2010, the Senior Human Resources Officer with DSS (SHRO/DSS) advised Mr. Pirnea that DSS “ha[d] decided not to extend [his] fixed-term appointment when it expire[d] at the end of this month” and a more formal notification would follow shortly. On 13 October 2010, Mr. Pirnea sent a letter to the Under-Secretary-General, DSS, explaining that his appointment would not expire until the end of February 2011, and requesting his assistance. On 26 October 2010, the SHRO/DSS notified Mr. Pirnea that he had received a copy of the letter to the Under-Secretary-General and was reexamining Mr. Pirnea’s contractual status. The SHRO/DSS asked Mr. Pirnea whether he would agree to an extension of his contract until 26 February 2011, and advised him that this would mean his duty station would be officially changed to Nairobi. Mr. Pirnea agreed to the extension of his contract and the change of duty station.

8. On 27 October 2010, the SHRO/DSS advised Mr. Pirnea, who had made an inquiry about whether he could receive daily subsistence allowance (DSA) following his relocation from Hargeisa to Nairobi, that he probably could not receive DSA because the relocation was not considered a reassignment, but the UNDP Human Resources Policy Unit would look into it.

9. On 2 February 2011, Mr. Pirnea inquired of the SHRO/DSS why his contract would not be renewed beyond 26 February 2011. The SHRO/DSS advised him that, as the holder of a fixed-term appointment with UNDP, he had no legal or other expectancy of renewal or conversion of his contract.

10. On 16 February 2011, Mr. Pirnea submitted a request to UNDP's Management Evaluation Unit (MEU) for review of DSS' "implied decision" not to renew his fixed-term appointment upon its expiration on 26 February 2011, and asked the reason for that decision. Mr. Pirnea also requested that the MEU suspend the decision until completion of management evaluation.

11. On 19 February 2011, Mr. Pirnea was informed that the Secretary-General had decided not to suspend the implementation of the impugned decision. Mr. Pirnea immediately submitted an application for suspension of action with the UNDT. On 21 February 2011, the UNDT granted the application for suspension until 9 March 2011, to afford the Secretary-General an opportunity to respond.

12. On 9 March 2011, by Order No. 26 (NBI/2011), the UNDT dismissed Mr. Pirnea's application for suspension of action with written reasons to follow and he was separated from service that day. On 31 March 2011, the UNDT issued Judgment No. UNDT/2011/059.

13. On 28 March 2011, Mr. Pirnea again inquired of the SHRO/DSS about receiving DSA after his relocation to Nairobi from Hargeisa. On the same date, the SHRO/DSS advised Mr. Pirnea that he was not entitled to DSA because it would be "double compensation for cost of accommodation and other expenses that are addressed by [post adjustment] and rental subsidy".

14. On 1 April 2011, the MEU advised Mr. Pirnea that the reason his "contract was not renewed [was] due to the fact that [he] could no longer perform [his] functions as FSCO" in Somalia because his "life was at risk" after the incident in the hotel and he "could no longer return to Somalia in [his] FSCO capacity". In light of this reason, the Organization declined to suspend or reverse the decision not to renew his contract.

15. On 10 May 2011, Mr. Pirnea filed an application before the UNDT challenging the decision not to renew his contract on the grounds the Administration improperly exercised its discretion and violated due process by not advising him of the reason for his.

16. While the OAI had closed the investigation into the 2009 allegations from Côte d'Ivoire in late 2009, it did not inform Mr. Pirnea until 28 February 2012. It is not clear whether Mr. Pirnea's supervisors in DSS were aware of the closure of the investigation in 2009.

17. On 1 March 2012, the UNDT held an oral hearing at which Mr. Pirnea testified on his own behalf.

18. On 10 May 2012, the UNDT issued Judgment No. UNDT/2012/068, which concluded: (1) there was no valid reason for not renewing Mr. Pirnea's contract; (2) there was bias within the Administration against Mr. Pirnea that contributed to the non-renewal decision; (3) the decision to transfer Mr. Pirnea from Côte d'Ivoire to Somalia was motivated by unproven allegations; and (4) Mr. Pirnea's claim for DSA was receivable since his request for management evaluation of the non-renewal encompassed "entitlements", including DSA. The UNDT then awarded Mr. Pirnea: (1) "two years' net base salary for the non-renewal of his contract and for the treatment meted out to him following the allegations of racist behaviour" in Côte d'Ivoire; and (2) "DSA entitlements for the period [he] was posted in Nairobi, Kenya when his duty station was in Hargeisa, Somalia". Additionally, the UNDT referred the conduct of the Côte d'Ivoire CSA to the Secretary-General, pursuant to Article 10(8) of the UNDT Statute.

