



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2011/016  
UNDT/NBI/2011/023  
Judgment No.: UNDT/2013/023  
Date: 18 February 2013  
Original: English

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**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Jean-Pelé Fomété

IGBINEDION

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Nyaberi Omweri Samson, Ombeta and Associates  
Dominic Osoro, Osoro Advocates

**Counsel for Respondent:**

Saidou N'Dow, UN-Habitat  
Nana Kariuki, UN-Habitat

## **Introduction**

1. The Applicant was, at the time of his application, a P-3 Editor in the Governing Council Secretariat of the United Nations Human Settlements Programme (UN-Habitat). He held a Fixed-Term Appointment.
2. The Applicant is contesting the decision not to renew his Fixed-Term Appointment, which expired on 18 April 2011.

## **Facts and Procedural History**

3. The Applicant joined UN-Habitat in 2001, as a consultant, and was later on appointed on a Fixed-Term contract in January 2004.
4. On 1 December 2010, the Applicant's Fixed Term appointment, which was due to expire on the 19<sup>th</sup> of that month, was renewed for a further four months through to 18 April 2011.
5. On 21 February 2011, the Executive Director of UN-Habitat (ED), Dr. Joan Clos, sent a memorandum to Division Directors of UN-Habitat directing that

due to financial constraints on the UN-Habitat budget... it has been necessary to implement the following changes to recruitment policies and procedures, effective immediately: No recruitment or extension of contracts for temporary staff members.

6. On 18 March 2011, the Applicant was informed by Mr. Chris Mensah, Secretary to the Governing Council of UN-Habitat, that his contract would not be renewed beyond 18 April 2011. Mr. Mensah wrote in a further email to the Applicant on 31 March 2011 that his

understanding of the ED's memo which refers to the non-extension of all temporary (non-regularised) staff members is that the one year contract extension therefore only refers to regularized staff members who ordinarily had two year contract extensions.

7. On 9 April 2011, the Applicant requested management evaluation of the decision not to extend his appointment beyond 18 April 2011.

8. On 11 April 2011, the Applicant filed a motion for suspension of action with the United Nations Dispute Tribunal in Nairobi seeking a suspension of the same decision. The Applicant's motion was served on the Respondent on 12 April 2011 with a deadline for any submissions in response to be filed by 13 April 2011.

9. On 15 April 2011, on the basis of the written submissions of the Parties, the Tribunal suspended the decision not to renew the Applicant's contract (Order No. 030 NBI/2011). In so doing, the Tribunal held the view that an oral hearing of the matter was necessary and the Parties were ordered to attend court on 4 May 2011 at 1000hrs for a hearing of this matter. The Tribunal further ordered i) the Applicant to appear as a witness; and ii) the Respondent to make the author of the impugned decision, Mr. Antoine King, available as a witness.

10. On 27 April 2011, counsel for the Applicant moved for an adjournment of the hearing, and the hearing was then rescheduled for 9 May 2011 (Order No. 031NBI/2011).

11. On 6 May 2011, the Management Evaluation Unit (MEU) wrote to the Applicant indicating that his request for review may be time-barred and sought clarification from him. The Applicant responded to the MEU on 8 May 2011.

12. At the hearing on 9 May 2011, counsel for the Applicant informed the Tribunal that a substantive suit had also been filed with the Registry. Counsel sought directions from the court on whether the Tribunal wished to proceed with the hearing of the application for suspension of action or further suspend the impugned decision until the matter is heard and determined on the merits. The Tribunal decided that it will hear the application for suspension of action first.

13. The record shows that the Applicant's first attempt at filing the Application was on 8 May 2011, and counsel averred to this filing in court on 9 May 2011.

14. Following the hearing, the Parties were directed to file their respective closing submissions by 10 May 2011.

15. On 10 May 2011, the Applicant's request for Management Evaluation was rejected on grounds of receivability. The MEU determined that the Applicant's request for management evaluation was time-barred, and not receivable for the purposes of Management Evaluation, as the administrative decision in question was taken on 1 December 2010 when the Respondent renewed the Applicant's contract for only four months.

