



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/051

Judgment No.: UNDT/2019/137

Date: 9 September 2019

Original: English

**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ROBINSON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Michael Brazao, OSLA

**Counsel for the Respondent:**

Amboko Wameyo, ECA

## **Introduction**

1. The Applicant is a former Head of the Training Division at the African Institute for Economic Development and Planning (IDEP), at the P-4 level, within the Economic Commission for Africa (ECA).
2. On 2 July 2016, he filed an application with the United Nations Dispute Tribunal (UNDT) contesting the decision not to renew his fixed-term appointment beyond 31 December 2015.
3. The Respondent filed a reply to the application on 22 and 23 August 2016, challenging receivability and the merits of the application.

## **Procedural history**

4. Set out below is a brief procedural history of this matter.
  - a. On 23 August 2016, parallel with the filing of the Respondent's reply to the application, the Under-Secretary-General for Management replied to the Applicant's request for management evaluation. In light of the ECA refusal to supply reasons for the impugned decision, he recommended the payment of financial compensation to the Applicant for the non-renewal of appointment and for the failure to provide reasons in the amount of one year's net base salary. Additional USD8,000 was offered for moral damages.
  - b. On 16 September 2016, the Tribunal issued Order No. 434 (NBI/2016) inviting the Applicant to provide his comments on the receivability of the application by 21 September 2016. Following the Tribunal's grant of the Applicant's motion requesting for an extension of time, he filed the said submissions on 28 September 2016.
  - c. On 4 November 2016, the Respondent filed additional submissions on receivability and the Applicant filed observations thereon on 11 and 14

November 2016.

d. Two case management discussions took place on 4 and 30 November 2016. The Applicant maintained his position and refused to accept the remedy offered claiming the prevailing importance of moral satisfaction. Counsel for the Respondent, on her part, declared that she did not adhere to the position taken by the Under-Secretary-General for Management in the management evaluation and questioned the receivability of the application. Based on this discussion, given that the compensation offered by the Management Evaluation Unit (MEU) was said to still be a valid option for informal settlement, the Applicant was repeatedly invited to consider withdrawing his application. This he refused to do.

e. On 7 November 2016, the Tribunal issued Order No. 477 (NBI/2016) inviting the parties to make submissions on the merits, regarding inter alia, whether the post held by the Applicant has been abolished and whether the non-extension was related to performance. The parties filed their responses between 21 and 29 November 2016. The Respondent denied either of the circumstances as reasons for non-extension

f. On 20 April 2017, in response to insistence by the Counsel for the Respondent to make a finding on irreceivability, the Tribunal issued Order No. 086 (NBI/2017) by which the parties were informed that the Tribunal had decided to continue the proceedings on the assumption that the application was receivable. The Tribunal also invited the parties to submit evidence on the existence, or lack, of ulterior motives for the non-renewal of the Applicant's appointment and a list of witnesses for the hearing of the case which was scheduled to take place from 11 May 2017. The parties filed responses to this Order on 27 and 28 April 2017.

g. The Tribunal commenced hearing the case on 11 May 2017 and subsequently adjourned because of the need to accommodate the fact that no

jurist representing the Respondent as Counsel was available to attend Court on several occasions. Among other, it entailed the need to re-hear witnesses testifying in French and adjourn until French interpretation required by Counsel for the Respondent would be available. The hearing of the case continued from 21-22 November 2017.

5. During the hearings, oral testimony was received from:
  - a. The Applicant;
  - b. Karima Bounemra – IDEP Director;
  - c. Chekh Alima Toure – Senior Finance Assistant/IDEP;
  - d. Desire Sibanda – former member of the Governing Council/IDEP;
  - e. Giovannie Biha – Deputy Executive Secretary of ECA for Knowledge Delivery;
  - f. Tharcisse Ntilivamunda – former Senior Training Assistant at/IDEP;
  - g. Ron Kamwendo – Head of Administration, Finance and Partnerships/IDEP;
  - h. Jit Gurung - former ECA Chief of Human Resources;
  - i. Adebayo Olukoshi - former Director/IDEP; and
  - j. Carlos Haddad – Director, Division of Administration (DoA)/ECA.

6. After the conclusion of the hearing, the Tribunal directed the parties to file closing submissions by 15 March 2018. This deadline was subsequently extended several times due to the unavailability of the Counsel for the Applicant and Counsel for the Respondent for a variety of reasons. Eventually, the parties filed their closing submissions on 26 July 2018 (the Respondent) and on 16 August 2018 (the Applicant).

## **Receivability**

### *Facts relevant to receivability*

7. The Applicant held fixed-term appointments with ECA since August 2012, the latest expiring on 31 December 2015.

8. On 3 December 2015, the Applicant sent an email to Human Resources/ECA requesting information as to the anticipated renewal of his appointment.<sup>1</sup> He received no reply, prior to his departure on leave which had been previously approved.

9. On 11 January 2016, upon return from leave, the Applicant became aware of a memorandum from the Director/DoA, dated 4 January 2016 entitled “Separation upon Expiration of your Fixed-Term Appointment”.<sup>2</sup> In this memorandum the Director/DoA, informed the Applicant of the necessary clearance processes following the expiry of his appointment on 31 December 2015 and noted that the Applicant’s separation from service was effective 1 January 2016.

10. On 11 January 2016, the Applicant requested reasons for the non-renewal of his appointment, which were not provided.<sup>3</sup>

11. By email dated 4 March 2016, the Applicant requested management evaluation of the decision not to renew his fixed-term appointment beyond its expiration date of 31 December 2015.

12. By letter dated 8 March 2016, the Officer-in-Charge of the Management Evaluation Unit (MEU) acknowledged receipt of the Applicant’s request, specifying that it had been received at that office on 7 March 2016 and stating that the 45-day period of evaluation of the administrative decision would begin to run from the date the request was received at that office.

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<sup>1</sup> Application, annex 10.

<sup>2</sup> Application, annex 11.

<sup>3</sup> Application, annexes 12 and 13.

13. On 20 July 2016, this being exactly the last day of the 45-day period from the deadline to complete the management evaluation as determined by MEU, 7 March 2016, the Applicant filed an application with the Tribunal.

14. On 22 August 2016, the Respondent replied questioning the receivability of the application and on 23 August 2016 replied on the merits.

15. On 23 August 2016, the Under-Secretary-General for Management replied to the Applicant's request for management evaluation.

*Respondent's submissions on receivability*

16. The Respondent's contentions may be summarized as follows:

a. There is no distinct non-renewal administrative decision capable of being challenged. The Applicant's appointment expired on 31 December 2015 without prior notice. The Applicant's employment came to an end by effluxion of time in accordance with its terms. Communication to the Applicant on 4 January 2016 was afterwards and it was in connection with the separation clearance process. It was not an administrative decision informing the Applicant of the expiry of his appointment or non-renewal but, rather, a memo informing him of steps to take to ensure his separation from the Organization.

b. The application is belated. A request for management evaluation had been sent by the Counsel for the Applicant by email on 4 March 2016, thus activating the 45-day deadline. In the absence of the timely management evaluation, therefore, the Applicant had until 17 July 2016 to file his application before the Tribunal. His application filed on 20 July 2016 is thus time-barred. The Applicant should not have relied on the date of acknowledgement of receipt of his management evaluation request, i.e., 7 March 2016, to calculate the timeline to file his case as this is an erroneous interpretation of the rules and jurisprudence.

c. In the event of any ambiguity or contradiction between the UNDT Statute and the Staff Rules, the UNDT Statute takes precedence over the Staff Rules. The UNDT Statute calculates the deadline from the moment of “submission” whereas staff rule 11.2(d) calculates the running of the deadline from the “receipt” of the request for management evaluation. This is a contradiction in which the provision of the UNDT Statute must prevail.

