Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

OBDEIJN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The Applicant contests the decision not to extend his fixed-term contract with the United Nations Population Fund ("UNFPA") beyond its expiration date of 2 April 2009. He alleges, *inter alia*, that the decision was improper because it was motivated by extraneous factors. The Respondent refused to disclose the reasons for the contested decision to the Applicant and has refused to disclose them to the United Nations Dispute Tribunal, asserting that the Administration is not required to provide reasons for a decision not to renew an appointment.

2. The Applicant requests compensation in the amount of two years' net base salary and retroactive reinstatement to the United Nations Joint Staff Pension Fund. The Applicant also requests compensation in the amount of three months' net base salary for emotional injury and distress caused by the "abrupt and unlawful termination of his career" with the Organisation and by UNFPA's failure to respond to his repeated attempts to obtain the reasons for the contested decision.

3. The main legal issue in this case is whether the decision not to renew the Applicant's fixed-term contract was lawful.

4. After issuing several case management orders, the Tribunal held hearings on 13 August and 1 October 2009 and on 16 February 2010, following which further submissions were filed. The statement of appeal, the Respondent's reply, and subsequent submissions constitute the pleadings and the record in this case.

Facts and procedural history

5. The Applicant joined UNFPA on 3 October 2005 on a fixed-term two-year appointment as UNFPA Representative in Yemen (P-5 grade, step III). His letter of appointment was "subject to the provisions of the Staff Regulations and Staff Rules applicable to the United Nations Population Fund" and stated, *inter alia*:

> Th[is] Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment … . Staff members specifically recruited for the United Nations Population Fund have no entitlement for consideration for posts outside [UNFPA].

6. Although the letter of appointment provided that this appointment in itself did not entitle the Applicant to an expectation of renewal and articulated that he had "no entitlement for consideration for posts outside [UNFPA]", it did not state that no further extensions were permitted. In fact, the letter of appointment specified that a rise in his assessable salary was "subject to satisfactory service" and "[s]ubject to extension of appointment". The Applicant's appointment was subsequently extended on two occasions—for one year on 3 October 2007 and for a further period of six months on 9 October 2008 (effective 3 October 2008).

7. The Applicant submits—and the Respondent did not seek to contest this submission—that on 9 October 2008, immediately after being notified of the six-month extension, he discussed that extension with his supervisor, the Director of the Arab States Regional Office of UNFPA. According to the Applicant, he explained to the Director during that discussion that, in July 2008, he had discussed with the Division for Human Resources whether his contract would be extended for one or for two years and he had been told that this would be decided after the Director of the Arab States Regional Office of UNFPA would assume his post. In the period of October–December 2008 the Applicant continued, to no avail, to seek clarification, both by email and in person, as to the reasons for the six-month renewal and whether his contract would be extended further.

8. By a letter dated 13 February 2009 and signed by the Director of the Division for Human Resources, the Applicant was notified of the expiration of his appointment on 2 April 2009. The letter stated:

> As you know, your fixed-term contract with UNFPA expires on 2 April 2009. I would like to use this occasion to thank you very much for your services to UNFPA and to the Yemen Country Office, and to

> wish you every success in your future endeavours. My colleagues will be in contact with you in due course regarding separation formalities.

9. On 15 February 2009 the Applicant sent a letter to the Director of the Division for Human Resources, requesting the reasons for the non-renewal of his contract. The Applicant stated in his letter, *inter alia*:

> I am surprised at your letter of 13 February 2009 and fail to understand this decision after a period of almost 3.5 years of hard and dedicated work in a UNFPA priority country with a complex and security compromised setting, where I have done my very best and with no issues that I was made aware of, as was recorded in my yearly performance reports, as well as the 2008 mid-year performance discussions with my immediate supervisor on 23 September 2008.
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> …
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> As can be expected, … I do not comprehend how and where I was not seen by the Senior Management as a most positive asset to UNFPA, as I am seen as such by the UN Country Team and the officials of the Government of Yemen and those in the Civil Society Organisations. I would truly appreciate you providing me with a reason for giving me a six-month extension from 3 October 2008 …, to be followed by a non-renewal of my contract [notified by letter issued] on 13 February 2009 …, without any explanation by you or my direct supervisor.
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> … [D]uring our meeting of 10 December 2008 with Deputy Executive Director …, the Regional Director of the Arab States [of UNFPA] … explicitly made a promise for a mission to Yemen in January 2009 to discuss the situation and to consider further extension of my contract. Such a visit did not materialize, nor did any further discussion on the matter take place. Instead, there was a silence from [the Headquarters] and no follow-up on the perceived issue by my direct supervisor until this date. With all respect, it can easily be deduced that such a situation gives the idea that there is an issue. However, I am not aware of what it is and would like to know on what basis both decisions (six-month contract and [non-]renewal thereafter) were taken by the Senior Management.

10. By a letter dated 9 March 2009 the Applicant sought an administrative review of the decision not to renew his contract. In this letter the Applicant stated, *inter alia*:

> Pursuant to Staff Rule 111.2, I herewith request review of the administrative decision taken on 13 February 2009 by … UNFPA,

> Director of Division [for] Human Resources, advising me of the decision that my fixed-term contract would not be renewed beyond the six-month expiry date of 2 April 2009.

