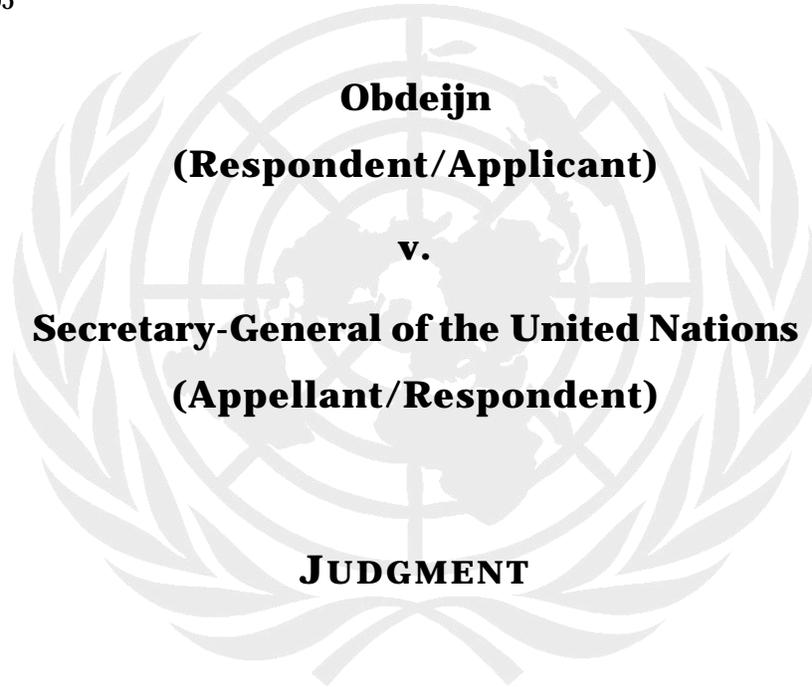




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2011-205



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**Before:** Judge Sophia Adinyira, Presiding  
Judge Inés Weinberg de Roca  
Judge Jean Courtial

**Judgment No.:** 2012-UNAT-201

**Date:** 16 March 2012

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Lyndon Barnes/Bart Willemsen

**Counsel for Appellant/Respondent:** Amy Wood

**JUDGE SOPHIA ADINYIRA**, Presiding.

**Synopsis**

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by the Secretary-General of the United Nations against Judgment No. UNDT/2011/032 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 10 February 2011 in the case of *Obdeijn v. Secretary-General of the United Nations*. Mr. Hans Obdeijn submitted an answer on 13 May 2011.

2. The Secretary-General appeals the UNDT Judgment on the grounds that the UNDT erred on a question of law and exceeded its competence in requiring the Administration to give reasons for its decision not to extend Mr. Obdeijn's fixed-term appointment (FTA) beyond its agreed date of expiry.

3. The Appeals Tribunal notes that where the applicable Staff Regulations and Rules provide that an FTA does not carry an expectancy of renewal and is ipso facto extinguished on expiry, a non-renewal is a distinct and challengeable administrative decision.

4. The obligation of the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Staff Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

5. Whereas, normally, the staff member bears the burden of proof of showing that the non-renewal decision was arbitrary or tainted by improper motives, the refusal by the Administration to disclose the reasons for a contested decision shifts the burden of proof, so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives.

6. However, if the Administration does not comply with a Tribunal's order to disclose the reasons for an administrative decision as such, the Tribunal cannot automatically conclude that the decision was arbitrary. But it is entitled to draw an adverse inference from the refusal.

7. In view of the foregoing, the fact that the Administration did not discharge the burden of proving that its decision was neither arbitrary nor tainted by improper motives, we affirm, on the principle, the UNDT's finding that this decision must be deemed unlawful.

8. The appeal is allowed in part. We affirm the award for moral damages, but set aside that awarded for economic loss as none was proven.

#### **Facts and Procedure**

9. Effective 3 October 2005, Mr. Obdeijn joined the United Nations Population Fund (UNFPA) as UNFPA's Representative in Sana'a, Yemen, at the P-5 level on a two-year FTA. His Letter of Appointment specified that a rise in his salary was "subject to satisfactory service" and "[s]ubject to extension of appointment". It also contained the following clauses: "The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment on the Staff of the United Nations Population Fund. Staff members specifically recruited for the United Nations Population Fund have no entitlement for consideration for posts outside that Fund."