*Applicant’s submissions on receivability*

17. The Applicant’s contentions are as follows:

a. The Respondent did not bring up the receivability issue in his initial filing and, therefore, is estopped from doing so now;

b. A decision to separate a staff member upon expiration of a fixed-term appointment inherently involves a decision not to renew the appointment. The Administration must provide reasons for such non-renewal;

c. Whereas the request for management evaluation was sent on 4 March 2016, it was received by the MEU only on 7 March 2016. The time limit for conducting management evaluation should be calculated from the date on which the request was “present[ed]” to the MEU. In the rules controlling the calculation of deadlines, there is no distinction between “submission” and “receipt” for purposes of filing a document before an administrative body of the United Nations. The word “submission” used in the UNDT Statute has a more general meaning than “receipt” used in the Staff Rules, and since both terms apply to the same subject matter, the doctrine of *lex specialis* should apply;

d. In the alternative, the Applicant argues that the late filing of the application was directly caused by the Applicant’s detrimental reliance on an official communication from the MEU acknowledging receipt of his request for management evaluation on 7 March 2016, as such, exceptional

circumstances exist to warrant a waiver of the deadline for the filing of the application;

e. In the event of an ambiguity in the terms of staff rule 11.2(2) and article 8.1(d)(i)(b) of the UNDT Statute, the doctrine of *contra proferentem* should be applied and the interpretation should be construed in favour of the Applicant.

### **Considerations on receivability**

18. The Respondent is not estopped from raising arguments of receivability. As repeatedly held by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*. This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.<sup>4</sup> Accordingly, the question of receivability will be considered in the paragraphs below.

*Whether there is a distinct non-renewal administrative decision capable of being challenged before the UNDT*

19. It is well established in UNAT jurisprudence that, whereas the applicable Staff Regulations and Rules provide that a fixed-term appointment 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.<sup>5</sup> A non-renewal decision can be challenged in case the Administration does not act fairly, justly or transparently or if the decision is motivated by bias, prejudice or improper motive.

20. In the case at hand, it is undisputed that the Administration, did not afford the Applicant written notice so he learnt about the non-renewal only upon the expiration of his fixed-term appointment. This practice, however, does not disable the right to

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<sup>4</sup> See e.g., *Christensen* 2013-UNAT-335; *Gehr* 2013-UNAT-313; *O'Neill* 2011-UNAT-182.

<sup>5</sup> *He* 2018-UNAT-825; *Badawi* 2012-UNAT-261; *Obdeijn* 2012-UNAT-201.



seek review of the non-renewal decision by the UNDT. It is well settled in UNAT jurisprudence that the Tribunal's cognizance extends over express as well as implied administrative decisions<sup>6</sup>; the lack of an express decision only poses the question of dating. In this respect, as held in *Rosana*, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine."<sup>7</sup> The Tribunal considers that such an objective factual element as to the non-renewal of the Applicant's appointment consists in the memorandum instructing the Applicant to commence his separation procedure, dated 4 January and delivered to the Applicant on 11 January 2016. Recalling that the Applicant sought information about the extension of his appointment at the beginning of December and received no response, noting further that it happened at ECA that letters of appointment were issued with a retroactive effect and personnel actions were taken literally last minute<sup>8</sup>, the Tribunal has no reasons to believe that the implicit decision was issued at an earlier time. There is, in any event, no dispute that there was no earlier communication to the Applicant.

21. The Tribunal wishes to recall that the Administration has a general duty to act fairly, justly and transparently in its dealings with its staff.<sup>9</sup> Notwithstanding that the fixed-term appointments end by the effluxion of time, a good administrative practice requires that relevant notice be given sufficiently in advance of the expiry of the appointment.<sup>10</sup> Such notice, apart from the fact that it informs against eventual expectations for an extension that a staff member might harbour, also facilitates a timely and cost-effective separation. Parting with the articulated good practice, especially if aimed at obscuring the fact of issuance of a negative decision, should be discouraged.

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<sup>6</sup> *Survo* 2016-UNAT-644; *Awan* 2015-UNAT-588; *Chahrour* 2014-UNAT-406; *Rosana* 2012-UNAT-273.

<sup>7</sup> *Rosana* 2012-UNAT-273, para. 25.

<sup>8</sup> Reply, annexes 1 and 3.

<sup>9</sup> *Obdeijn* 2012-UNAT-201, para. 33; *Ahmed* 2011-UNAT-153, para. 45.

<sup>10</sup> See Human Resources online handbook of the United Nations Secretariat - <https://hr.un.org/handbook>.

*Whether the application is time-barred*

22. The UNDT Statute provides in article 8.1(i) that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation, if required; and the application is filed within the following deadlines:

- a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or
- b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days **after the submission of the decision** to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices (emphasis added).

23. The UNDT Statute does not define which date is denoted by the term "submission" - the date of sending or the date of receipt. Contrary to the Respondent's attempt at linguistic parsing, the term is not unequivocal. In accordance with the ordinary meaning the term "submission" will mean an effective provision of a filing, that is, the date where the addressee is capable of acting upon the submission. Thus, the running of a deadline to undertake an action which is dependent on the service of a document usually commences on the date of receipt. In public law relations, however, in order to facilitate access to the proceedings before a court or an administrative organ, the effect of submission may also be attributed to the date of sending, which is the date that the sender is able to determine with certainty and proof. Filing by electronic means causes that the date of sending and receipt will usually be the same. Still, there are two reasons why differentiating the two dates for the determination of procedural consequences is warranted. First, it cannot be excluded that, as is the case here, a disparity occurs and gives rise to a dispute about timeliness. Second, software that individual litigants have in their disposal is not necessarily equipped with a "return receipt" function, which would reliably inform of the receipt date by the MEU. Accordingly, a reasonable reading of article 8.1(i) of the UNDT Statute in respect of the term "submission" is that a request is deemed

submitted once the applicant has sent it to the MEU. On the other hand, from the MEU side, the request is submitted once it reached the MEU, hence it could act upon it.

24. The same idea, establishing different moments that count as “submission”, is expressed in staff rule 11.2, which provides in relevant part that:

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless **it is sent within 60 calendar** days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

(d)The Secretary-General’s response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within **30 calendar days of receipt** of the request for management evaluation if the staff member is stationed in New York, and within **45 calendar days of receipt** of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General (emphasis added).

25. The question of how to calculate the deadline for filing the application in the situation where no management evaluation was obtained is not a matter of course and must be determined by a positive rule. This matter is regulated by staff rule 11.4 which provides:

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal **within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d),** whichever is earlier (emphasis added).

26. As results from the Staff Rules cited above, in the case of lack of response from the MEU, the time to file an application is to be calculated from the date of the receipt of the request by MEU. Of note is, however, that, as pointed out by the

Respondent, effective implementation of staff rule 11.4(a) requires acknowledgement of the receipt of the request. The Tribunal notes that this is indeed a consistent MEU practice.