11. On 12 March 2009 the Officer-in-Charge of the Division for Human Resources replied to the Applicant's letter dated 15 February 2009, stating, *inter alia*:

> I would like to explain that in accordance with Staff Rule (104.12(b)(ii)), a fixed-term appointment does not carry any expectancy of renewal of the appointment. Rather, the appointment expires automatically and without prior notice on the expiration date specified in the letter of appointment (Staff Rule 109.7(a)).

12. On 27 March 2009 the Executive Director of UNFPA replied to the Applicant's request for administrative review, stating that UNFPA was not required to disclose the reasons for the contested administrative decision. The Executive Director's letter stated, *inter alia* (emphasis omitted):

> My review of the administrative decision in question entailed a review [of] whether it was taken in accordance with the United Nations Staff Regulations, Rules, and applicable UNFPA policy [i.e., UNFPA Policies and Procedures Manual, hereinafter referred to as the "UNFPA Manual"].
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> …
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> Given that you have been serving with UNFPA for a period of less than five years (i.e., three years and [six] months), the Administration of UNFPA was permitted, in accordance with section 5.2 of the policy and the established jurisprudence of the [UN Administrative] Tribunal, not to renew your appointment, without having to justify that administrative decision.

13. The Applicant's appointment expired on 2 April 2009 and he was separated from the Organisation. Due to within-grade increments throughout the duration of his contract, at the time of separation the Applicant was at the P-5 grade, step VI.

14. On 4 May 2009 the Applicant filed an incomplete statement of appeal with the Joint Appeals Board, which was followed by a complete statement of appeal on 29 May 2009. On 1 July 2009 the case was transferred to the Dispute Tribunal. On

13 July 2009 the Respondent filed his reply to the application, stating, *inter alia*: that the appeal was without merit; that the Applicant had no expectancy of renewal; that the Respondent was under no obligation to provide reasons for the contested decision; and that the Applicant failed to offer any evidence in support of his allegations of prejudice and extraneous factors.

15. On 27 January 2010 the Dispute Tribunal issued Order No. 8 (NY/2010), directing the Respondent to provide the reasons for the non-renewal of the Applicant's contract. In a submission dated 8 February 2010, filed in response to the Order, the Respondent reiterated his position that the Administration was "not required to disclose the reason(s) for its decision not to renew a fixed-term appointment". The Respondent based his argument on the wording of the Applicant's contract and the jurisprudence of the United Nations Administrative Tribunal. Accordingly, no reasons for the contested decision were provided to the Dispute Tribunal.

16. On 10 February 2010 the Applicant filed a submission entitled "Motion for Summary Judgment", stating that "whereas [the] Respondent has failed to provide evidence that could serve to refute [the] Applicant's case—in defiance of Order No. 8[—the] Applicant respectfully requests that the Tribunal pursuant to Article 9 of the Rules of Procedure enter a summary judgement rescinding the Impugned Decision".

17. On 12 February 2010 the Respondent filed a submission requesting the Tribunal to issue an order "to the effect that the Respondent is not required, as a matter of law, to provide the reasons for the non-renewal of the Applicant's appointment". Alternatively, the Respondent requested suspension of the execution of Order No. 8 (NY/2010), until a purported appeal against the Order would be adjudicated by the United Nations Appeals Tribunal.

18. In view of the importance of the legal issues raised in this case and to ensure that both parties had ample opportunity to present their cases, the Tribunal held a

further hearing on 16 February 2010. At that hearing, following the Tribunal's explanation that Order No. 8 (NY/2010) was not a final judgment in the matter, the Applicant withdrew his motion for summary judgment. No appeal was subsequently filed by the Respondent. The parties were directed to make further submissions as to whether the Respondent was required to provide the reasons for the non-renewal of the Applicant's appointment. In his final submission, as in all submissions, the Respondent maintained that he was not required to disclose the reasons for the non-renewal of the Applicant's appointment.

Applicant's submissions

19. The Applicant's main contentions may be summarised as follows:

a. The withholding of the reason for the decision, both at the time of the actual decision and at the management evaluation stage, where there appears to be no compelling reason not to renew, effectively precluded any review of the decision, contrary to the principles of natural justice, thus violating the Applicant's right to due process, and rendering the decision null and void. Further, if the Respondent is permitted not to disclose reasons for such decisions, it would allow non-renewal of contracts based on improper reasons, as the Administration would be aware that such decisions would not be reviewable as long as no reasons are disclosed.

b. The only reasonable inference to be drawn from the withholding of this reason is that the decision was improper, particularly as the post in question was not abolished, funding remained available, and the Applicant's performance did not warrant separation from service. Further, para. 25 of the UNFPA Manual provides that "[f]ixed-term appointments appointed under the 100 or 200 Series of the Staff Rules should normally be renewed for two years at a time" (emphasis omitted).

c. Although fixed-term appointments do not carry an expectation of renewal, an exercise of discretionary authority not to renew a fixed-term appointment cannot be "unfettered" and must not be tainted by bias, prejudice, improper motivation, lack of due process, or other extraneous factors. Staff members should be treated with fairness, respect, dignity, and in good faith.

d. From discussions with his supervisors the Applicant "reasonabl[y] deduce[d]" that his contract would be renewed. The Applicant was told by the Director of the Arab States Regional Office of UNFPA that further renewal of his contract would depend on further discussion with him and consideration of "perceived performance issues". The Applicant understood that his performance was deemed fully satisfactory as no discussions ever took place about any performance issues. Given the Respondent's position that performance-related issues were not relevant and that there was no shortage of funding for the position, the decision must be considered arbitrary and illegal as there was no alternative legitimate reason available.