16. While the Applicant's attempt to have the matter internally and informally resolved were noted, the MEU cited existing UNDT jurisprudence to support the position that this does not absolve an applicant of the responsibility to adhere to the statutorily established time-limits.<sup>1</sup>

17. On 11 May 2011, the Respondent filed additional submissions moving the Tribunal to vacate the first Order of suspension issued on 15 April 2011 (Order No. 030 NBI/2011). The Respondent submitted that the MEU's finding on the issue of Receivability rendered the Applicant's motion for suspension of action time-barred and moot.

18. On 12 May 2011, based on the evidence heard on 9 May 2011, and the putative filing of the substantive application, the Tribunal issued Order 033 (NBI/2011), pursuant to Article 14 of the Rules of Procedure, suspending the impugned decision until the matter is heard and determined on the merits.

19. On 13 May 2011, the Respondent separated the Applicant from service and filed an appeal against Order No. 033 with the United Nations Appeals Tribunal (UNAT).

20. On 16 May 2011, in violation of Order 033, the Applicant was informed by email that his contract will not be extended beyond 13 May 2011. The email read as follows:

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<sup>1</sup> *Johnson* UNDT/2009/037; *Shetto* UNDT/2010/043; *Zewdu* UNDT/2011/043; *Costa* 2010-UNAT-036; *Sethia* 2010-UNAT-079.

This is in light of the decision of the MEU dated 10 May 2011, which supersedes the UNDT's Order of 12 May 2011 on your application for suspension of action. Please be advised that UN-HABITAT has directed Staff Administration, HRMS, UNON to proceed with the formalities to separate you from service based on the non-extension of your appointment.

21. The Tribunal finally received the substantive Application in its entirety on 16 May 2011.<sup>2</sup>

22. On 17 May 2011, the Applicant filed a motion for contempt proceedings to be instituted against the Respondent for violation of Order 033, which motion was served on the Respondent on the same day. The Respondent filed his Reply to the Motion for Contempt Proceedings on 23 May 2011. The Applicant filed his surreply on 1 June 2011.

23. The Respondent filed his Reply to the substantive application on 17 June 2011.

24. The United Nations Appeals Tribunal rendered its judgment on the Respondent's appeals on 8 July 2011.<sup>3</sup>

25. Hearings were heard in this case on 22 September, 28 September, 29 September and 8 November 2011.<sup>4</sup>

26. During the hearings, the Tribunal heard from the Applicant and, for the Respondent, from Mr. Chris Mensah, Ms. Kathleen Creavalle (Finance Management Officer, Programme Support Division, UN-Habitat), Ms. Deborah Ernst (Chief, Staff Administration Section, Human Resources Management Services, UNON), Mr. Antoine King (Director, Programme Support Division, UN-Habitat) and Ms. Hilda McHaffie (Human Resources Liaison Officer, Programme Support Division, UN-Habitat).

27. The Parties filed their closing submissions on the substantive application on 1 August 2012.

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<sup>2</sup> On 12 May 2011, the Registry advised counsel for the Applicant that it had not received the substantive Application and that the filing of 8 May 2011 was incomplete.

<sup>3</sup> 2011-UNAT-159.

<sup>4</sup> Order No. 112 (NBI/2011).

### **Applicant's submissions**

28. The Applicant submits that the decision not to renew his contract is unlawful, being contrary to General Assembly Resolution 63/250 on Human Resources Management reform, particularly the Transitional Measures and the rules governing fixed-term appointments.

29. The Applicant states that the former Executive Director of UN-Habitat, at the end of her term, promised a two-year extension for all staff members, which led him to believe that his contract would be renewed for two years.

30. The Applicant alleges that he “has been the target of persistent, well-coordinated acts of malice and unlawful actions (particularly whenever his contract is due for renewal).” He names Ms. Felista Ondari (Programme Management Officer, UN-Habitat), Mr. King, Dr. Clos, Ms. McHaffie and Mr. Mensah as the decision makers, who have committed “acts of malice.”