27. The Tribunal finds no contradiction of staff rule 11.4(a) with the UNDT Statute. Rather, the provision of staff rule 11.4(a), as read together with staff rule 11.2(d), remains in the relation of *lex specialis* to article 8.1(i) of the UNDT Statute, supplying the needed specificity.

28. The Tribunal moreover finds that the jurisprudence relied upon by the Respondent is not relevant for the specific issue at hand. As concerns the cases *Abu Hawaila*<sup>11</sup> and *Gehr*<sup>12</sup>, they generally assert the supremacy of the UNDT Statute over Staff Rules in case of inconsistency, a principle which is not disputed, only irrelevant for the issue at hand. Whereas the case of *Couquet*<sup>13</sup> is entirely irrelevant. On the other hand, the jurisprudence cited by the Applicant, *Rees*<sup>14</sup>, *Fayek*<sup>15</sup> and *Modeste*<sup>16</sup>, demonstrates that the Tribunal consistently accepted the date of the receipt as per staff rule 11.2(d) as the date controlling the calculation of the time-line for the filing of the application.

29. The Tribunal is mindful of UNAT's interpretation of article 8.1(i) of the UNDT Statute originating from *Neault*<sup>17</sup> and its related finding that staff rule 11.4(a) contradicts it in part. It notes, nevertheless, that the contradiction concerns only the phrase "whichever is earlier", which UNAT found to impermissibly qualify the 90-day deadline contained in art. 8(1)(i) of the Statute. This holding does not extend over the entirety of the said staff rule and is not relevant for the issue at hand. Moreover, even if staff rule 11.4(a), in connection with staff rule 11.2(d), contradicted the UNDT Statute, which it does not, the Tribunal considers that it is not for the

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<sup>11</sup> 2011-UNAT-118.

<sup>12</sup> 2013-UNAT-293.

<sup>13</sup> 2015-UNAT-574.

<sup>14</sup> UNDT/2009/007.

<sup>15</sup> UNDT/2013/124.

<sup>16</sup> UNDT/2011/073.

<sup>17</sup> 2013-UNAT-345.

Respondent – the drafter and promulgator of the Staff Rules – to invoke such a contradiction against an applicant who would *bonae fidei* rely on an explicit staff rule.

30. The Tribunal, moreover, agrees with the Applicant in that reliance on erroneous information from the MEU about the calculation of time would automatically justify restoration of the statutory time limit. As results from UNAT jurisprudence, this would be applicable even where the Applicant would have been represented by counsel.<sup>18</sup> In the case at hand, however, the MEU's instruction was not erroneous.

31. In conclusion, the Tribunal holds that the date of “receipt” of the request for management evaluation as indicated by MEU, which in the present case is 7 March 2016, is the starting point to calculate the 45 calendar days for the request for management evaluation and the following 90 calendar days for the filing of an application. Therefore, the Applicant's application filed on 20 July 2016 is receivable *ratione temporis*.

## **Merits**

### **Facts**

#### *Background*

32. The Applicant commenced his employment with the United Nations on 17 August 2012 as an ECA Regional Advisor, working with IDEP as Head of the Training Division at the P-4 level<sup>19</sup>, on a two-year appointment expiring on 16 August 2014<sup>20</sup>.

33. IDEP is a subsidiary organ of ECA. It is managed by a Director, who at the

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<sup>18</sup> *Faraj* 2013-UNAT-331; see also *Dieng* 2019-UNAT-941, paras. 39-40. In the latter case the Applicant had OSLA counsel retained only after receiving erroneous communication about the calculation of the timeline from MEU.

<sup>19</sup> Application, annex 1 performance evaluation reports.

<sup>20</sup> Reply, annex 1.

period 2012-2014 was Prof. Olukoshi. IDEP's prime oversight and decision-making body is a Governing Council (at times, in documents and the testimony referred to as "Board of Directors"). The Chair of the Governing Council is the Executive Secretary of the ECA and its remaining members are African Ministers.<sup>21</sup> IDEP is funded from three sources: Member States assessed contributions, extra-budgetary resources and United Nations General Assembly allotment (at times, in documents and the testimony referred to as "annual grant"), made available through ECA.<sup>22</sup>

34. In the course of 2012, Mr. Carlos Lopes was appointed as Executive Secretary/ECA. One of the measures that Mr. Lopes announced was to abolish the 18 positions of regional adviser under the Regular Program of Technical Cooperation (RPTC) resources and to reconfigure the organization according to his new priorities.<sup>23</sup> In execution of this plan, on 14 December 2012, Mr. Lopes informed the Applicant that the post of Regional Adviser which he was encumbering would be abolished as of 1 March 2013. The Applicant was further informed that his appointment as Head of the Training Unit/IDEP would be accommodated using a post funded from extra budgetary resources.<sup>24</sup>

35. After the abolition of his Regional Advisor post, the Applicant was offered a one-month appointment from August to September 2014, then another one for three and a half months from September to December 2014 and later for one year from January to December 2015. In this last extension, the Applicant's title was changed from Acting Head/IDEP<sup>25</sup> to Head of Training Division/IDEP.<sup>26</sup>

36. Ever since the abolishment of regional advisers, the Applicant's salary, just as the salary of other IDEP professional category personnel, was paid from the core

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<sup>21</sup> Application, annex 24(a).

<sup>22</sup> Ron Kamwendo's testimony – Transcript dated 4 July 2017, pages 8-10; annex 20 to the application - IDEP 2015 Budget Position.

<sup>23</sup> Professor Olukoshi's testimony – Transcript dated 5 July 2017, page 50; facts known to the Tribunal *ex officio* from cases of *Toure* UNDT/2015/081 and *Oguntola* UNDT/2017/079.

<sup>24</sup> Reply, annex 2 and Professor Olukoshi's testimony – Transcript dated 5 July 2017, pages 50-51.

<sup>25</sup> Reply, annexes 3(a) and 4, application, para. 7. (On 30 April 2015, the Applicant was appointed as Officer-in-Charge (OIC) of IDEP, following the departure of IDEP's Director).

<sup>26</sup> Reply, annex 4 and para. 5 of the application.

budget of the institute, supplied by the United Nations General Assembly annual grant.<sup>27</sup> While there was no dispute that the Applicant was accommodated against budgeted funds earmarked for the Head of Training post, the Tribunal heard different accounts as to whether the post was budgeted at the P-5 or P-4 level, with the annual grant being apparently obligated at the P-5 level but disbursed at the P-4 level<sup>28</sup> There is, however, no dispute that the post of the Head of Training originally held at the P-5 level became vacant in 2009 and, subsequently, in 2012 in practical terms, it was designated as P-4.<sup>29</sup> Further, whereas there were efforts to fill it as a P-5 position in 2013<sup>30</sup>, and the Applicant applied for the vacancy, this recruitment was never brought to fruition.<sup>31</sup>

37. On 23 September 2014, Professor Olukoshi addressed a memorandum to Amareswara Rao, Chief of HR/ECA requesting for the Applicant to be confirmed as the P-4 head of the IDEP Training Section and that the post be covered under the United Nations annual grant to IDEP.<sup>32</sup> Subsequently, in 2015, he was involved in the preparation of the sub-programme 8 for the 2016-2017 biennium with Mr. Kamwendo and the Applicant. The sub-programme corresponds with training for economic policy-makers and development planners, which IDEP was required to submit within the overall programme of work of the ECA, which was then submitted to the United Nations Secretariat in New York for processing by the relevant committees and bodies. At the time of Professor Olukoshi's departure from IDEP, all was set for the usual process of approval of the sub-programme. According to the biennium proposal, at the professional level there was a position for a D-1, two P-4s,

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<sup>27</sup> Ron Kamwendo's testimony – Transcript dated 4 July 2017, page 16; Applicant's annexes 20 and 28; Professor Olukoshi's testimony – Transcript dated 5 July 2017, page 53.