Respondent's submissions

20. The Respondent's main contentions may be summarised as follows:

a. The appeal is without merit because the Applicant's fixed-term appointment expired automatically and without notice, as per his letter of appointment. There is no expectation of renewal with respect to any fixed-term contract, even where efficient or exceptional performance was shown. Pursuant to sec. 5.2 of the UNFPA Manual, "[i]n accordance with past practice, upon expiration of the fixed-term appointment of a staff member who has served with UNFPA for less than five years, the Administration of UNFPA may choose not to renew the appointment" and "[i]n such case, the Administration will not offer reasons for non-renewal of appointment"

(emphasis omitted). As affirmed by the United Nations Administrative Tribunal, the Respondent is under no obligation to provide reasons for the decision not to renew (see, e.g., UN Administrative Tribunal Judgment No. 1191, *Aertgeerts* (2004)).

b. The Respondent denied the Applicant's assertions of fact as to what was said by the relevant Director, stating that although the possibility of a mission had been discussed, it was "far from a promise or commitment to [the Applicant] to undertake this mission". Further, such a mission, had it materialised, would have had multiple programmatic objectives which may or may not have included a discussion concerning further extensions of the Applicant's appointment. Even if the Applicant's account of what was said by the Director were accepted, these facts were far from constituting countervailing circumstances, such as an express promise on the part of the Administration. A claim to renewal must be based not on a mere verbal assertion unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case. The Applicant failed to meet his burden of proof and thus his argument with regard to expectancy of renewal must fail.

c. The decision not to renew the Applicant's contract was not vitiated by prejudice or extraneous factors. Paragraph 25 of the UNFPA Manual does not create any expectation of renewal because it deals only with situations in which the Administration decides to renew the appointment, which was not the Applicant's case. Further, the decision to renew the Applicant's appointment for a limited period of six months in October 2008 does not prove prejudice against the Applicant.

21. Following the hearing of 16 February 2010, the Respondent made a further submission on the legal issues pertaining to the instant matter. The Respondent submitted, *inter alia*, that the jurisprudence of the United Nations Administrative

Tribunal established that there were three exceptions to the rule that no justification was required for non-renewal: (i) where there is an expectation of renewal; (ii) where a staff member has to be afforded every consideration for further employment because he or she has served without a break in service for five years or more; and (iii) where there is prejudice. According to the Respondent, none of these apply to the Applicant's case. The Respondent also submitted that there were sufficient protections against abuse in the existing legal framework governing the non-renewal of fixed-term appointments (including, *inter alia*, through the application of sec. 5.2 of the UNFPA Manual).

Consideration and findings

The nature of the contested decision in this case

22. The first question the Tribunal must consider is whether the decision not to renew a contract is an administrative decision within the meaning of art. 2.1 of the Statute.

23. Generally, a decision not to "renew" a staff member's contract is a decision not to extend the duration of an existing contract. (For this reason, for the purposes of the present Judgment the terms "non-renewal" and "non-extension" will be used interchangeably.) As the International Court of Justice ("ICJ") stated in its Advisory Opinion of 23 October 1956 concerning *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization* (*ICJ Reports 1956*, p. 93):

> The view that there is a link between renewal and the original contract and that the situation here envisaged is different from that arising in the case of granting a new contract to an applicant corresponds to the accurate meaning of the term "renewal". That view is also in accordance with the fact that at the time when the question of renewal arises the interested person is an official of the Organization and not a stranger to it. … [I]n cases of renewal it is the initial appointment

> which remains in existence and not a new appointment independent of its predecessor.

24. In one of the cases adjudicated by the Administrative Tribunal of the International Labour Organization ("ILOAT")—see ILOAT Judgment No. 1317, In re *Amira* (1994)—the International Telecommunication Union had argued that the relevant staff regulations provided that separation as a result of the expiration of a fixed-term contract shall not be regarded as a termination, that personnel shall be appointed on temporary appointments for fixed periods which would expire without notice on the expiration date specified in the letter of appointment, and that temporary appointments did not carry any expectancy of renewal or conversion to any other type of appointment. The ILOAT recognised that similar provisions have counterparts in the staff regulations and rules of other international organisations and that precedent was clear that, even when someone has just a temporary appointment, a decision not to renew such appointment must be taken when the contract period is expiring. The ILOAT described this requirement as "an indispensable safeguard of security of employment in the international civil service". The ILOAT highlighted its consistent case law that even where an organisation's staff regulations say that a fixed-term contract is *ipso facto* extinguished on expiry, non-renewal must be treated as a distinct and challengeable administrative decision. The ILOAT further stated that its ruling in that case was in line with what proved to be "an important feature of the common law of international organisations".

25. The Tribunal finds that notification of a non-renewal shall be treated as an administrative decision covered by art. 2.1 of the Statute as it necessarily affects the staff member's terms of appointment (namely, the duration of his or her contract). As the Statute does not distinguish between a decision not to renew and any other administrative decision falling under art. 2.1, such decision would not differ, in any significant respect, in its legal character from any other administrative decision made under the contract of employment and will be subject to the usual standards of review. Accordingly, it may be challenged in the same way as any other

administrative decision. The contested decision in such case would not be the initial decision to set a certain expiration date at the time of the entry into contract, but the later decision not to extend the applicant's appointment beyond its original expiration date.