### **Submissions**

#### **Secretary-General's Appeal**

19. The UNDT erred on a question of law and fact by concluding Mr. Pirnea was not provided with a valid reason for the non-renewal of his appointment. The Administration's decision was based on Mr. Pirnea's inability to discharge his functions as FSCO in Somalia because his life was in danger there, and the resultant interference with DSS' capacity to perform its mandate in Somalia because it was short one FSCO. The decision was not based on the allegations of sexual assault in Somalia.

20. The UNDT erred on a question of law in determining the Administration's decision not to renew Mr. Pirnea's fixed-term appointment was unlawful because it failed to inform Mr. Pirnea of the reason for non-renewal at the time of the decision. The reason may properly be given to the staff member when he or she requests it. In the present case, the reason was given to Mr. Pirnea by the MEU as part of its response to his request for management evaluation.

21. The UNDT exceeded its jurisdiction or competence when it considered matters not included in Mr. Pirnea's request for management evaluation in determining the legality of the decision not to renew his appointment. In particular, the UNDT erred in considering and determining the 2009 allegations of racist and improper behavior tainted the decision not to renew Mr. Pirnea's contract. Since there was no evidence that the 2009 allegations or the CSA played any role in the non-renewal decision, the UNDT effectively shifted the burden to the Administration to show the non-renewal decision was not motivated by bias. Rather, it is the staff member's burden to show bias or improper motivation.

22. The UNDT exceeded its competence and erred on a question of law and of fact by concluding that Mr. Pirnea's claim for DSA was receivable. It was not receivable because his request for management evaluation did not refer to DSA, and DSA is not an "entitlement".

23. The UNDT erred in law in finding that Mr. Pirnea was entitled to DSA for the period from 24 July 2010 until his separation from service. This ruling is contrary to the UNDP Special Operations Approach Guidelines.

24. The UNDT exceeded its competence and erred on a question of law in awarding Mr. Pirnea two years' net base salary as compensation for the unlawful non-renewal of his appointment and the mistreatment "meted out" to him regarding the 2009 allegations. First, this award has no legal basis because the non-renewal was lawful. Second, the UNDT did not set forth any reasoning to justify the award of two years' net base salary. Third, no prejudice was shown by Mr. Pirnea, who did not have a two-year contract and no expectation of a two-year renewal. If the award was for moral damages, it is unlawful because Mr. Pirnea did not present any evidence that he suffered moral injury and, thus, no prejudice was shown.

25. The UNDT exceeded its jurisdiction and erred in its referral of the CSA to the Secretary-General. As noted above, Mr. Pirnea never sought management evaluation of his transfer from Côte d'Ivoire in 2009, and any comments the CSA may have made at that time about Mr. Pirnea's departure were not relevant to the application before the UNDT.

26. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

**Mr. Pirnea's Answer**

27. The UNDT correctly determined that the decisive factor in the Administration's decision not to renew Mr. Pirnea's contract was the cumulative, adverse effect of two distinct disciplinary investigations into his conduct. The investigation into the 2009 allegations from Côte d'Ivoire remained open when the Administration was considering an extension of his contract between October 2010 and February 2011. The OAI did not give notice that the Somali allegations would not be investigated until after the decision not to renew Mr. Pirnea's contract had been made. The Administration's failure to secure an alternative assignment for Mr. Pirnea after he was relocated from Somalia for his own safety shows he was viewed as "damaged goods" and supports the UNDT's conclusion that the decision was tainted by these factors.

28. The Administration denied Mr. Pirnea the right to due process by failing to comply with UNDP rules and the rules of the Administration in conducting the investigation into the 2009 allegations, and especially in not giving written notice to Mr. Pirnea (and others) that the investigation had been closed. In light of this, the UNDT's factual findings and legal conclusions that the decision not to renew his appointment was arbitrary, capricious and guided by unlawful extraneous motives were reasonable.