<sup>28</sup> Respondent's submission pursuant to Order No. 086 (NBI/2017); Professor Olukoshi's testimony, transcript dated 5 July 2017, pages 54 and 60; Ron Kamwendo's testimony – Transcript dated 4 July 2017, pages 9, 16 and 20-22; and annex 20 to the application- IDEP 2015 Budget Position.

<sup>29</sup> Applicant's annex 27, enclosure 2; Ron Kamwendo's testimony – Transcript dated 4 July 2017, page 12; Carlos Haddad's testimony – Transcript dated 22 November 2017, page 6.

<sup>30</sup> Respondent's annex 20.

<sup>31</sup> Paragraphs 4(c), (d) and (e) of the Respondent's closing submissions of 26 July 2018; Ron Kamwendo's testimony – Transcript dated 4 July 2017, page 16; Carlos Haddad's testimony – Transcript dated 22 November 2017 at page 6; Professor Olukoshi's testimony, transcript dated 5 July 2017, pages 61 – 63; Applicant's testimony, transcript dated 11 May 2017, page 12.

<sup>32</sup> Respondent's Annex 19.

a P-3 and one LL. The Applicant was expected to occupy one of the P-4 posts, whereas the vacant P-5 post was to be discontinued.<sup>33</sup>

38. On 30 April 2015, following the departure of Professor Olukoshi, the Applicant was appointed as Officer-in-Charge (OiC) of IDEP.<sup>34</sup> The Tribunal did not manage to receive reliable information as to whether the staffing of IDEP proposed by Prof. Olukoshi has been implemented to the effect of the Applicant's post being accordingly regularized.

39. However, at all relevant times, IDEP was in good financial standing. The annual United Nations grant to IDEP had increased from USD190,000 a biennium to USD1,300,000; IDEP had grants from the European Union; from the Ford Foundation; and from the Open Society Initiative for West Africa. Several member states had cleared their accumulated arrears.<sup>35</sup> Notwithstanding fluctuations in Member States' contributions to ECA and the extra-budgetary resources in the period 2011-2014<sup>36</sup>, funding for regular budget posts at IDEP remained unaffected.<sup>37</sup> The United Nations General Assembly allotment was being made fully available to IDEP in the sum of USD1,300,000 annually.<sup>38</sup> In 2015 in particular, the financial results of ECA were encouraging in that "*success [was] reported on receipts from member states beyond the total assessed contributions.*"<sup>39</sup> Moreover, extra-budgetary resources were supplied to IDEP by ECA.<sup>40</sup>

#### *Events leading to a clash between the Applicant and the ECA Executive Secretary*

40. During 2015, ECA's Executive Secretary, Mr. Lopes, pursued a reform of IDEP. On 8 June 2015, he visited Dakar, Senegal and held a town hall meeting with

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<sup>33</sup> Professor Olukoshi's testimony – Transcript dated 5 July 2017, pages 57 – 60; Applicant's annexes 19, 20 and 22.

<sup>34</sup> Application, para. 7.

<sup>35</sup> Professor Olukoshi's testimony, transcript dated 5 July 2017, page 72; Mr. Kamwendo's testimony, transcript dated 4 July 2017, pages 8-9; annex 20 to the application- IDEP 2015 Budget Position.

<sup>36</sup> Applicant's annex 18.

<sup>37</sup> Mr. Kamwendo's testimony, transcript dated 4 July 2017, page 9.

<sup>38</sup> Respondent's annex 12: Report of the 54<sup>th</sup> meeting of IDEP Governing Council, annex I.

<sup>39</sup> Respondent's annex 8, IDEP Management report for 2014-2015, para. 175.

<sup>40</sup> Respondent's annex 12: Report of the 54<sup>th</sup> meeting of IDEP Governing Council, annex I.



IDEP staff during which he addressed, *inter alia*, the appointment of the new IDEP Director for which he had selected a candidate, further integration of IDEP into ECA, and IDEP's finances.<sup>41</sup>

41. On 19 June 2015, IDEP's Staff Association sent a memorandum to the Executive Secretary, in his capacity as Chair of the IDEP Governing Council, copying all members of the Governing Council, where they highlighted concerns regarding the Executive Secretary's handling of the matters addressed during the town hall meeting of 8 June 2015.<sup>42</sup>

42. Following receipt of the Staff Association's memorandum, on 19 June 2015, the Executive Secretary wrote an email to Ms. Biha, Deputy Executive Secretary of ECA for Knowledge Delivery, copying the Applicant. In this email, the Executive Secretary stated that the Staff Association had put words in his mouth and that it was "disrespecting his authority". The Executive Secretary further stated that he expected the Applicant to "react urgently" to the Staff Association's memo.<sup>43</sup>

43. On 21 June 2015, Ms. Biha responded to the Executive Secretary, copying the Applicant, stating that the Applicant would soon be in Addis Ababa (where the DES/Knowledge Delivery is located) and that she would then discuss the handling of the matter with the Applicant.<sup>44</sup>

44. The Applicant travelled to Addis Ababa to attend a workshop from 22 to 24 June 2015. While there, he had several meetings with Ms. Biha. According to the Applicant, during these discussions he promised to send an email to clarify certain misunderstandings in relation to the town hall meeting of 8 June 2015. Upon his return to Dakar, on 26 June 2015, the Applicant had several meetings with the Staff Association to better understand their concerns so that he could provide a meaningful

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<sup>41</sup> Application, annex 2.

<sup>42</sup> Ibid.

<sup>43</sup> Application, annex 3.

<sup>44</sup> Ibid.

response to its memorandum of 16 June 2015.<sup>45</sup>

45. On 28 June 2015, Mr. Lopes sent an email to the Applicant stating the following:

As you are aware the Staff representative sent me an inappropriate email, copied to Board members. The same day I asked you to immediately react to the message which I consider a breach of authority and unacceptable language. Since then you have been silent. Giovane spoke with you and no reaction still. I am giving you until tomorrow to deal with this serious issue. If not I will handle it in a way that will certainly desauthorize [sic] you. Thanks, C.<sup>46</sup>

46. On 29 June 2015, the Applicant responded to Mr. Lopes, indicating that he had in fact been actively attending to the email from the Staff Association and explaining what steps he had taken thus far, including speaking with Ms. Biha and the Staff Association in preparation for drafting the Executive Secretary's requested reply.<sup>47</sup>

47. On 2 July 2015, the Applicant sent an email to Mr. Lopes where he explained his assessment of the meeting held on 8 June 2015 and the content of the memorandum dated 16 June 2015 from the IDEP's Staff Association. On the question relating to the process for the appointment of the new IDEP Director, he stated that he had informed IDEP staff that the appointment of the new IDEP Director would be done in accordance with the framework for selection and consultation with members of the Governing Council envisaged by the IDEP statute. He further stated that the IDEP Staff Association in a subsequent memo to him had urged for a deliberative process of appointment with a wide-ranging consultation, "given the recent unhappy history of the Institute from which it only narrowly managed to escape from being closed down completely."<sup>48</sup>

48. Following this email, there were further exchanges between the Applicant and

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<sup>45</sup> Application, annexes 4 and 5.