26. It is clear from the Applicant's employment history, contemporaneous records, and the parties' submissions, that the subject matter of this application is not the Respondent's refusal to enter into a new, separate, and unrelated contract of employment with the Applicant, but the Respondent's decision, notified to the Applicant by letter of 13 February 2009, not to extend his appointment any further. Therefore, this application is properly before the Tribunal.

Scope of the contested decision

27. The Tribunal finds that the scope of the case relates only to the decision not to extend the Applicant's contract beyond 2 April 2009, which was notified to him on 13 February 2009, and not the earlier decision to extend his contract for six months, communicated to him on 9 October 2008. Although in his request for administrative review, dated 15 February 2009, the Applicant sought "to know on what basis both decisions (six-month contract and [non-]renewal thereafter) were taken", his request for review was timeous only with respect to the decision not to renew his contract, notified to him by letter dated 13 February 2009. The decision to extend the Applicant's contract for six months was communicated to him on 9 October 2008, and therefore his request for administrative review, dated 15 February 2009, was submitted more than two months after the expiration of the deadline for filing of a request with respect to that decision (see former staff rule 111.2). As the Appeals Tribunal held in *Costa* 2010-UNAT-036 (approving *Costa* UNDT/2009/051), the Dispute Tribunal does not have the power to waive or suspend the time limits for requests for administrative review or management evaluation (see also *Bernadel* UNDT/2010/210, para. 32, and *Sahel* UNDT/2011/023, para. 31).

Was the contested decision lawful?

28. When considering the propriety of a contested administrative decision, the Tribunal will consider, *inter alia*, the lawfulness of any reasons given for the contested decision, including whether it was based on improper motives (see *Saka* UNDT/2010/007 and *Abdalla* UNDT/2010/140).

29. The Applicant contends that the Respondent's failure to give a reason for the non-renewal of his fixed-term contract renders the decision unlawful. The Respondent's view is that, under principles of the law of contract, fixed-term contracts expire automatically and without notice and that the Staff Regulations of the United Nations do not contemplate any requirement on the part of the Respondent to disclose reasons for the non-renewal of a fixed-term appointment. The Respondent submits, *inter alia*, that he was "not required to disclose reasons for the decision not to renew a fixed-term appointment" and maintains that he is not obligated—and, accordingly, will not—provide the reasons for the contested decision to the Tribunal, just as he refused to disclose them to the Applicant.

30. Generally at common law and under the law of contract, a fixed-term contract, unlike one for an indefinite period, expires automatically by operation of law at the end of the agreed period, by effluxion of time, without requirement of notice or reason. Fixed-term contracts may be a necessary and efficacious arrangement for both parties in respect of many occupations and activities and are entered into for a specific period or for a specific project. However, it is recognized that this type of contract may be misused to avoid conferment of rights otherwise granted to permanent workers, or to enable the cessation of an employment relationship without good reasons and without following fair procedures. Therefore, in many jurisdictions, including Member States of the International Labour Organization ("ILO") (pursuant to ILO Convention No. 158 of 1982) and Member States of the European Union (pursuant to the Council of the European Union Directive 1999/70/EC of 28 June 1999), appropriate legislative protections are provided to prevent abuse of employees

on fixed-term contracts. Examples of such protection may include the requirement to provide objective reasons justifying the renewal of fixed-term contracts, the maximum total duration of successive fixed-term contracts, the maximum number of renewals before conversion to a contract of indefinite duration, and so forth.

31. It is generally accepted that the employment relationship of international civil servants with the organisation for which they work is governed by the internal law prevailing within the organisation (see World Bank Administrative Tribunal Decision No. 1, *de Merode et al.* (1981). National labour laws do not as such constitute part of the internal law of the Organisation. The contract of employment is normally the source of rights and obligations, together with the various regulations, rules, and administrative issuances upon which employment and other rights are conferred. In the adjudication of employment disputes that come before them, international administrative tribunals may rely on, among other sources, general principles of law—including international human rights law, international administrative law and labour law—which may be derived from, *inter alia*, international treaties and international case law. The Tribunal notes in this respect the United Nations Appeals Tribunal's pronouncement in *Tabari* 2010-UNAT-030 that the principle of equal pay for work of equal value—referred to in art. 23.2 of the Universal Declaration of Human Rights—applies to United Nations staff (see also the useful discussions in *Muthuswami et al.* 2010-UNAT-034, para. 30, and *Chen* UNDT/2010/068, paras. 39–45). Further, in many cases international administrative tribunals may find guidance by reference to the case law of counterpart tribunals, ILO Conventions and Recommendations, as well as Digests of Decisions of specialized committees and Reports of the Committee of Experts on the Application of Conventions and Recommendations of the ILO, all of which are standard-setting and standard-defining and create international labour norms, even though they may not be obligation-creating.

32. The preamble to the Charter of the United Nations states that the United Nations was created to "establish conditions under which justice and respect for

obligations arising from treaties and other sources of international law can be maintained". When the General Assembly established the current system of administration of justice, it affirmed that such system shall be "consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike" (General Assembly resolution 63/253). The General Assembly therefore contemplates interpretation of the internal law of the United Nations in conformity with international law and principles of the rule of law.