31. The Applicant further accuses the Administration of UN-Habitat of “being unable or unwilling to take unbiased action regarding his contract. Some of the animosity is based on misconception, some on racism, and some on egotistical behaviour.” He submits that Mr. Antoine King in particular has acted illegally and in abuse of his office and authority by acting in a biased and discriminatory manner towards him.

32. The Applicant also submits that before April 2011, he was not explicitly told that the reason for the non-renewal of his contract was linked to financial difficulties in UN-Habitat; rather that it was part of a strategy to “get rid” of him, which the Applicant alleges Mr. Mensah told in him.

33. The Applicant finally states that he has been treated in contravention of staff regulation 1.2(a), which states that staff members “shall not discriminate against any

individual or group of individuals or otherwise abuse the power and authority vested in them.”

34. The Applicant is seeking the extension of his Fixed-Term contract for one year, effective 19 April 2011. He has been on a roster since 2009, and also seeks intensified efforts to regularise his contract for 20 months. Alternatively, the Applicant seeks 20 months’ net base salary compensation. In either case, the Applicant finally asks that 20 months’ net base salary be imposed as “punitive damage” against the Respondent.

### **Respondent’s submissions**

35. Within his reply to the Applicant’s original application on contempt, filed on 15 June 2011, the Respondent submitted that the original application was not receivable for the same reason as that given by the MEU. The Applicant did not contest the disputed administrative decision (namely the four-month renewal of his contract) within the sixty day deadline, instead choosing only to write to the ED of UN-Habitat. The Respondent argues that the application is not receivable *ratione temporis* in accordance with staff rule 11.2(c) and article 8(3) of the Tribunal’s Statute.

36. The Respondent also submits that “there is nothing in the UN General Assembly Resolution [63/250] and the applicable Staff Rules which states that a fixed term appointment can only be extended for 1 year and that transitioned staff members should be granted a mandatory two year term of appointment.” The Respondent uses staff rule 4.13(a) to claim that the Applicant’s expectation of a two-year reappointment is unsubstantiated.

37. The Respondent adds that the non-renewal of the Applicant’s contract stems from “organisational need and acute financial constraints” faced by UN-Habitat and the Organisation as a whole, and that there was neither an improper motive nor an improper exercise of discretion behind the Applicant’s non-renewal.

38. With regard to the extraneous motives alleged by the Applicant, the Respondent submits that the Organisation acted in good faith throughout the Applicant’s tenure with UN-Habitat, seeking to employ him wherever and whenever posts became

available. The Respondent submitted that the Applicant had no reason to believe that his appointment would remain valid until his retirement, nor that he would be renewed for two years. Neither Fixed-Term nor temporary appointments carry any expectancy of renewal according to staff rules 4.12(c) and 4.13, therefore the Applicant had no such legitimate expectation, even given his positive e-PAS ratings.

39. Crucially, the Respondent submitted that the Applicant was on a Fixed-Term appointment “simply to comply with the transitional arrangements,” and that he was in reality at all times holding temporary posts. The decision was therefore predictable.

40. The Respondent states that neither the Organisation nor its officials used any discriminatory or abusive language towards the Applicant, nor was there a plan to “get rid” of him.

41. The Respondent finally argues that the remedies sought by the Applicant are unreasonable and unjustified, as his rights as a staff member have not been violated and there is no justification for a remedy which would require the Organisation to intensify efforts to regularise his contract.

### **Receivability**

42. The Tribunal must first deal with the issue of receivability, as raised by the Respondent in his Reply to the substantive Application.

43. This issue was first raised during the hearing on 9 May 2011, when counsel sought to challenge the receivability of the application for suspension of action on grounds of timeliness.

44. When asked to explain the timeliness of the challenge itself, counsel curiously informed the court that he “was in communication with the Management Evaluation Unit” on this matter and thought it appropriate for the MEU’s findings to be issued before he raised the objection formally.