<sup>46</sup> Application, annex 4.

<sup>47</sup> Ibid.

<sup>48</sup> Application, annex 5, page 29.

Ms. Biha regarding the contents of the email dated 2 July 2015. Ms. Biha informed the Applicant that the purpose of the message that he had drafted was not clear and that he had failed to address the core of the contentious issues in the Staff Association's memorandum of 16 June 2015.<sup>49</sup>

49. Eventually, by email dated 7 July 2015, Ms. Biha wrote to IDEP's Staff Association herself. Her email stated, *inter alia*, that by its memorandum of 16 June 2015, the Staff Association had violated staff regulation 1.2 by communicating its concerns about IDEP to the Governing Council.<sup>50</sup> In August, in an email copied to the Executive Secretary, Ms. Biha continued to criticize the Applicant for his inefficient way of handling the issue with the Staff Association.<sup>51</sup> In response, the Applicant maintained that while he was not a member of the Staff Association and had had no part in drafting of the letter, he shared the concerns expressed by the Staff Association.<sup>52</sup>

50. In July 2015, Ms. Bounemra was nominated by the Executive Secretary and in August 2015 was appointed as the new IDEP Director.<sup>53</sup> She assumed her functions in September 2015. This appointment was effected through a lateral move, a modality foreseen by article VII of the IDEP Statute and upon consultations with members of the IDEP Governing Council undertaken either by way of written memoranda or by phone.<sup>54</sup> As it constituted a departure from the previous practice, it attracted criticism from the staff for the lack of a competitive process, perceived violation of the requirement of consultative process with the Member States and the authoritarian manner in which it was announced, which was all received as an assault on IDEP autonomy. IDEP senior management, including the Applicant, would express their concerns about the legality of this appointment before the members of the Governing

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<sup>49</sup> Application, annex 6.

<sup>50</sup> Application, annex 7.

<sup>51</sup> Application annex 8.

<sup>52</sup> Application, annex 9.

<sup>53</sup> Application, annex 24.

<sup>54</sup> Respondent's annex 15.

Council.<sup>55</sup> The Applicant, in particular, harbored a conviction that the appointment was illegal.<sup>56</sup>

51. The appointment of Ms. Bounemra led to a tense work environment in IDEP and bred resentment amongst staff members who opposed certain reforms she proposed such as changes to travel plans, annual leave and plans to transform IDEP into an e-learning centre.<sup>57</sup>

52. The working relationship between the Applicant and Ms. Bounemra started amicably but soon began to deteriorate. The Applicant felt that he was being excluded from certain discussions and meetings and he was of the opinion that he was being undermined in terms of his function considering that IDEP is a training institute and the head of training is at the core of it. On the issue of preparing IDEP travel plans in advance, the Applicant was of the opinion that it was imposed whereas IDEP's senior management team had been sidelined in making that decision. He felt that he was also sidelined from discussions from the recruitment process to replace a staff member who was retiring from the training division.<sup>58</sup>

53. Ms. Bounemra, on her part testified that she had no reservations about the Applicant's performance as head of training, but that there had been an area where their views did not converge in terms of the organization of the work, such as the issue regarding the travel plan, with which the Applicant did not want to comply. She did not have any major issues with the Applicant because she did not have enough

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<sup>55</sup> Applicant's testimony, transcript dated 11 May 2019, page 30; Dr. Sibanda's testimony, transcript dated 30 May 2017, pages 26 – 31; Dr. Sibanda's testimony, transcript dated 5 July 2017, pages 8-9 (Dr. Sibanda testified that the members of the IDEP Governing Council were not happy with the manner in which the consultation was done given the level of the post. They expected to express these concerns during their next meeting); Respondent's annex 11: IDEP Board of Director's mission to IDEP.

<sup>56</sup> Applicant's testimony, transcript dated 11 May 2017, page 30.

<sup>57</sup> Mr. Toure's testimony, transcript dated 30 May 2019 at pages 8 – 12 and 28, Dr. Sibanda's testimony, transcript dated 30 May 2017 at pages 28-30 and Mr. Kamwendo's testimony, transcript dated 4 July 2017, page 23.

<sup>58</sup> Application annexes 25(a) and 26; Applicant's testimony in the transcript dated 11 May 2017, pages 35-41; Mr. Ntilivamunda's testimony in the transcript dated 31 May 2017 at page 80; and Mr. Toure's testimony in the transcript dated 30 May 2017, page 12.

time to interact with him.<sup>59</sup> She also testified that she had not intended to marginalize the Applicant.<sup>60</sup>

54. The Applicant has no performance evaluation for 2015. He filed his last performance evaluation report for the period 1 January 2014 to 31 December 2014, which was very positive; for the period January to December 2015 performance evaluations had not been filed allegedly because of the problems with accessing the pertinent platform.<sup>61</sup> The Respondent maintains however, that the Applicant failed to initiate the process despite multiple reminders.<sup>62</sup>

55. The established fact is that on 30 October 2015, Ms. Bounemra approached a retiring staff member, Mr. Ntilivamunda, with terms of reference and an offer of an individual contract in the capacity of IDEP Training Officer with a change of reporting lines in that he as the individual contractor would report directly to her. Mr. Ntilivamunda testified that when he saw the proposed terms of reference, he realized that the change in supervision strategy was an attempt to sideline the Applicant and he therefore rejected them.<sup>63</sup> Ms. Bounemra then proposed another draft terms of reference, where the formulation “under direct supervision of the Director” was amended to read “under direct supervision of the Director through the Head of Training”.<sup>64</sup> On 3 December 2015, the Applicant commented briefly on the terms of reference to Mr. Kamwendo<sup>65</sup>, but was not invited to discuss with the Director. Ultimately, in January 2016, having learned about the Applicant’s separation, Mr. Ntilivamunda refused the consultancy.<sup>66</sup>

*Facts surrounding the issuance of the impugned decision*

56. On 3 December 2015, the Applicant sent an email to the IDEP Focal Point in

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<sup>59</sup> Karima Bounemra’s testimony, transcript dated 12 May 2017, page 42.

<sup>60</sup> Ibid., page 5.

<sup>61</sup> Applicant’s submissions of 21 and 29 November 2016.

<sup>62</sup> Respondent’s submission pursuant to the Tribunal’s direction in Order No. 477 (NBI/2016).

<sup>63</sup> Mr. Ntilivamunda’s testimony in the transcript dated 31 May 2017 at pages 76 – 80 and Applicant’s annex 26.

<sup>64</sup> Ibid.

<sup>65</sup> Respondent’s annex 17.

<sup>66</sup> Mr. Ntilivamunda’s testimony in the transcript dated 31 May 2017, pages 76 – 80.

the Human Resources Services Section, copying the Chief of Human Resources, ECA, requesting information as to the anticipated renewal of his appointment.<sup>67</sup> He did not receive any response.