33. Any administrative decision entails a reasoned determination arrived at after consideration of relevant facts since there is a duty and requirement on institutions to act fairly, transparently, and justly in their dealings with staff members. Like any other administrative decision, a decision not to renew a staff member's contract must be reasoned, as a decision taken without reasons would be arbitrary, capricious, and therefore unlawful (see, e.g., *Abosedra* Order No. 10 (NBI/2011), para. 23, on an application for suspension of action, as well as *Rasul* Order No. 143 (NBI/2010), para. 50, also on an application for suspension of action, in which the Dispute Tribunal found that the decision not to renew the Applicant's appointment "without any reasons being given to her [was] unlawful" and that "[i]n the absence of any reasons from the Respondent the only inference that should be drawn is that the Respondent acted unlawfully"). As the United Nations Administrative Tribunal stated with respect to a decision not to renew a fixed-term appointment, "[d]ue consideration of renewal of contract would appear to the Tribunal to require at least that the arguments for and against renewal should be objectively weighed and in the event of an adverse decision the reasons for such decision clearly set out" (UN Administrative Tribunal Judgment No. 203, *Sehgal* (1975), para. VIII). See also *Ahmed* UNDT/2010/161, which held that all decisions, including a decision not to renew an appointment, should be given full and fair consideration and should be based on proper grounds and be in conformity with due process.

34. The Respondent relies on the UNFPA Manual in support of his contention that no reasons are required to be provided for a decision not to renew an appointment. The UNFPA Manual states, *inter alia* (emphasis omitted):

> 5.2 In accordance with past practice, upon expiration of the fixed-term appointment of a staff member who has served with UNFPA for less than five years, the Administration of UNFPA may choose not to renew the appointment. In such case, the Administration will not offer reasons for non-renewal of appointment. If a staff member who is appointed for a fixed term has been serving with UNFPA for five years or more and without break in service, UNFPA shall accord the UNFPA staff member every reasonable consideration for further employment.
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> 5.3 While it rests primarily within the authority of the substantive manager to decide that an appointment should not be renewed under the preceding paragraph, any non-renewal of appointment shall require the concurrence of the Director, [Division for Human Resources].
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> 5.4 In the interest of good human resources administration, if a fixed-term appointment is not to be renewed under these provisions, the Division for Human Resources … or an appropriate officer in the field should inform the staff member concerned accordingly, in writing, at least one month in advance of the non-renewal.
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> …
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> 25. Fixed-term appointments: staff members require a reasonable amount of job security. Fixed-term appointments of staff members appointed under the 100 or 200 series of the Staff Rules should normally be renewed for two years at a time. [The footnote to this paragraph stated, *inter alia*, that "[t]his only applies if UNFPA has taken a decision that an appointment should be renewed at all".]
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> 26. The Director, [Division for Human Resources], or the manager at the UNFPA field duty station, as applicable, may determine that an appointment should be renewed for a shorter period of time if:
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> – this is in the interest of UNFPA;
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> – the funding arrangements or the budget underlying the post so requires (appointments should never be renewed beyond any period of time for which funding has been secured);
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> – departures from the standards of performance or conduct have occurred.

35. The Tribunal finds that the UNFPA Manual is of little assistance in the present matter. It is at best an internal instruction developed by UNFPA and, if its provisions conflict with the provisions of the contract of employment or the terms of appointment, it will not have the effect of unilaterally amending the terms thereof. If sec. 5.2 of the UNFPA Manual is to be interpreted such that the reasons for non-renewal shall never be disclosed, such an interpretation would, in effect, mean that certain types of administrative decisions are exempt from any kind of review—either by the Administration itself or by the Dispute Tribunal.

36. The UNFPA Manual cannot have the effect of absolving the Respondent from the obligation to disclose the reasons for the contested decision, thus rendering the decision not reviewable and ousting the jurisdiction of the Tribunal. I note, in this respect, the following pronouncement of the ILOAT in Judgments No. 17, In re *Duberg* (1955); No. 18, In re *Leff* (1955); No. 19, In re *Wilcox* (1955); and No 21, In re *Bernstein* (1955)—the four judgments considered and declared valid by the ICJ in its 1956 Advisory Opinion (quoted at para. 23 above):

> ON THE SUBSTANCE
>
> A. Considering that the defendant Organisation holds that the renewal or the non-renewal of a fixed-term appointment depends entirely on the personal and sovereign discretion of the Director-General who is not even required to give his reason therefor;
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> [The ILOAT considered] that if this were to be so, any unmotivated decision would not be subject to the general legal review which is vested in the Tribunal, and would be liable to become arbitrary.

37. Whilst in terms of sec. 5.3 of the UNFPA Manual the "substantive manager" has the discretion to decide whether an appointment should be renewed, this discretion must be exercised lawfully. The ILOAT in Judgment No. 191, In re *Ballo* (1972), stated:

> It appears from the formal provisions of Staff Rule 104.6 that the Director-General's decision not to renew a fixed-term appointment lies within the discretionary authority enjoyed by the head of the Organisation as the person responsible for its smooth running.

> Accordingly, the complainant cannot claim any right to have his appointment renewed, and, so as not to impair the Director-General's authority, the Tribunal's power of review is limited.
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> Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority.