45. The Respondent then filed written submissions on the same objection on 11 May 2011 essentially arguing that the MEU’s finding that the request for review was time-

barred renders the application for suspension of action before the court equally time-barred and therefore moot.

46. The Tribunal dealt with this issue exhaustively in Judgment UNDT/2011/110 in this very case. But the Respondent has chosen to raise the issue again, both in his Reply to the substantive Application and in his closing submission filed in July 2012.

47. On the issue of receivability, the Tribunal must determine two issues:

- a) Whether the Tribunal, based on the Respondent's reading of staff rule 11.2 (c) and Article 8 (3) of the Statute of the UNDT, is bound by a finding of receivability made by the Management Evaluation Unit; and
- b) Whether the Application is receivable.

*Is the Tribunal, based on the Respondent's reading of staff rule 11.2 (c) and Article 8(3) of the UNDT Statute, bound by a finding of receivability by the MEU?*

48. The crux of the Respondent's position is that the provision of Article 8 (3) which enjoins the Tribunal from "suspend[ing] or waive[ing] the deadlines for management evaluation" necessarily means that a finding of receivability by the MEU as to timelines and limits binds the court.

49. Staff rule 11.2 (a) and (c) require a staff member to first approach the Secretary-General for the resolution of a dispute within sixty (60) days of being notified of the impugned decision. That is the threshold of receivability before the Management Evaluation Unit.

50. The threshold for receivability before this Tribunal is governed by Articles 7 and 35 of the Rules of Procedure. Article 7 (1) provides [Emphasis added]:

Applications shall be submitted to the Dispute Tribunal through the Registrar within:

- (a) *90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;*

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

51. *Subject to Article 8.3 of the Statute*, Article 35 further affords the Tribunal (President, or judge or panel hearing a case) the authority to “shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require.”

52. What then, does Article 8 of the Statute say with regards to receivability of an application? Article 8(1) (d) (i) and (ii) essentially mirrors Article 7(1) of the Rules of Procedure. Article 8 (3) of the Statute provides

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

53. The second sentence of Article 8 (3) appears to form the thrust of the Respondent’s argument in respect of receivability. Citing the UNAT judgments in *Costa*, *Samardziz*, *Sethia*, and *Adjini*, the Respondent submits

[T]hat the Applicant’s substantive application is not receivable by the Dispute Tribunal as it did not comply with the time limits required by Staff Rule 111.2(c) [*sic*] and Article 8(3) of the Dispute Tribunal Statute and moreover since the MEU has determined that it is time-barred such a deadline should not be suspended or waived.

54. The MEU took the position that the impugned decision in the present matter was that of 1 December 2010, when the Applicant’s contract was extended for four (4) months. Counting sixty (60) days from that date, it decided that the request for management evaluation is time-barred.

55. The submission by the Respondent that this finding by the MEU binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word ‘deadline.’

56. Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It does not bind the Tribunal to findings of timelines made *by* management evaluation.

57. Put very simply, the Tribunal would be acting in excess of its jurisdiction if it allowed a litigant to seek management evaluation *after* the sixty (60) day deadline. It would also be exceeding its jurisdiction if it ordered the Management Evaluation Unit to consider a request by a staff member outside of the time-limits prescribed for such a request.

58. The MEU made a *finding* that the request before it was time-barred for the purposes of being reviewed by the Unit. To suggest that that finding is a ‘deadline’ for the purposes of litigation before the Tribunal is both misconceived and erroneous.

59. The UNDT and Management Evaluation Unit operate on different receivability thresholds. A litigant *must* seek management evaluation before looking to have his or her dispute litigated and, for the purposes of litigation, time begins to run either from receipt of a response from the MEU or the expiry of the time-limit set for such a response.