57. The Applicant was on his pre-approved annual leave from 22 December 2015 to 8 January 2016. Upon his return to the office, he received a memorandum dated 4 January 2016 informing him that his fixed-term appointment expired on 31 December 2015 and that, consequently, his separation from the Organization was effective 1 January 2016.<sup>68</sup>

58. On 11 January 2016, the Applicant sent a memorandum to the DoA/ECA asking for the reasons of the non-renewal of his appointment and his separation.<sup>69</sup> Mr. Gurung, ECA Chief of Human Resources, testified that he was instructed by the DoA/ECA not to respond to the Applicant.<sup>70</sup>

59. On the same day, the Applicant received a memorandum from the DoA/ECA. The memorandum stated, *inter alia*, that “[f]or expiration of an appointment, the organization need not provide a reason for an expiry because it is in the nature of the contract itself to expire on the date indicated in the Letter of Appointment”.<sup>71</sup>

60. The Tribunal undertook to hear staff of ECA who were indicated as having knowledge of the decision-taking regarding Mr. Robinson’s non-extension.

a. Ms. Biha testified that the decision not to renew the Applicant’s appointment was taken by Mr. Lopes because IDEP intended to advertise the P-5 post on which he was sitting. She stated that the Director/IDEP had consulted HR/ECA and had been informed that it was not possible to renew the Applicant’s appointment for a period of less than one year whilst the

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<sup>67</sup> Application, annex 12.

<sup>68</sup> Application at para. 22 and annex 11.

<sup>69</sup> Application, annex 12.

<sup>70</sup> Mr. Gurung’s testimony, transcript dated 4 July 2017, pages 85 and 91.

<sup>71</sup> Application, annex 13.

recruitment process for the P-5 post was ongoing.<sup>72</sup>

b. According to Mr. Gurung, ECA Chief of Human Resources, he had sent a routine contract extension memo to Ms. Bounemra but did not receive a response. Subsequently, towards the end of December 2015, he learned that the Applicant's contract would not be renewed. He obtained this information from Mr. Haddad. He could not respond to the Applicant's request for information about his contract renewal because he was instructed by the Director/DoA that "there was a different discussion going on". He did not have copies of any emails that he sent in respect to inquiries about the contract renewal.<sup>73</sup>

c. Mr. Haddad, the DoA, testified that the new Director/IDEP had wanted to fill the vacant P-5 position and this had triggered the non-renewal of the Applicant's appointment. He could not recall instructing Mr. Gurung not to respond to the Applicant's request for information about the renewal of his appointment. On his account, HR/ECA advised Ms. Bounemra that it was not possible to renew the Applicant's appointment for less than one year. At the time, however, he was not aware of this advice which, in retrospect, was wrong. The decision not to renew the appointment came to him either from Ms. Biha or Ms. Bounemra after they discussed it with Mr. Lopes.<sup>74</sup>

d. Ms. Bounemra stated that once she had been informed about the budget structure upon taking the office, she considered and discussed options with the aim of staffing the P-5. Regarding the question of extension of the Applicant's appointment, she had assumed that she could not offer the Applicant an extension of less than one year and that the Applicant had been entitled to apply for the P-5 position in IDEP once advertised<sup>75</sup>; however, it

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<sup>72</sup> Ms. Biha's testimony, transcript dated 31 May 2017, page 52.

<sup>73</sup> Mr. Gurung's testimony, transcript dated 4 July 2017, pages 84-85 and 91-93.

<sup>74</sup> Mr. Haddad's testimony, transcript dated 22 November 2017, pages 6 – 11.

<sup>75</sup> Ms. Bounemra's testimony, transcript dated 12 May 2017 at page 23 and Ms. Biha's testimony, transcript dated 31 May 2017, page 52.

was not feasible to keep both the P-4 and the P-5 position because of the funding issue.<sup>76</sup> She felt offended by the fact that the Applicant dealt with the administration in Addis-Ababa while failing to discuss it with her at all.<sup>77</sup> Ms. Bounemra testified that it had been “ECA management” who had decided to not extend the appointment of Mr. Robinson, but she had presented the options and made comments.<sup>78</sup> She stated there had been email exchanges concerning non-extension of the Applicant’s appointment; when the Tribunal requested that they be provided to it, it received a response that discussions on the matter were oral and that Ms. Bounemra would provide dates of the meetings on 26 May 2017 - which she never did.<sup>79</sup>

*Facts subsequent to the Applicant’s separation*

61. In February 2016 at the 54<sup>th</sup> session of the Governing Council, a closed-door session was requested by the Governing Council during which the Executive Secretary explained, among other, the issue of the appointment of the IDEP/Director.<sup>80</sup> Notwithstanding the fact that the Director and her report were received quite positively, some members of the Council expressed concerns about the deteriorated social climate at IDEP. Amendments to art. VII of the IDEP Statute were proposed, according to which, for the future, a committee would be formed for the purpose of identifying candidates for the Director’s position.<sup>81</sup> Following the meeting, three members of the Governing Council undertook a mission to Dakar in order to meet with IDEP management and staff. A resulting mission report recommended a greater involvement of the Governing Council in the staffing of the IDEP/Director position.<sup>82</sup> Dr. Sibanda, who was one of the three members of the Governing Council who undertook the mission, did not make it in time for the 19

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<sup>76</sup> Ms. Bounemra’s testimony, transcript dated 12 May 2017, page 78.

<sup>77</sup> Karima Bounemra’s testimony, transcript dated 12 May 2017, page 80.

<sup>78</sup> Ibid., page 81.

<sup>79</sup> Order No. 099 (NBI/2017) dated 23 May 2017 and Respondent’s response to Order No. 099 dated 24 May 2017, para. 6.

<sup>80</sup> Reply, annex 11 and Dr. Sibanda’s testimony, transcript dated 30 May 2017, page 15.

<sup>81</sup> Respondent’s annex 12.

<sup>82</sup> Ibid.



February 2016 meeting and only two of the committee members actually participated.<sup>83</sup> Next day Dr. Sibanda met with the entire membership of the IDEP staff association at his hotel.<sup>84</sup> He testified that, despite him not having a meeting with the other members to sign on its content, the mission report nevertheless represented a correct record of what had been agreed.<sup>85</sup>

62. During the Governing Council Meeting in February 2016, the Director/IDEP presented to the IDEP Governing Council a proposal of reorganization of IDEP, including a new organizational chart for IDEP which provided, among other, for a P-5 Head of Training and Research post.<sup>86</sup> This plan was not implemented promptly, allegedly due to “internal going back and forth.”<sup>87</sup> The P-5 post had no incumbent and its recruitment process had stalled, with the vacancy announcement released only in November 2016.<sup>88</sup> In December 2016, it was criticized by the Staff Association in its (unsigned) memorandum to the new ECA Executive Secretary.<sup>89</sup> A vacancy for an Associate Training Officer’s position (national post, equivalent to one held by Mr. Ntilivamunda) was announced only in January 2017. In that vacancy, the reporting lines through the Head of Training have been restored.<sup>90</sup> As at the date of the hearings in this case mid-2017, the process of implementing the new organizational structure was still ongoing.<sup>91</sup>

### **Applicant’s Case**

63. The Administration has a duty to provide reasons for the non-renewal of his contract.

- a. The Administration’s failure to proffer immediate reasons leads rightly to speculation. Had a genuine reason of reorganization existed, then it would not

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<sup>83</sup> Mr. Kamwendo’s testimony, transcript dated 4 July 2017, pages 46 and 50.

<sup>84</sup> Ibid., page 50.

<sup>85</sup> Dr. Sibanda’s testimony, transcript dated 30 May 2017, page 31.

<sup>86</sup> Respondent’s annex 12, para. 45.

<sup>87</sup> Mr. Kamwendo’s testimony, transcript dated 4 July 2017, page 47-48.