38. Accordingly, for the reasons stated above, whilst the Tribunal recognizes the Organisation's discretionary authority not to renew a fixed-term contract, the exercise of that authority is not immune to review by the Tribunal.

39. The Applicant submitted that based on a number of factors, including his performance and his communications with the Director of the Arab States Regional Office of UNFPA, he had a reasonable and legitimate expectation that his contract would be extended. The Respondent did not elect to call the Director of the Arab States Regional Office of UNFPA as a witness in this case to challenge the Applicant's assertions. The Respondent contends that the Applicant's contract clearly provided that there was no expectancy of renewal.

40. The practice of inserting disclaimers into fixed-term contracts to the effect that an employee has no expectation of renewal is not conclusive proof that the employee could not reasonably have expected his or her contract to be renewed. An implied assurance that the contract may be renewed can be given in a number of ways. What constitutes a reasonable expectation will be a question of fact in each particular case. Silence may be sufficient in some cases, especially if the contract has previously been renewed several times. A reasonable expectation may be created by arranging an employee's work schedule for the future, indicating in some way that he

will still be working after the expiry date or discussing the availability of the post. As the Dispute Tribunal stated in *Ahmed* UNDT/2010/161, an expectancy of renewal may also be created by countervailing circumstances, such as violation of due process, arbitrariness or other extraneous motivation on the part of the Administration (see also *Hepworth* UNDT/2010/193, as well as UN Administrative Tribunal Judgment No. 1192, *Mbarushimana* (2004)).

41. Even though a staff member does not have a right to an automatic renewal of a fixed-term contract, a decision not to renew such contract may not be taken for improper motives, and the Tribunal is required to consider whether the motives were proper or whether any countervailing circumstances existed in the decision not to renew the contract that may have tainted such decision with unlawfulness (see *Azzouni* UNDT/2010/005 and *Abdalla* UNDT/2010/140). This is particularly the case in a matter in which an applicant asserts that she or he expected that her or his contract would be renewed. Unlike in *Abdalla*, where the Tribunal examined the reasons and found that no improper circumstances existed, in this case the Tribunal was deprived of this opportunity because of the Respondent's refusal to furnish any reason for the non-renewal.

42. As the Tribunal stated in *Parmar* UNDT/2010/006, when a staff member brings a case against the Administration alleging that a decision he or she is contesting was improper, and the Administration fails to rebut the staff member's allegations, the Tribunal is entitled to draw negative inferences from the Administration's position (see also *Calvani* UNDT/2009/092). The Respondent cannot expect the Applicant to present to the Tribunal evidence of a specific type of prejudice when relevant or potentially relevant material and the reasons for the decision are withheld by the Respondent. In the instant case, the Applicant alleged, in effect, that the decision was improper and that there was an expectation of extension based on his performance record. The Respondent has been given every opportunity to provide the reasons for the decision, but has declined to do so.

43. The Respondent has not challenged the Applicant's contentions that the post was not abolished, that the funding was still available, that there were no issues with the Applicant's performance, and that he expected his contract to continue. Moreover, the Tribunal notes that the Applicant's letter of appointment clearly indicated the possibility of extension subject to satisfactory service (see para. 6 above). In view of the Respondent's refusal to disclose the actual reasons for the contested decision to the Tribunal, the Tribunal is left with no choice but to draw an adverse inference and conclude that the contested decision was arbitrary, capricious, and therefore unlawful.

Failure to disclose the reasons for the contested decision to the Applicant

44. Although the findings above are sufficient to render the contested decision unlawful, I find it appropriate to state the following concerning the non-disclosure of the reasons for the decision to the Applicant.

45. It is important to reiterate that the contested decision in this case is not the decision to set a certain expiration date, made at the time of the entry into contract, but the later decision not to extend the Applicant's appointment beyond 2 April 2009, which was a separate administrative decision, as explained above.

46. Although the Applicant was not entitled to an automatic extension of his contract, his enquiries as to the reasons for the decision not to extend it were timeous, fair, and reasonable in the circumstances of this case. His requests for information were refused and he was unable to obtain any satisfactory answer from the Administration. The only response provided by the Respondent was, in effect, that the Applicant cannot expect to be given the reasons for the non-extension of his contract unless he articulates with sufficient specificity why the decision was unlawful—in other words, the staff member will not be informed of the reasons unless he tells the Administration why these reasons were improper. This argument is an obvious logical fallacy. Staff members are not required to satisfy some arbitrary threshold set by the Respondent when requesting reasons for administrative

decisions. Reasons must generally be disclosed at the time of the notification of the decision, and they also most certainly must be disclosed when requested by the staff member.

47. Further, reasons must be made available at the management evaluation stage (or, in the former system of justice, administrative review stage). The purpose of administrative review and management evaluation is to "allow management the opportunity to rectify an erroneous, arbitrary or unfair decision" and to "give management a chance to correct an improper decision, or provide acceptable remedies in cases where the decision has been flawed, thereby reducing the number of cases that proceed to formal litigation" (*Tadonki* UNDT/2009/058). The system of review and evaluation affords staff members an opportunity to have their grievances addressed internally and objectively, and evaluation of a contested decision must take into account the true reasons for the decision (*Beaudry* UNDT/2010/039 and *Omondi* UNDT/2011/020, referring to *Omondi* Order No. 17 (NBI/2010)). Without knowing the bases for the contested decision, the staff member may not be able to effectively challenge it, and the office responsible for carrying out its review and evaluation will not be able to examine its propriety and lawfulness. In the present case, no reasons were disclosed to the Applicant prior to or at the administrative review stage and there is no evidence at all that there was any substantive examination of the lawfulness of the contested decision as part of the administrative review.