10. Mr. Obdeijn's FTA was subsequently extended on two occasions, first for one year (3 October 2007 to 2 October 2008) and then for six months (3 October 2008 to 2 April 2009).

11. In a letter dated 13 February 2009, the Director of the Division for Human Resources, UNFPA, notified Mr. Obdeijn that his FTA would expire on 2 April 2009 and that he would be contacted in due course regarding separation formalities.

12. By letter dated 15 February 2009 to the Director for Human Resources, UNFPA, Mr. Obdeijn requested the reasons for his non-renewal.

13. On 9 March 2009, Mr. Obdeijn requested administrative review of the decision not to renew his FTA beyond 2 April 2009.

14. On 12 March 2009, the Officer-in-Charge, Division for Human Resources, UNFPA, replied: "[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...."

15. On 27 March 2009, the Executive Director, UNFPA, replied to Mr. Obdeijn's request for administrative review, stating: "Given that you have been serving with UNFPA for a period of less than five years ... the Administration of UNFPA was permitted, in accordance with section 5.2 of the policy and the established jurisprudence of the [former Administrative] Tribunal, not to renew your appointment, without having to justify that administrative decision." (Underline in original)

16. Mr. Obdeijn's appeal to the former Joint Appeals Board was transferred to the UNDT on 1 July 2009. In Judgment No. UNDT/2011/032, the UNDT found that the Administration had breached its obligation to disclose the reasons for the decision not to extend Mr. Obdeijn's appointment, particularly in response to his requests for reasons, in violation of the requirements of good faith and fair dealing. In the view of the UNDT, "[l]ike 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..." "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." "[T]hese reasons must be provided in sufficient detail to enable her or him to decide whether to proceed with a formal appeal..." As damages, the UNDT ordered that Mr. Obdeijn be paid six months' net base salary for the actual economic loss suffered and USD 8,000 for the emotional distress suffered.

### Submissions

#### Secretary-General's Appeal

17. The UNDT erred in fact in finding that Mr. Obdeijn's initial Letter of Appointment indicated the possibility of extension subject to satisfactory performance. The text "subject to extension of appointment" was in the footnote, and not in the main body of the letter. The Administration did not create a legitimate expectancy of renewal of Mr. Obdeijn's FTA.

18. The UNDT erred in law when it drew a negative inference from the fact that the Administration did not provide reasons for the contested decision. Contrary to the established jurisprudence requiring a party alleging harassment, prejudice or other improper motivation to prove his or her allegations, the UNDT placed the burden of proof on the

Secretary-General and required him to prove that the non-renewal decision was not arbitrary or improper.

19. The UNDT erred on a question of law in creating a new obligation on the part of the Administration to provide reasons for not extending Mr. Obdeijn's FTA, by relying on legislation from international and national jurisdictions and the jurisprudence of the Administrative Tribunal of the International Labour Organization (ILOAT) to justify its departure from the jurisprudence of the former Administrative Tribunal and the long-standing practice of the Organization. The UNDT's reliance on the instruments of the International Labour Organization and the European Union is inaccurate and misplaced. The ILOAT cases cited by the UNDT are distinguishable from the present case.

20. The Administration had no obligation to extend Mr. Obdeijn's FTA, let alone an obligation to explain why it did not undertake such an obligation. The Administration acted lawfully by relying on the plain language of its employment agreement with Mr. Obdeijn.

21. The UNDT exceeded its competence in concluding that the contested decision not to renew Mr. Obdeijn's appointment was unlawful, and in ordering the payment of compensation to Mr. Obdeijn for his economic loss and emotional injury.

#### **Mr. Obdeijn's Answer**

22. The Secretary-General fails to articulate how the obligation to disclose reasons, a standard affirmed in the ILOAT jurisprudence and consonant with the principles that underlie EU Directive 199/70/EC and ILO Convention No. 158, has occasioned a violation of his rights. The UNDT is entitled to consider international laws and principles and decisions of other international administrative tribunals for guidance.

23. Neither the UNDT nor the Appeals Tribunal is bound by the jurisprudence of the former Administrative Tribunal. The Secretary-General's discontent with a departure from this jurisprudence or the outcome of a judgment is not a sufficient basis for an appeal.