<sup>88</sup> Ibid., page 48.

<sup>89</sup> Applicant’s annex 27.

<sup>90</sup> Applicant’s annex 26 (a).

<sup>91</sup> Mr. Kamwendo’s testimony, transcript dated 4 July 2017, pages 47-48.

have seemed impracticable to have communicated the details of it to him either prior to the decision or upon request. To delay such a response suggests that the reasoning was concocted in order to fit the facts after the event.

b. This was not simply a case of the ECA Administration overlooking any obligation to provide reasons but rather one in which it actively blocked any attempt to provide him an explanation, as confirmed by Mr. Gurung, who was instructed not to reply to any e-mails from the Applicant regarding his contract or provide reasons why it was not being renewed. The only conclusion that can be drawn was that a decision was taken to place the Applicant in the dark to deny him the opportunity to question the decision.

64. The decision not to renew his contract was based on improper bias.

a. The rushed decision to separate him from service without notice and the subsequent failure of the ECA Administration to provide any cogent reasons are symptomatic of a wider and more concerning approach adopted by the former Executive Secretary of the ECA, Mr. Lopes.

b. Mr. Lopes had adopted a hostile approach towards the Applicant.

c. Evidence of Mr. Lopes' conduct and behavior has been demonstrated also in relation to another staff member. In a UNDT decision regarding the application filed by that staff member, Mr. Lopes was referred to the Secretary-General for accountability.<sup>92</sup>

d. The Applicant was clearly being retaliated against and the actions of ECA to separate him whilst he was away on leave and subsequently not provide reasons were the *actus reus*.

e. During trial, a common theme that ran throughout the proceedings related to Mr. Lopes' grievance towards the Applicant. In particular, Mr. Lopes took

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<sup>92</sup> *Kelapile* Order No. 243 (NBI/2015) /Corr. 1. (Not appealed).

offence with the Applicant's lack of action against the Staff Association following their complaint against him concerning his sudden selection of a new IDEP director.

f. The subsequent e-mail dated 28 June 2015, where Mr. Lopes wrote to the Applicant stating that the failure to act would result in the Executive Secretary handling the issue in a way that would "desauthorize" him demonstrated the threatening side to Mr. Lopes' managerial approach. The evidence adduced during the proceedings serves to reinforce the conclusion that his separation was the crystallization of the process established by Mr. Lopes to "desauthorize" him.

65. For these reasons, the Applicant requests that he be reinstated into his original post or to another post in the Organization for which his services are suitable.

66. In the alternative, the Applicant requests monetary compensation equivalent to two years' net base salary to compensate him for the loss of employment that he had expected to maintain.

67. The Applicant requests moral damages to compensate him for the severe stress that he has suffered by finding himself suddenly unemployed and for the reputational harm that he has suffered as a result of the impugned decision.

68. Pursuant to art. 10.5(b) of the UNDT Statute, since moral damages need to be established by evidence, the Applicant refers to his testimony given in court and in particular:

a. He had four children under 10 years including a three months old baby and a son who was at his first year in university and suddenly he had this financial bomb of not knowing how to meet all his commitments. His children had to leave the international school they were attending and he forced them to attend a local French-speaking school. They had difficulties adjusting to that new environment and constantly told him that they did not want to go to

school. His children remained in school in Dakar because he could not uproot them from school in the middle of the school year.

b. After some time he started having problems with his health since he was anxious from being out of work. He had to see his doctor for medication.

c. He lost professional ties with colleagues and lost a lot of respect because when he tried to explain to people, they did not understand and thought he had been sacked. For this reason, he believes that his United Nations career has been damaged because of what happened and there is no price that can be placed on that. At job interviews he felt that he was being judged because he had been separated from service and felt that his ability to get a job was hindered by the non-renewal of his appointment.

d. As a result, he became very isolated and begun to question why this happened to him. He was also saddened to see that his former post had been advertised at a P-5 level despite the fact that he had been performing well and that it would now cost the United Nations far more money to bring in somebody new. The terms of reference of the advertised P-5 post are similar to those he had as a P-4.

e. He remained unemployed for eight months before obtaining work at a university.

f. He refused MEU's offer of monetary compensation because no amount of money can compensate him for the psychological damage, the damage to his professional reputation and the harm to his family that was caused by a deliberate, calculated act to allow his appointment to expire.<sup>93</sup>

### **Respondent's Case**

69. Fixed-term appointments die natural deaths at the end of the stipulated

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<sup>93</sup> Applicant's testimony, transcript dated 11 May 2017, pages 46 – 56.

duration indicated in the Letter of Appointment. The Applicant's contract expired on 31 December 2015 without notice. The reason for the expiry of the Applicant's contract is effluxion of time and the Applicant was informed of this.

70. The Applicant was recruited as a Regional Advisor at the P-4 level and his post was abolished during a restructuring exercise in 2013-2014.

71. The former Director of IDEP accommodated the Applicant at IDEP by paying him using the funds allocated for the post of P-5 Head of Training which was vacant at the material time.

72. The Applicant was never recruited, laterally transferred or by any legal appointment processes of United Nations assigned to the post of Head of Training at IDEP.

73. The funds which were used to accommodate the Applicant by paying his P-4 salary, reverted to the rightful position of P-5 Head of Training with the coming of the new Director of IDEP which led to the expiry of the Applicant's contract.

74. The process of recruitment of the current Director of IDEP are matters beyond the scope of the Applicant's case and the jurisdiction of the Tribunal because the recruitment process of the Director of IDEP is not the subject matter of this case and also it was never subject to management evaluation.

75. There is no connection between the Applicant's performance evaluation and the expiry of his contract and the Tribunal has ruled that a good performance is not a guarantee to a renewal of contract.

76. The Applicant's argument that there was improper bias citing an alleged threat from Mr. Lopes is unfounded and an attempt to create extraneous circumstances where none exist. It is up to the Applicant to prove that the reason given by the Administration for the expiration of his contract is incorrect, or that there has been an abuse of power, which he has failed to prove.

77. The Applicant is not entitled to damages and or compensation because the expiration of his appointment on 31 December 2015 was not an unlawful act.

### Considerations

*Is the Respondent obliged to provide reasons for the impugned decision?*

78. It is settled law that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment.<sup>94</sup> However, it is also settled law that the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment when requested. As held in *Obdeijn*:

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 [a fixed-term appointment], where the staff member requests it or, a fortiori, the Tribunal orders it.<sup>95</sup>

79. In the same vein in *Pirnea*, the Appeals Tribunal, in determining whether a non-renewal of a fixed-term appointment was based on a valid reason, held that:

An administrative decision not to renew [a fixed-term appointment] must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment. Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals' ability to judicially review the validity of the Administration's decision.<sup>96</sup>

80. This Tribunal wishes to add that transparency in the decision-making process has a wider purpose than enabling judicial control – in the first place it serves to demonstrate reasonableness and lawfulness of the actions of the administration to any potential reader, to prevent abuse of discretionary powers, to promote acceptance of the decision by the addressee, and to facilitate informal resolution if the dispute

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<sup>94</sup> Staff regulation 4.5.; ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations); *Appellee* 2013-UNAT-341; *Badawi* 2012-UNAT-261; *Syed* 2010-UNAT-061.

<sup>95</sup> *Obdeijn* 2012-UNAT-201, para. 37; see also *Lauritzen* 2013-UNAT-282, para. 35.