*Is the Application receivable?*

60. In *Igbinedion* UNDT/2011/110, the Tribunal ruled that the impugned decision was that of 18 March 2011, thus making the application for suspension of action, which was the subject of that Judgment receivable. The Tribunal reasoned its decision thus:

Following an email dated 29 November 2010 from the Applicant, Mr. Mensah confirmed that he had requested the extension of the contract. There is on record a document entitled Extension of Appointment in which Mr. Mensah recommended on 15 September 2010 an extension of the contract up to 18 December 2011.

According to the procedure explained by Mr. Antoine King, the recommendation then went to the Certifying Officer who on 28 September 2010 certified as follows: Certified Extension through date: 18/12/11 and Remarks: S/M (Staff Member) charged against vacant post for budgetary purposes only.

In an email dated 1 December 2010, two months after the Certifying Officer had processed the Extension of Appointment document, Mr. Antoine King wrote the following to Mr. Chris Mensah:

After our discussion, I am now confirming that we can extend his contract for another 4 months. This is to take him to just after the GC, (the Governing Council of UN-Habitat) i.e. 19/4/2011 and will help you out as you approach the GC. Please inform him urgently. This should also be in writing afterwards.

Much later, on 18 March 2011 Mr. Mensah informed the Applicant in an email that his contract will not be renewed after 18 April 2011. This is what Mr. Mensah wrote:

Dear Mr. Igbinedion,  
With reference to my discussion with you on 14 March 2011 and following the Memo to (sic) the Executive Director of UN Habitat to all Directors dated 21 February, this is to **confirm**, with pain that your post is among those that we will not be renewed (sic) when your contract expires on 18 April 2011. A formal letter to that effect will be coming from the relevant office. (Emphasis added).

In an email dated 31 March 2011 Mr. Mensah wrote to the Applicant and stated:

As you may recall from our discussions in December 2010 when the duration of your contract extension arose, you were informed that the organization was only able to extend your contract on an exceptional basis to cover the Governing Council by four months (up to 18 April 2011) with no expectation of further extension.

The issue that arises from the above is the date the Applicant was officially informed that his contract would not be renewed. The Respondent cites financial constraints as the principal reason for the decision not to renew his appointment. As at December 2010, when Mr. King decided on a four month extension, the issue of financial constraints had not been mooted. It is only on 21 February 2011, that the Executive Director brought the financial difficulties of the Organisation to the fore.

Further, if a final communication had been made to the Applicant in December about the decision of the administration on the fate of his contract for financial reasons why would there have been a need for a discussion with the Applicant by Mr. Chris Mensah as is mentioned in the email dated 18 March 2011?

The Tribunal finds that the Applicant found himself in a situation comprising a continuum of events, beginning with the decision to significantly shorten the recommended period of extension from twelve months to four, attempts to clarify the situation and the eventual decision to not renew that four month appointment.

The Tribunal finds that the impugned administrative decision is the decision which was communicated to the Applicant on 18 March 2011.

61. The Tribunal sees no reason to review that decision, and continues to hold that the impugned decision is that dated 18 March 2011.

62. Under the specific circumstances of the present Application, the Tribunal accepts that the Applicant attempted to file his brief on 8 May 2011, and that technical glitches led to it eventually reaching the Tribunal on 16 May 2011. As the MEU decision was issued on 11 May 2011, the Applicant technically had 90 days from that date within which to file his papers.

63. The Respondent's motion to have the Application dismissed on grounds of receivability is refused.

### **Deliberations**

64. The issue in this case is whether the non-renewal of the Applicant's appointment is lawful.

#### *Expectancy of renewal*

65. The Applicant argues that having been afforded a fixed-term appointment of twelve (12) months, he cannot be considered a temporary staff member and that the rules governing such an appointment are being erroneously applied to him. Citing General Assembly Resolution 63/250 and the Transitional Measures for staff

members as at 30 June 2009,<sup>5</sup> the Applicant submits that he falls under the category of staff governed by the following provision: “[...] one year of cumulative service in the last 2 years will be transitioned to a fixed-term appointment limited to the Department/Office and lever for up to two years.”