24. The Administration's failure to disclose the reasons for its decision not to renew Mr. Obdeijn's FTA is a fundamental breach of the rule of law as it detracts from accountability, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

25. The UNDT correctly held that the Administration's refusal to provide reasons for the contested decision permitted it to draw an adverse inference. The requirement to disclose reasons for an administrative decision not to renew an FTA does not alter the rights and obligations that flow from the Letter of Appointment.

26. The UNDT did not overturn the contested decision on the basis of a legal expectancy or renewal. Rather, the UNDT overturned the decision based on its finding that the non-renewal decision was unlawful. Therefore, whether or not there was a legitimate expectancy of renewal is not relevant to the present case.

27. Compensation for moral damages in the amount of USD 8,000 is entirely reasonable. It is in line with the amount awarded by the UNDT and the Appeals Tribunal in several other cases. In fact, this amount falls closer to the lower end of the spectrum where moral damages have been awarded.

#### Considerations

28. The primary issue for consideration is the submission by the Secretary-General that the UNDT erred on a question of law and exceeded its competence in requiring the Administration to give reasons for its decision not to extend Mr. Obdeijn's FTA beyond its agreed date of expiry.

29. The Secretary-General relying on the jurisprudence of the former Administrative Tribunal refused to comply with the UNDT's order to disclose the reasons for the contested administrative decision not to renew Mr. Obdeijn's appointment.

30. The Appeals Tribunal recalls its decision in *Sanwidi*<sup>1</sup> that the jurisprudence of the former Administrative Tribunal, though of persuasive value, cannot be a binding precedent for the new Tribunals to follow.

31. The Appeals Tribunal notes that where the applicable Staff Regulations and Rules provide that an FTA does not carry an expectancy of renewal and is ipso facto extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal.

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<sup>1</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 37.

32. An administrative decision not to renew an FTA 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.

33. Like any other administrative decision, a decision not to renew an FTA can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.<sup>2</sup>

34. When a request for reasons is made as part of a formal review process, a failure by the Administration to respond would seriously hamper or preclude the staff member, the Management Evaluation Unit, and the Tribunals from reviewing administrative decisions affecting the contractual rights of staff members.

35. It must be highlighted that, in the absence of an obligation on the part of the Administration to state the reasons which led to its decision, especially where the Administration exercises a discretionary power which creates adverse effects on staff members, the Tribunals' ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals would be compromised.

36. Consequently, the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

37. It follows from the above that the Administration cannot legally refuse to state the reasons for a decision that creates adverse effects on the staff member, such as a decision not to renew an FTA, where the staff member requests it or, a fortiori, the Tribunal orders it.

38. Whereas, normally, a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives, the refusal to disclose the reasons for the contested decision shifts the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives.

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<sup>2</sup> *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para.45.

39. However, if the Administration does not comply with a Tribunal's order to disclose the reasons for an administrative decision as such, the Tribunal cannot automatically conclude that the decision was arbitrary. But it is entitled to draw an adverse inference from the refusal.

40. In view of the foregoing, considering that the Secretary-General refused, relying on the jurisprudence of the former Administrative Tribunal that we depart from, to comply with the UNDT's order to disclose the reasons for the contested administrative decision not to renew Mr. Obdeijn's appointment, and the fact that in doing so the Administration did not discharge the burden of proving that its decision was neither arbitrary nor tainted by improper motives, we affirm, on the principle, the UNDT's finding that this decision must be deemed unlawful.

41. The Secretary-General submits that the UNDT erred on a question of law and fact, and exceeded its competence in awarding compensation in the amount of USD 8,000 for emotional injury and six months' net base salary for economic loss in the present case.

42. Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages. The Tribunal may thus award compensation for actual pecuniary or economic loss, non-pecuniary damage, stress and moral injury.

43. The UNDT found in this case that Mr. Obdeijn suffered moral damage in the form of emotional distress as a result of the sustained lack of response created in these particular circumstances for which he was entitled to be compensated.

44. We affirm the award of USD 8,000 for moral injury.

45. However we are not satisfied with the basis for awarding damages for economic loss as Mr. Obdeijn was unable to establish any.<sup>3</sup> We accordingly set aside the award of six months' net base salary for economic loss.

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<sup>3</sup> Cf. *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095; *Sina v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-094.

**Judgment**

46. The appeal is allowed in part. The UNDT Judgment is affirmed, subject to variation of compensation.

Original and Authoritative Version: English

Done this 16<sup>th</sup> day of March 2012 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Courtial

Entered in the Register on this 7<sup>th</sup> day of May 2012 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar