



**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

PIRNEA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Seth Levine, OSLA

**Counsel for Respondent:**  
Thomas Elftmann, UNDP

## **Introduction**

1. The Applicant joined the United Nations on 26 February 2007 as a Field Security Coordination Officer (FSCO) in Man, Ivory Coast under a United Nations Development Programme (UNDP) Letter of Appointment but serving with the United Nations Department of Safety and Security (UNDSS).

2. The Applicant is contesting the decision not to renew his fixed-term appointment upon its expiry on 26 February 2011, alleging that it was guided by extraneous motives and therefore unlawful. The Applicant further contends that the Organization did not inform him of the reasons for non-renewal of his contract prior to its expiry and that he did not receive the Daily Subsistence Allowance (DSA) owed him.

3. The Applicant filed this Application with the United Nations Dispute Tribunal (UNDT) on 11 May 2011. The Respondent submitted his Reply on 10 June 2011. The Tribunal held a hearing on 1 March 2012.

## **Facts**

4. On 30 June 2008, the Chief Security Advisor (CSA) in Ivory Coast, Mr. Innocent Dassanou, sent the Applicant a letter of complaint alleging “racist and further improper behavior” and ordered an investigation. An investigation was carried out and on 16 July 2009, the Applicant received the Investigation Report from UNDP Office of Audit and Investigations (OAI) noting that “at this stage there is no disciplinary case against [the Applicant].”

5. The Applicant was reassigned to Mogadishu, Somalia on 4 September 2009 and continued to hold a UNDP Letter of Appointment, but his salary was paid by Australian donors for an initial six months.

6. On 24 July 2010, UNDSS took a decision to remove the Applicant from Somalia and send him to Nairobi, Kenya following sexual assault allegations made by staff at the Ambassador Hotel, where he was staying. UNDSS cited concerns for the Applicant’s safety as the reason for evacuating him to Nairobi.

7. On 5 October 2010, the Applicant received an email from the Senior Human Resources Officer (SHRO), UNDSS, informing him that his appointment would expire on 31 October 2010. The Applicant wrote back to the SHRO stating that according to provisional staff rule 4.8, the expiration of his fixed-term appointment should be at the end of February 2011. The SHRO thereafter renewed the Applicant's appointment until the end of February 2011.

8. On 9 November 2010, the Applicant received an email from UNDP/OHR Copenhagen confirming that his appointment would not be renewed beyond 26 February 2011.

9. In an attempt to find out why his appointment would not be renewed, the Applicant wrote to the SHRO on 2 February 2011 asking for the basis of the decision not to renew his appointment. He received a response dated 2 February 2011 that since he held a fixed-term appointment, there was no expectancy, legal or otherwise, of renewal or conversion of his fixed-term appointment.

### **The Applicant's submissions**

10. In his closing submissions, the Applicant states that he "encountered numerous operational difficulties while serving as FSCO in the Ivory Coast . . . [which] brought him into conflict with the CSA [there]." The Applicant stated during the court hearing that after receiving the letter of allegation of 30 June 2008, the CSA "put an atmosphere in the work place that everyone was against the Applicant."

11. The Applicant states that he was never investigated and never received an explanation as to why he was transferred to Somalia. Additionally, the Applicant admitted into evidence an email from the CSA to colleagues stating that the Applicant had left the Ivory Coast for Somali like a thief<sup>1</sup> to highlight the strenuous relationship between him and the CSA.

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<sup>1</sup> "Chers Collegues, Soyez tous informes que M. Pirnea est parti de la Cote d'Ivoire comme un voleur (sic) . . ." Email from CSA to colleagues, dated 11 October 2009.

12. The Applicant contends that given the allegations of misconduct which motivated the non-renewal of his contract, disciplinary proceedings ought to have been communicated to him within six months of the conclusion of the OAI investigation.

13. The Applicant therefore contends that there was a causal link between his fractious relationship with the CSA in Ivory Coast, the unproven allegations against him in 2008 and his re-assignment to the Somalia office in 2009, with all of these leading to the non-renewal of his contract upon its expiry. Additionally, the Applicant's position is that since he was never informed that the investigation of the alleged "racist and further improper behaviour" was closed, when the allegations of sexual assault arose in Somalia, it would appear to anybody that UNDP had now subjected the Applicant to two separate investigations into serious misconduct.

14. The Applicant's final contention is that absent the factors identified in paragraph 13 above, the Applicant would have continued to serve in the Ivory Coast, or possibly elsewhere, as a FSCO, as no issue has ever been raised regarding his performance.

### **The Respondent's submissions**

15. The Respondent contends that the decision not to renew the Applicant's contract was based on the fact that the Applicant could no longer perform his professional duties at his former duty station in Hargeisa, Somalia.<sup>2</sup>

16. Regarding the allegations against the Applicant of "racist and further improper behaviour", the Respondent submits that these unproven allegations did not influence the contested decision of non-renewal of the Applicant's contract, as that decision was taken in 2011, two years later after the allegations occurred.

17. During the court hearing of 1 March 2012, the Respondent agreed with the Applicant that indeed the Applicant was investigated for these "racist and further

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<sup>2</sup> Reply, para. 3.

improper behaviour” by UNDP/OAI (Office of Audit and Investigations) and SIU (Security Investigation Unit). However, the case was closed in 2009 and no disciplinary action against the Applicant was initiated. The Applicant was never informed that this matter had been closed.

18. That when the Applicant started his duties as Security Analyst with the UNDSS Office for Somalia in Nairobi, Kenya, his primary supervisor at the time assessed that the Applicant did not have the required skills to be a Security Analyst, and the Applicant agreed with these comments in writing. The Applicant held this position for approximately seven months, from 7 October 2009 until 12 May 2010.

19. That because of this evaluation, the Applicant was reassigned to Hargeisa, Somalia as a FSCO on 13 May 2010. However, because of the alleged sexual assault that occurred on 23 July 2010, the UNDSS was no longer in a position to ensure the Applicant’s safety in Somalia territory and evacuated the Applicant to Nairobi on 24 July 2010.

20. During the court hearing, the Applicant acknowledged that an incident took place at his hotel at the time he was taking a shower when two cleaners came in the room and screamed and left. The Respondent did not rebut this testimony.

21. That the Respondent could not investigate this matter since the cultural context made it both difficult and inappropriate to interview the alleged victim as such a serious allegation of sexual assault in Somalia may stigmatize alleged female victims as “raped women” without prospect of getting married. Further, the safety of the alleged perpetrator is jeopardized in view of the prevailing culture of lynching or drastic punishment under Sharia law, including capital punishment. Thus, the Respondent closed this case on 23 October 2010, on the day of the alleged incident.

22. That because the Applicant was evacuated to Nairobi, Kenya, he could no longer perform his duties as a FSCO in Somalia and that the Applicant was informed by email on 2 February 2011 that his contract would not be renewed

beyond its expiry date of 26 February 2011. The UNDSS did not disclose a reason for this decision as it held the view that there was no legal obligation under the terms of the contract to provide a reason for the non-renewal of the contract.

23. Further, the Applicant points to Judgment No. UNDT/2011/059 regarding the Applicant's Suspension of Action application in which the Tribunal found that the decision of UNDSS not to disclose the reasons for the contested decision was not unlawful.

24. Finally, the Respondent submits that the Applicant's claim for DSA is not receivable as the Applicant did not request a management evaluation thereof.

### **Consideration**

25. In determining this Application, the main issues for examination are:

- a. Whether the Respondent should have given the Applicant reasons for the non-renewal of his contract;
- b. Whether the non-renewal of the Applicant's fixed-term contract was based on extraneous factors;
- c. Whether the Applicant's claims for DSA is receivable.

### ***Whether the Respondent should have given the Applicant reasons for the non-renewal of his contract***

26. The Respondent's contention is that as stipulated in staff rule 4.13(c), fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of length of service. The Respondent therefore states that no explanation is needed for the non-renewal of said appointments.