48. The right to have an administrative decision properly reviewed, including at the management evaluation stage, is part of a staff member's contract of employment. To merely state in response to a staff member's inquiries—as the Administration did in this case—that the contract will not be renewed because there is no obligation to renew it subjects the administrative decision to circular reasoning. Such an answer renders the decision impossible to examine and would deprive the staff member of his right of appeal under art. 2.1 of the Statute of the Tribunal. This is a fundamental right of every staff member and it must be allowed to be exercised meaningfully. For the right to appeal to be meaningful, when a staff member seeks reasons for the

decision not to extend his or her appointment, these reasons must be provided in sufficient detail to enable her or him to decide whether to proceed with a formal appeal (*Beaudry*). As the ILOAT stated in Judgment No. 1817 (1999) and reiterated in Judgment No. 2124 (2002),

> A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say.

The requirement to give reasons should be present not because there is an automatic expectancy of renewal of a fixed-term contract, but because otherwise the staff member, the Administration itself, and, ultimately, the Tribunal, would be precluded from or, at the very least, seriously hampered in trying to examine and verify the propriety of the decision, made in response to the staff member's request, not to extend his or her contract beyond its expiration date. (See, e.g., *Bofill* UNDT/2010/190, para. 30, and *Ippolito* UNDT/2010/181, para. 26, stating that "[t]he only lack of transparency which could be punished by the judge would be the refusal of the Administration to inform the Tribunal and the applicant staff member of the considerations on which the [Administration] based [its] decision".)

49. Further, replying to a request for reasons, particularly when such request is made as part of a formal review process, is an altogether different issue and, as stated above, reasons must be examined and explained by the Administration as part of its administrative review or management evaluation.

50. It was submitted by the Respondent that the former UN Administrative Tribunal held that, as a general rule, the Administration was not required to provide reasons to staff members or to the Administrative Tribunal in support of its decisions not to renew their contracts, including when requested for them. (See, e.g., paras. II–

III of UN Administrative Tribunal Judgment No. 1003, *Shasha'a* (2001), stating that "[t]he Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision", in which case "the contract terminates automatically and without prior notice", but "when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts".) The Respondent submitted that the Dispute Tribunal should not disturb this long-standing and settled jurisprudence of the United Nations Administrative Tribunal.

51. Indeed, the United Nations Administrative Tribunal did not require reasons to be automatically given when a decision not to renew a staff member's contract was notified to him or her (see, e.g., para. II of UN Administrative Tribunal Judgment No. 1191, *Aertgeerts* (2004) (relied on by the Respondent), stating that "the Organization does not have to provide any reason when deciding not to renew a fixed-term contract upon its expiration"). However, as the United Nations Appeals Tribunal stated in its recent decision in *Sanwidi* 2010-UNAT-084:

> 37. The Dispute Tribunal and Appeals Tribunal established under the new system of administration of justice are a marked improvement on the earlier system on account of their independence, transparency, and professionalism. The Statutes creating the Tribunals do not provide that the judgments of the former Administrative Tribunal shall be treated by the new Tribunals as binding precedent. The new system of justice will naturally have a fresh approach on the legal issues, and new jurisprudence will develop over time, which may or may not be different from that of the former Administrative Tribunal. Consequently, the jurisprudence of the former Tribunal, though of persuasive value, cannot be binding precedent for the new Tribunals to follow. We can understand the argument that the earlier judgments provide consistency, clarity and continuity of jurisprudence, but binding precedents they are not.
>
> 38. Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals

> may for good reason interfere with the exercise of administrative discretion.

52. The right of a staff member to know the reasons for a decision not to renew her or his appointment has been part of ILOAT's long-standing jurisprudence. The ILOAT, which was established in 1946 and exercises jurisdiction over disputes arising out of more than 50 international organisations, has described the right to know the reasons for a decision not to renew a staff member's appointment as "a general principle of international civil service". See ILOAT Judgment No. 675, In re *Pérez del Castillo* (1985) (stating at paras. 8 and 11 that "[t]here must be a good reason [for a decision not to renew] and the reason must be given" and that "[t]he failure to give a reason will in many cases lead to the conclusion either that the Director-General mistakenly thought that he held an arbitrary power to do as he liked or that his decision was in fact arbitrary or wrongly motivated"); Judgment No. 1154, In re *Bluske* (1992) (stating at para. 4 that "it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member"); Judgment No. 1911, In re *Ansorge (No. 3)* (2000); and Judgment No. 2499 (2006) (stating at para. 6 that "there must be a valid reason for any decision not to renew a fixed-term contract [which] must be given to the staff member, who must be told the true grounds for non-renewal"). I note the persuasive value of these pronouncements of the ILOAT.

53. The area of employment relations and the law pertaining thereto is dynamic and not static. Whilst it is recognised that fixed-term contracts can serve a useful purpose in many instances, and that management must have the prerogative to make certain decisions, the rule of law and due process must be followed. Labour is not a commodity and the Organisation is continuously working to effect transparency and accountability in the workplace. This was further affirmed by the General Assembly in its resolution 63/253, quoted above.