66. The Respondent contends that the Applicant has misunderstood the General Assembly Resolution and the Transitional Measures. Neither of these documents creates an expectancy that a staff member in the Applicant’s position will be provided with an extension for a maximum of two-years. This decision was informed by an organisational need and carried no expectancy of renewal.

67. The Applicant in this case found himself in the peculiar situation of being ‘in-between rules,’ as it were. As the human resources system morphed from the old into the new, on 30 June 2009, the Assistant Secretary-General for the Office of Human Resource Management (ASG/OHRM) approved the *Interim Guidelines For Implementation Of Transitional Measures For The United Nations Contractual Reform For Currently Serving Staff Members Other Than Those Serving In United Nations Peacekeeping And Political Missions* (Guidelines/Transitional Measures).

68. These *Guidelines* were issued pending the promulgation of the new Staff Rules to guide managers and human resource officers in matters pertaining to staff appointments and renewals.

69. The Applicant refers to these Transitional Measures arguing that it has been incorrectly applied to his situation, (the other being extraneous factors which will be discussed later in this judgment), and the Respondent counters this argument by submitting that the Applicant’s argument is legally incorrect.

70. The new Staff Rules came into effect on 1 January 2011, by way of ST/SGB/2011/1, which abolished ST/SGB/2010/06. The Guidelines/Transitional Measures explicitly states that “[e]ffective 1 July 2009, all staff members that were in

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<sup>5</sup> The Tribunal understands the cited ‘Transitional Measures’ to be the Interim Guidelines for the Implementation of Transitional Measures for the United Nations Contractual Reform for Currently Serving Staff Members Other Than Those Serving in United Nations Peacekeeping and Political Missions, 1 July 2009.

service as of 30 June 2009 will be governed under the new Staff Rules” and that the Guidelines “describe transitional arrangements for staff members serving ...as of 30 June 2009.”

71. The Administrative Instruction on Temporary Appointments was, at the time, ‘under preparation.’

72. The Tribunal finds that that legislative vacuum forms, in significant part, the genesis of the issues that plagued the Applicant’s appointment.

73. As at 14 December 2009, the Applicant was on a continuous fixed-term appointment for 13.5 months. He was then made to take a mandatory break in service, following which, on 18 December 2009, he was given a 12 month fixed-term appointment.

74. The Applicant was on a *fixed-term* appointment. Nothing in his conditions of service suggested to him that his was an appointment that was in some way ‘temporary.’ He served continuously for 13.5 months, with no break-in-service.

75. This was clearly *after* the issuance of the transitional measures and the putative (but yet to be issued) new rules governing staff selection and appointments.

76. The Respondent’s repeated renewal of his appointment and penultimate renewal without a break-in-service with the same conditions of service gave him a legitimate expectation of renewal.

#### *The Financial Situation*

77. In the Judgment rendered on the application for suspension of action, the Tribunal held

[...] At the end of the day, it is clear that at the time the recommendation for a year’s extension was made, there was funding available and that no reasonable explanation has been given to the Tribunal as to how this funding evaporated two weeks later. The Tribunal uses two weeks as a gauge to reflect the amount of time that elapsed between the certification of funding by the Certifying Officer and the decision of Mr. King not to approve the one-year extension.

In response to a question from the Bench, Mr. King stated that the approval by the Certifying Officer in September 2010 meant that there was funding for the post. When pressed upon to explain how the funding had deteriorated so dramatically in those two weeks, Mr. King tried to rely on the case of 23 other staff members who were axed or on the point of being axed. He was at pains to give a rational and coherent explanation.

The Tribunal considers that the issue of UN-Habitat's finances became live when the Inter-Office Memorandum of February 2011, signed by the Executive Director, was sent out. The Tribunal cannot but state in no uncertain terms that the financial crunch was used as a colourable device to get rid of the Applicant. This is made more compelling by the fact that the Respondent did not rebut any of the allegations of countervailing circumstances which the Applicant argued motivated the impugned decision.