27. The Tribunal held in *Obdeijn* UNDT/2011/032 that "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."<sup>3</sup>

28. Obdeijn was an applicant who contested the decision not to extend his fixed-term contract beyond its expiration date, alleging *inter alia*, that the decision was improper because it was motivated by extraneous factors.<sup>4</sup> The respondent in Obdeijn refused to disclose the reasons for the contested decision to the applicant and also refused to disclose them to the Tribunal, asserting that the Administration was not required to provide reasons for a decision not to renew a fixed-term appointment.<sup>5</sup>

29. The Tribunal in *Obdeijn* went on to state that "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 a contract may not be taken for improper motives, and the Tribunal is required to consider whether the motives were proper or whether countervailing circumstances existed in the decision not to renew the contract that may have tainted such decision with unlawfulness."<sup>6</sup>

30. As this Tribunal stated in *Pirnea* UNDT/2011/007, "[t]he general rule is that a fixed-term contract has an expiry date and such contract does not carry any expectancy of renewal. From the case law of the former United Nations Administrative Tribunal and the United Nations Dispute Tribunal, two schools of thought have emerged. Firstly, there is no duty to give reasons for the non-renewal of a fixed-term appointment but if the Organization decides to give reasons these reasons must be supported by evidence or by facts. Secondly, there is an emerging jurisprudential thinking that when a contract is not renewed or

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<sup>3</sup> *Obdeijn* at 22, para. 48.

<sup>4</sup> *Obdeijn* at 2, para. 1.

<sup>5</sup> *Obdeijn* at 2, para. 1.

<sup>6</sup> *Obdeijn* at 19, para. 41 citing *Azzouni* UNDT/ 2010/005 and *Abdalla* UNDT/2010/040.

terminated reasons must be given to the concerned staff member so that he or she is in a position to take any actions as he or she deems fit.”<sup>7</sup>

31. In this case, the reason given by the Administration for the non-renewal of the Applicant’s contract is that he could no longer perform his professional duties at his former duty station in Hargeisa, Somalia.<sup>8</sup> This reasoning was based on the alleged sexual assault incident, which according to the Administration, put the Applicant’s safety in high risk and thus he had to be evacuated to Nairobi. Therefore, according to the Administration, the Applicant could not carry out his duties from another duty station, as he was needed to be physically present in Hargeisa, Somalia. The Respondent goes on to states that the UNDSS Office had only 10 FSCOs operating at different duty stations in Somalia when the Applicant’s contract expired, instead of 11 FSCOs as reflected in the UNDSS Staffing Table.<sup>9</sup>

32. It is clear to the Tribunal that the main reason given by the Respondent for the non-renewal of the Applicant’s fixed-term appointment is the risk the Applicant would have been exposed to if he had remained in Somalia in view of the alleged sexual assault.

33. In the course of his testimony the Applicant stated that he was having a shower with his room unlocked when two females walked in and left. He strenuously denied that he assaulted or attempted to assault any of them sexually.

34. Unfortunately the incident was not and could not be investigated given the prevailing cultural environment in Somalia. However much the Tribunal sympathizes with those entrusted with the duty and responsibility to investigate all allegations of sexual assault, in a society like Somalia, the Tribunal cannot jettison the basic rule of fairness when confronted with such a serious allegation.

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<sup>7</sup> *Pirnea*, para. 28.

<sup>8</sup> Respondent’s Closing Submission, para. 3.

<sup>9</sup> *Id.*, at 19.



35. The charge of sexual assault triggered the transfer of the Applicant to Nairobi. Subsequently his contract was not renewed on the ground that his conduct had made it very risky for him to stay in Somalia. It has been stated in a number of cases that where reasons are given for the non-renewal of a contract, they must be valid. In the same vein where reasons are given, they must exist. If a reason does not exist its validity cannot be evaluated.

36. As the United Nations Appeals Tribunal stated in *Hepworth* 2011-UNAT-178, “[d]ue process requires that a staff member must know the reasons for a decision [not to renew his or her fixed-term appointment] so that he or she can act on it.”<sup>10</sup>

37. In this case, the Administration has given the Applicant a reason for the non-renewal of his fixed-term contract, however, that reason was based on sexual assault allegations that were never proven.