54. Finally, it is the duty of the Organisation to act in good faith and to respect the dignity of staff members. This duty requires that reasons be given particularly so that staff members may exercise their right to appeal and take whatever action may be necessary. A decision not to renew a contract is subject to the requirements of good faith and fair dealing, which are accepted as part of the contract of employment between the Organisation and its staff (see, e.g., *James* UNDT/2009/025, *Castelli* UNDT/2009/075, *Utkina* UNDT/2009/096, *Allen* UNDT/2010/009, *D'Hooge* UNDT/2010/044, *Sina* UNDT/2010/060, *Gaskins* UNDT/2010/119). These requirements imply that both parties will be placed on equal footing when it comes to appeals against decisions affecting their legal rights and that staff members will have a certain level of access to information necessary to protect their rights. Not disclosing the reasons for an administrative decision, including a decision not to renew a fixed-term contract, particularly when the affected staff member requests them, is an act in violation of the requirements of good faith and fair dealing. The Organisation must ensure that staff members have reasonable and effective means to contest administrative decisions.

55. Therefore, for the reasons stated above, the Tribunal finds that the Administration breached its obligation to disclose the reasons for the contested decision to the Applicant, particularly in response to his requests.

Compensation

56. The Tribunal is placed in a peculiar situation in determining the amount of compensation to be awarded to the Applicant, partly as a result of the Respondent's refusal to explain the reasons for the non-renewal and to provide relevant material in justification of these. The Applicant requested, *inter alia*, an award of two years' net base salary, referring to paras. 25 and 26 of the UNFPA Manual, which provide that a renewal of an appointment would "normally" be for two years, unless there was a reasoned determination that the appointment should be renewed for a shorter period of time.

57. In light of the Tribunal's comments regarding the UNFPA Manual and in the circumstances of this case, the Tribunal finds that it does not follow with a sufficient degree of certainty that, were it not for the unlawful decision, the Applicant's contract would have been renewed for two years. Both of his previous extensions were less than "for two years at a time". The first extension received by the Applicant was for one year only and there is no evidence that he sought to contest it. The second extension, for six months, was given to the Applicant after his discussions with the Director of the Arab States Regional Office of UNFPA in July 2008 about whether his next extension would be for one or for two years (see para. 7 above). Therefore, even in July 2008, the option of a further renewal for a period shorter than two years was being considered and the Applicant was aware of it. Nevertheless, as discussed at para. 27 above, the Applicant failed to file a timeous request for administrative review with respect to the six-month extension. The Tribunal is persuaded, based on the circumstances of this case, including the past practice of extensions given to the Applicant, that the next renewal would have been for less than two years. The Tribunal notes that a further extension of six months beyond 2 April 2009 would have brought the total duration of contract extensions since its original expiration date of 2 October 2007 to exactly two years, and to one year from October 2008 (one of the two options apparently considered in July 2008) Therefore, the Tribunal considers that the appropriate remedy for the violation of the Applicant's rights and for any economic loss suffered as a result of the unlawful decision is compensation in the amount equivalent to six months' net base salary and entitlements, if any (see also *Sehgal*, para. XI). The Applicant shall be paid interest on these payments in accordance with *Warren* 2010-UNAT-059, from the date that they became due (see *Iannelli* 2010-UNAT-093, para. 18, *Fayek* UNDT/2010/194, para. 22, and *Alauddin* UNDT/2010/200, para. 39).

58. The Applicant has requested compensation for the emotional distress and injury suffered by him as a result of the Respondent's failure to disclose the reasons for the decision. As the United Nations Appeals Tribunal stated in *Tabari* 2010-

UNAT-030, to be compensated for emotional injury, the Applicant must establish the grounds for his claims. The Applicant has clearly articulated, and the Respondent has failed to contest, that the Applicant made attempts as early as July 2008 to ascertain whether his contract would be extended any further and that the Applicant continued to seek clarification as to the reasons for the six-month renewal and whether he would be receiving any further extensions. Thereafter, without any explanation or reasons, on 13 February 2009 he was given sudden notification of the expiration of his contract with no further renewal beyond 2 April 2009. The Tribunal is satisfied that any reasonable person would suffer emotional distress as a result of the sustained lack of response and uncertainty created in these particular circumstances. The Tribunal is persuaded that the Applicant suffered emotional harm warranting compensation in this case and, accordingly, sets such compensation in the amount of USD8,000.

Conclusion

59. The Applicant contested the decision, communicated to him in February 2009, not to extend his appointment beyond 2 April 2009. The Respondent has refused to disclose the reasons for the contested decision to the Applicant or to the Tribunal. The Tribunal draws an adverse inference from the Respondent's failure to disclose the reasons to the Tribunal and declares the contested decision arbitrary, capricious, and therefore unlawful.

60. To compensate the Applicant for the actual economic loss suffered, the Respondent shall pay him the amount equivalent to six months' net base salary and entitlements at the P-5 grade, step VI, with interest at the applicable US Prime Rate from the date each monthly payment was due and until date of payment. If this compensation is not paid within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until the date of payment.

61. To compensate the Applicant for the emotional distress suffered, the Respondent shall pay him USD8,000. This sum is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 10th day of February 2011

Entered in the Register on this 10th day of February 2011

(*Signed*)

Santiago Villalpando, Registrar, New York