29. The failure of the Organization to give Mr. Pirnea the reason for the non-renewal of his appointment at the time that decision was made is unlawful. The reason proffered by the MEU was not valid when the non-renewal decision was made in October 2010 because, at that time, the Mr. Pirnea could have been reassigned to some place other than Somalia. Moreover, even if Mr. Pirnea was not safe in Hargeisa, that did not mean he was not safe elsewhere in Somalia. Since he was not advised of the reason for the non-renewal of his appointment at the time the decision was made, Mr. Pirnea was unable to raise claims about that reason before the MEU.

30. The UNDT correctly determined that Mr. Pirnea's request for management evaluation was broad enough to encompass his claim for DSA, and the UNDT did not exceed its jurisdiction in receiving this claim. Since Mr. Pirnea's reassignment to Nairobi after the incident in Somalia was not at his request, and he incurred costs attendant to the reassignment, he is entitled to DSA for the period he was in Nairobi after leaving Hargeisa.

31. The UNDT correctly determined Mr. Pirnea is entitled to compensation because he was prejudiced by the Administration's consideration of extraneous factors in deciding not to renew his contract. Mr. Pirnea has shown that his due process rights were violated and he testified at the oral hearing that, since his separation from service, he has been unable to find work in any field related to his employment with the Organization. This is a direct consequence of the Organization's unlawful acts.

### **Considerations**

#### *The Non-Renewal of the Fixed-Term Appointment Was Based On A Valid Reason*

32. It is well-established that a fixed-term appointment has no expectation of renewal or conversion to another type of appointment.<sup>1</sup> Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive.<sup>2</sup> The staff member has the burden of proving such factors played a role in the administrative decision.<sup>3</sup>

33. "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."<sup>4</sup> 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.<sup>5</sup>

34. At the time Mr. Pirnea was advised that his appointment would not be renewed, he was not given the reasons for non-renewal. Subsequently, however, the MEU advised

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<sup>1</sup> *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061.

<sup>2</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201; *Ahmed, ibid.*

<sup>3</sup> *Assad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

<sup>4</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 32.

<sup>5</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201.



Mr. Pirnea of the Administration's reasons for not renewing his appointment. Our decision in *Obdeijn* does not require otherwise.

35. The MEU advised Mr. Pirnea that the non-renewal was "due to the fact that [he] could no longer perform [his] functions as FSCO" in Somalia since his life was at risk in Somalia and he could not return there to carry out his responsibilities as FSCO. According to the MEU, this meant, in turn, that the DSS Office in Somalia only had ten FSCOs, instead of eleven FSCOs as needed to protect the Organization's personnel in Somalia.

36. The reasons proffered by the Administration for not renewing Mr. Pirnea's appointment are valid reasons. Mr. Pirnea's assignment as FSCO was specifically with the DSS Office in Somalia. After the hotel incident, DSS determined that Mr. Pirnea's life was in danger if he were to remain in Somalia; thus, he was evacuated from Somalia to Nairobi. His inability to fulfill his duties as FSCO in Somalia is a valid reason for not renewing his appointment. And without Mr. Pirnea fulfilling his duties as FSCO in Somalia, DSS did not have sufficient FSCOs to meet its mandate to protect the Organization's personnel in Somalia. Although Mr. Pirnea argues he could have safely returned to Somalia, DSS determined that was not so. This determination may properly be made by DSS, which has expertise in the area of security matters, as well as a duty and an obligation to assure the safety and well-being of its staff members, including Mr. Pirnea. Mr. Pirnea's willingness to return to Somalia does not rebut either DSS' determination that he could not work safely in Somalia or DSS' duty and obligation of care toward him.

37. Despite the validity of the reasons proffered by the Administration for not renewing Mr. Pirnea's fixed-term appointment, the UNDT determined that there were other, hidden or tacit, reasons for the decision, i.e., the nature of the uninvestigated allegations against Mr. Pirnea in Somalia and the allegations against him of racist and improper behavior in Côte d'Ivoire. Since these hidden reasons stemmed from unproven allegations, the UNDT found that the Administration had an invalid or unlawful reason for not renewing Mr. Pirnea's appointment.

38. This Tribunal finds the UNDT's conclusion that the Administration had hidden reasons for not renewing Mr. Pirnea's appointment is based solely on speculation. Mr. Pirnea presented absolutely no evidence showing the Administration had improper motivation or prejudice against him resulting in the non-renewal of his appointment.