***Whether the non-renewal of the Applicant’s fixed-term contract was based on bias, illegality and improper motive***

38. The Applicant’s main assertions that the non-renewal of his contract was based on bias, illegality and improper motive stems from his alleged racist and improper behaviour in Man, Ivory Coast and allegations of sexual assault against him in Hargeisa, Somalia.

39. The allegations of racist and improper behaviour were never proven, leading to the closing of the investigation against the Applicant in Ivory Coast. In fact, at the court hearing, both parties stipulated that the investigation was closed due to lack of evidence. However, the Applicant was never informed that the

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<sup>10</sup> *Hepworth*, at 7, para. 32, citing International Labour Organization Administrative Tribunal Judgment No. 3041, 6 July 2011.

investigation was closed, leading him to think, rightly so, that the non-renewal of his contract was based on these allegations.

40. The Respondent on the other hand states that it exercised its discretion in the Applicant's case and the allegations did not influence the contested decision. In his closing submission, the Respondent proffers that since the Applicant did not introduce this assertion in his request for management evaluation, but only in his Application, the Applicant's contention that there was a connection between the alleged misconduct and the non-renewal of his contract lacks credibility and is inadmissible in the context of these proceedings.<sup>11</sup>

41. At the time of requesting the management evaluation, on 16 February 2011, the Applicant had not been informed whether the investigation in Ivory Coast was concluded. During the court hearing, the Applicant stated that he was told by the Administration in 2010 that the investigation would take longer than anticipated. Notwithstanding, the Respondent did confirm that indeed, the investigation was actually closed in 2009. In fact in October 2010, the Applicant's contract was extended to February 2011, but he was not notified that the investigation into the racial and improper behaviour allegations had been closed.

42. The court heard the issue of the alleged racist and improper behaviour. Both parties agreed that there was insufficient evidence to substantiate these allegations, and the matter was closed. The issue then becomes whether the Administration's failure to tell the Applicant that the investigation was closed in a timely manner leads to bias, which resulted in the non-renewal of his fixed-term contract.

43. The Applicant proffered at the court hearing that there was tension between him and the CSA. The Applicant stated that he encountered numerous operation difficulties while serving as a FSCO in Ivory Coast, leading to a lot of conflict between him and the CSA whenever he requested proper support. The Respondent did not refute this. Further, when the Applicant was posted to

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<sup>11</sup> Respondent's Closing Submission, para. 33.

Somalia, the CSA sent an e-mail to colleagues stating that the Applicant left the Ivory Coast like a “thief”.<sup>12</sup>

44. The evidence presented shows that there was strife between the CSA and the Applicant. The Tribunal is left to wonder whether the non-renewal of the Applicant’s contract was motivated by bias. The Respondent has not rebutted this evidence. Previously, the Respondent did not give the Applicant the reason why his fixed-term contract was not renewed, stating instead that the Applicant’s contract carries no expectation of renewal and therefore no explanation is necessary for its non-renewal. However, the Respondent now states that the reason that the Applicant’s fixed-term appointment was not renewed was because as to “the incident . . . involving allegations of sexual assault against the Applicant, UNDSS found that it was no longer in a position to ensure the Applicant’s safety on Somali territory.”<sup>13</sup>

45. As the Tribunal held in *Obdeijn* UNDT/2011/032, “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.”<sup>14</sup>

46. The Tribunal concludes however that it was an afterthought on the part of the Respondent to justify the non-renewal on the often repeated myth that a fixed-term contract lapses automatically at the end of their term and that there is no need to give reasons for their non-renewal. Such a myth can no longer be invoked as an absolute legal principle in the light of the pronouncements made in a number of cases, and in particular more recently in *Obdeijn* and *Hepworth*, referenced *supra*. The need to give reasons for the non-renewal of a fixed-term contract must

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<sup>12</sup> Email from CSA to colleagues dated 11 October 2009.

<sup>13</sup> Respondent’s Closing Submission, para. 10.