78. On the basis of those findings, the Tribunal held that the decision not to renew the Applicant's appointment was *prima facie* unlawful.

79. Having heard the testimony of Ms. Creavalle, the Finance Management Officer at UN-Habitat, the Tribunal is persuaded that there was neither the money nor the post for the continued employment of the Applicant with the Organisation.

80. The certification she provided as to the availability of funds did not change the fact that the Applicant's entire employment at UN-Habitat saw him being placed against one post or another, none of which he competed or was properly recruited for. The witness told the Court

This report shows all of the posts that Mr. Igbinedion has been charged through throughout his time at UN Habitat. Back from 2004, he was charged to a post in the deputy director's office. Then in 2005, he was charged to another post in the human settlements financing division. Another part of 2005, he was charged to a post in another division, the shelter and sustainable human settlements division. [...]

When I certified in September 2010 based on the recommendations of the supervisor for a year, I had envisioned that that post was going to be vacant for a long time. But when it went to the director's office, he realised that it was not going to be so long before that post was filled. So he actually sent it back to me and asked me to come up with a solution. [...]

Responding to a question from the Bench on whether it was the availability of posts or funding that led to the non-renewal of the Applicant, the witness testified:

A combination of both. It came back from the director's office to me because the director realised that the post was going to be filled sooner than I expected. And then he asked me to find another post, but at the same time we knew that the Executive Director had arrived and we were thinking about he was instructing us to start looking at posts to earmark for freezing to save funds.

So at the same time when he said to find a solution, he said, "Well, you have to be aware of the future operation of Habitat, and you have to only, you know, be aware of that." So we his advice was not to extend well, yeah. We had to envision at that time that the Executive Director was thinking about freezing many posts that were currently vacant.

So even if we wanted to extend, we had to be very cautious about how long we were going to extend and why we were extending.

81. The witness testified that since July 2009, the Applicant's appointment was charged against four (4) different posts in one extension year, and that at the time of the Applicant's separation there were really no posts at his level that he could have been properly placed again.

82. The Tribunal accepts from the testimony of Ms. Creavalle and Mr. King that the Organisation was attempting to streamline its post occupancy so that it could discontinue the practice of irregular appointments.

83. To that end, the Tribunal finds that the Organisation found itself in a situation that was both untenable and unsustainable from a human resources perspective, largely as a result of its own doing.

84. The practice of continuously renewing the appointments of those who have not been properly recruited by placing them, for budgetary purposes, against posts which do not correspond to the functions they performed signifies not only poor management practice but also leads to the situation the Applicant found himself in.

85. That is to say, the Applicant was placed in the unhappy situation of being led to believe that the fixed-term appointment he was on was secure.

86. The Respondent caused this misunderstanding with its repeated renewal of his appointment and his failure to change the Applicant's *type* of appointment even after the advent of the Guidelines from the Office of Human Resources Management. The

Respondent's submission that these repeated renewals were 'favours' or a show of goodwill is both ill thought-out and of poor judgment.

87. The Respondent's actions reflect an arbitrary and unseemly situation in which the Rules of the Organisation were flouted and with that, its resources misused.

## **CONCLUSION**

88. The Tribunal finds that the non-renewal of the Applicant's appointment was properly based on efforts by the Organisation to streamline its practices in line with the funding situation it faced.

89. The Tribunal also finds that the Respondent's actions in respect of the Applicant's appointment created an expectancy of renewal because of the legislative vacuum at the time and the absence of clear rules governing temporary appointment.

90. For this, the Tribunal awards the Applicant compensation in the amount of two (2) months' net-base salary.

91. The compensation awarded to the Applicant shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of this judgment at the current US Prime rate until payment. 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.

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*(Signed)*

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Judge Vinod Boolell

Dated this 18<sup>th</sup> day of February 2013

Entered in the Register on this 18<sup>th</sup> day of February 2013

*(Signed)*

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Jean-Pelé Fomété, Registrar, Nairobi