Thus, this Tribunal finds that the UNDT 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 Mr. Pirnea's appointment.

39. The UNDT awarded Mr. Pirnea compensation in the amount of two years' net base salary "for the non-renewal of his contract and for the treatment meted out to him following the [2009] allegations of racist behaviour". However, the UNDT neither explained how it arrived at this amount nor how it apportioned the award between the purportedly unlawful non-renewal decision and the "treatment meted out" to Mr. Pirnea. And it is not at all clear what treatment is referred to by the UNDT. Under Article 11(1) of the UNDT Statute, the UNDT was required to explain the reasons, facts and law on which its award of compensation was based.<sup>6</sup> The UNDT did not do this. Moreover, since the non-renewal of Mr. Pirnea's appointment was not unlawful, as we have determined, there is no basis for an award of compensation on the grounds of "unlawful" non-renewal. Lastly, there was no legal basis for the UNDT to address the propriety of any actions by the CSA, Côte d'Ivoire, let alone to award compensation to Mr. Pirnea based on such actions -- since Mr. Pirnea never sought management evaluation of such actions and such actions were not relevant to the issues before the UNDT. The award of compensation is thus vacated.

*The DSA Claim Was Not Receivable*

40. Article 8(1)(c) of the UNDT Statute requires that, for a claim to be receivable, the applicant must have "previously submitted the contested administrative decision for management evaluation, where required". Managerial review of an administrative decision to deny payment of DSA is required under Staff Rule 11.2(a), which provides that "[a] staff member wishing to formally contest an administrative decision ... shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision".

41. The UNDT concluded that Mr. Pirnea had complied with Staff Rule 11.2 regarding his claim for DSA, stating:

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<sup>6</sup> *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100.

... Although [Mr. Pirnea] did not specifically make a request for [DSA] in the request for management evaluation, [he] did in fact state in paragraph 25 of that request that a break-in-service would affect [his] right to certain entitlements that accrue with continuous service, including but not limited to the right to home leave.

... A proper reading of the request for the management evaluation indicates that [Mr. Pirnea] refers specifically to entitlements. Though *the word DSA is not used*, the Tribunal considers that legitimately the entitlements to which [Mr. Pirnea] claims were due to him also encompass the DSA entitlements<sup>7</sup>

42. Mr. Pirnea did not refer to DSA in his request for management evaluation, as the UNDT acknowledged. Any fair and objective reading of paragraph 25 of Mr. Pirnea's request for management evaluation shows that his use of the word "entitlements" was not intended to encompass DSA, which was the topic of separate correspondence between him and the SHRO/DSS. Management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary.<sup>8</sup> Clearly identifying the administrative decision the staff member disagrees with is essential for this goal to be met. Because Mr. Pirnea's request for management evaluation focused solely on the decision not to renew his appointment, and did not identify the denial of his claim for DSA, the MEU could not and did not address it. In concluding that Mr. Pirnea sought management evaluation of his DSA claim, the UNDT erred in law and fact resulting in a manifestly unreasonable decision. The UNDT also exceeded its jurisdiction or competence in receiving the DSA claim and reaching its merits.

#### *Improper Referral to the Secretary-General*

43. The UNDT erred in law and fact when it referred the conduct of the Côte d'Ivoire CSA to the Secretary-General under Article 10(8) of the UNDT Statute, which provides that the UNDT "may refer appropriate cases to the Secretary-General ... for possible action to enforce accountability". In the present case, Mr. Pirnea's reassignment from Côte d'Ivoire was never appealed by him and was not before the UNDT. And there was no evidence showing that the Côte d'Ivoire CSA had any role in the OAI's failure to give timely written notice to Mr. Pirnea (and others) of the closure of its investigation into the 2009 allegations.

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<sup>7</sup> UNDT Judgment, paras. 49 and 51 (footnote omitted; emphasis added).

<sup>8</sup> General Assembly resolution A/RES/62/228.

**Judgment**

44. The appeal is affirmed and UNDT Judgment No. UNDT/2012/068 is vacated.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of March 2013 in New York.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 24<sup>th</sup> day of May 2013 in New York.

*(Signed)*

Weicheng Lin, Registrar