<sup>14</sup> *Obdeijn*, at 22, para.48.

be justified unless the circumstances are such that the reasons are obvious to an applicant.

***Whether the Applicant's claims for DSA is receivable***

47. Article 8.1(c) of the UNDT Statute states, “[a]n application shall be receivable if: An applicant has previously submitted the contested administrative decision for management evaluation, where required.”

48. Further, staff rule 11.2(a) provides: “A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision . . .”

49. The Applicant requested a management evaluation on 16 February 2011, ten days before his fixed-term contract expired. Although the Applicant did not specifically make a request for Daily Subsistence Allowance (DSA) in the request for management evaluation, the Applicant did in fact state in paragraph 25 of that request that a break-in-service would affect the Applicant’s right to certain entitlements that accrue with continuous service, including but not limited to the right to home leave.<sup>15</sup>

50. The Respondent contends that the Applicant’s request for DSA for the period of July 2010 to February 2011, when he performed his duties in Nairobi, Kenya, whilst his formal duty station remained that of Hargeisa, Somalia is not receivable since he did not request a management evaluation seeking payment of the DSA.

51. A proper reading of the request for the management evaluation indicates that the Applicant refers specifically to entitlements. Though the word DSA is not

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<sup>15</sup> Application, Annex 9, para. 25.

used, the Tribunal considers that legitimately the entitlements to which the Applicant claims were due to him also encompass the DSA entitlements.

### **Conclusion**

52. The Tribunal finds therefore that the Applicant's contract was not renewed and no valid reason was proffered for this action mainly because no substantiated reason existed insofar as the Somalia incident is concerned. Even if the Respondent falls back on the principle that a fixed-term contract that reaches expiry lapses automatically, he must fail because in such a case reasons need to be given.

53. The Tribunal also finds that the decision to transfer the Applicant in a rather hurried way from Ivory Coast to Somalia was motivated by the allegations of racist and improper behaviour on his part. These allegations were never proven.

54. In the light of the above, the Tribunal awards the Applicant 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.

55. The Tribunal finds it strange and fails to understand why no action was taken following the email that the CSA, Mr. Innocent Dassanou, sent to a number of colleagues in Ivory Coast where he writes that the Applicant left Ivory Coast like a thief and that he did not even deem it fit to say goodbye to him except for a terse email sent to him. Surely treating a staff member as a thief without justification is conduct unbecoming of an international civil servant like Mr. Dassanou. The allegation of racism and improper behaviour was not investigated and there was no follow up action. Even though the Applicant did not complain about this email, it would have been up to the authorities not to stay quiet on it. By their silence and inaction, the relevant authorities simply condoned and maybe encouraged such an unbecoming conduct from Mr. Dassanou. In a number of instances such conduct has been disapproved and sanctioned.

**IT IS ORDERED THAT:**

56. The Applicant is awarded two years' net base salary. Pursuant to article 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total 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.

57. The Applicant is entitled to his DSA entitlements for the period he was posted in Nairobi, Kenya when his duty station was in Hargeisa, Somalia.

58. In *Kamunyi* UNDT/2010/214 regarding unlawful, careless or negligent actions of UN officials, Shaw J. stated that: "It is clear that the actions of several UN officials were unlawful, careless or negligent. It is for the Secretary-General to take any disciplinary or other steps in the light of the finding in this judgment and in the interests of the maintenance of the Rule of Law in the UN."<sup>16</sup> The learned Judge then ruled that it was for the Secretary-General to take any disciplinary or other steps in the interest of the maintenance of the Rule of Law in the UN. The Tribunal will follow that ruling and leave it to the Secretary-General, pursuant to article 10.8 of the Statute of the Tribunal, to take any action in regard to the conduct of Mr. Innocent Dassanou.

*(Signed)*

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Judge Vinod Boolell

Dated this 10<sup>th</sup> day of May 2012

Entered in the Register on this 10<sup>th</sup> day of May 2011

*(Signed)*

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Jean-Pelé Fomété, Registrar, Nairobi

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<sup>16</sup> *Kamunyi* at 49, para. 195.