<sup>96</sup> *Pirnea* 2013-UNAT-311, para. 33 citing to *Obdeijn*, para. 32.

ensues. Indeed, however, when the case has reached the Tribunal and the Respondent still refuses to provide reasons for an administrative decision, or decides to subsequently change the reasons that were put forth as the basis for it, the consequences go beyond the loss of credibility: the applicant is impeded in the exercise of the right to properly advance his/her case, additional burden is placed upon the Tribunal and costs are unduly incurred for the Organization. It is thus clear that the ECA's refusal to give reasons for the impugned decision was unlawful. The Tribunal has no pleasure in finding that all the negative consequences of it occurred in this case, burdening the Tribunal with verifying hypothesis and suggestions.

*Validity of alleged reasons*

81. One reason that was outright denied by the Respondent was performance, which was repeatedly stated to have had no connection with the expiry of the Applicant's appointment.<sup>97</sup>

82. Otherwise, scarce and conflicting information justifying the non-extension of the Applicant's appointment was supplied by different persons on different occasions: First, the MEU cited an unknown person at ECA that the reason was funding constraints, a reason maintained by the counsel for the Respondent in the UNDT proceedings. One year later, IDEP Management (Director Ms. Bounemra, Ms. Biha, Mr. Haddad) when testifying before the Tribunal, stated that the reason for non-extension was reorganization intended by the Director. The Tribunal recalls that reasons given for the non-renewal of contract must be supported by facts.<sup>98</sup> Based on the facts before it, the Tribunal finds both reasons unsubstantiated.

83. Regarding the funding difficulty alleged before the MEU, the Tribunal is appreciative of the fact that there may be fluctuations in donor funds to various United Nations projects and programmes. Nevertheless, the Organization cannot use the blanket reason of "funding constraints" as a reason for non-renewal without actual

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<sup>97</sup> Reply, para. 11(e).

<sup>98</sup> *Islam* 2011-UNAT-115.

proof of lack of funding, how the lack of the funding adversely impacts the Organization in general and, specifically, how it affects the particular staff member whose contract is not being renewed allegedly because of it.<sup>99</sup> Whereas the Respondent indeed demonstrated that in 2014-2015 there was a drop in mobilizing extra-budgetary resources earmarked for IDEP, this did not prove the funding difficulty affecting the Applicant's post. As shown by witness testimony and other documents, the funding of the Applicant's position was from a different source, which remained unaffected; moreover, the reorganization proposal by Ms. Bounemra intended to further increase the IDEP spending through the cost related to staffing the P-5 post in place of the P 4 encumbered by the Applicant and the creation of new positions at IDEP. In conclusion, the funding difficulty put forth as a reason for the impugned decision was false.

84. Regarding the reorganization, the Tribunal recalls the well settled jurisprudence that "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff", therefore, the Tribunal "will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like any other administrative decision, the administration has the duty to act fairly, justly and transparently in dealing with its staff members".<sup>100</sup> In practical terms, there are situations in which - while there are available funds - the functions of a staff member are no longer required. That can be due to a reduction in workload in a particular department or programme, or due to the fact that the functions of a staff member have been subsumed by changes in a restructuring process. A non-renewal decision can be justified in such a scenario.<sup>101</sup> However, the obligation is on the Respondent to prove the changes in the operational realities or the restructuring exercise that justify the non-renewal.

85. Regarding the Respondent's more recent averment i.e., that rather than the

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<sup>99</sup> *Rehman* UNDT/2018/031, upheld in 2018-UNAT-882.

<sup>100</sup> *Hersh* 2014-UNAT-433-Corr.1 paras. 16-17 and references cited therein.

<sup>101</sup> E.g., *Filippova* UNDT/2016/008, *Ding* Order No. 88 (GVA/2014).



lack of funds, the non-renewal had been based on the elimination of the need for the Applicant's post, these functions being taken over by a revived P-5 Head of Training position, the Tribunal notes, first, the belated advancement of this justification, which raises doubts about its relevance. Second, accepting, for the sake of argument, that regularization of the Head of Training, whether on a P-4 or P-5 level would have been legitimate as a goal, the timeline shows that separating the Applicant on account of reorganization would have been way premature. At the date of the Applicant's separation, a reorganization had not been articulated even as a concept, which is first mentioned in February 2016, let alone approved on all administrative levels. The recruitment for the P-5 post commenced with the vacancy announcement only in November 2016 and remained not effected still at the date of closing the hearing in mid-2017, which, by and large, reflects the practical realities. Even if there had been specific circumstances responsible for the delay, the Director, being experienced in the Organization, had no reason to assume that her concept could be implemented within a couple of months. Throughout this time the functionality of the Applicant's post remained needed at IDEP and unfilled by anyone. As admitted by Ms. Bounemra, in combination with the two other training officers having retired at the same time, the Applicant's separation caused a challenge in discharging IDEP's training mandate.

86. At the same time, Ms. Bounemra's testimony that she assumed that she could not extend the Applicant's appointment for less than a year is unconvincing in light of the previous IDEP practice, whereby the Applicant had been issued appointments for one and three and a half months. In this respect, the Tribunal is likewise unconvinced by the testimony of Ms. Biha and Mr. Haddad, who offer by way of hearsay that such advice would have been given to Ms. Bounemra by Human Resources, albeit Mr. Haddad admitting that he had not heard this justification at the time and that it would have been substantively wrong. This was not confirmed by Mr. Gurung. The Tribunal, moreover, finds it unbelievable that senior managers, including the Director who had explicit statutory responsibility for the staffing of IDEP, and who, admittedly, had been engrossed in considerations and discussions of the options for

months, would have decided on the separation of the Head of Training, being also the only training officer left standing, without having all the relevant and substantively correct information available to all of them. In stark contrast, a lot of thought was given to re-hiring Mr. Ntilivamunda for six months, even though Mr. Ntilivamunda was non-committal.

87. The Applicant's rushed separation cannot be justified under reasonable exercise of managerial discretion. The most logical conclusion to which it leads the Tribunal, is that retaining the Applicant at his post had been forgone, no matter the circumstance. This conclusion is strengthened by the fact that ECA administration purposefully kept the Applicant uninformed, just as before the communication of the decision as afterwards. Altogether, the Tribunal finds that the reorganization as a reason is *ex post facto* and, notwithstanding that it may have been a legitimate goal in a longer perspective, is unsupported by evidence as to the necessity of the abrupt discontinuation of the Applicant's employment at the time of his separation.

*Whether the decision was taken for improper purpose*

88. In *Toure*, the Appeals Tribunal confirmed that also in the case of restructuring, as part of judicial review, it is necessary to determine whether the decision on non-extension was vitiated by bias or bad faith, that is, if it was taken for an improper purpose.<sup>102</sup> In other words, while the staff member on a fixed-term appointment has no right to have his employment extended, he or she still has the right to be treated fairly, with the non-extension decision not being tainted by improper purpose. On the evidentiary plane, the staff member has the burden of proving that improper factors played a role in the administrative decision.<sup>103</sup> As held in *He*, “[s]uch a challenge invariably will give rise to difficult factual disputes. The mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that

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<sup>102</sup> *Toure* 2016-UNAT-660, para. 30.

<sup>103</sup> *Liu* 2016-UNAT-659; *Assale* 2015-UNAT-534; *Said* 2015-UNAT-500; *Pirnea* 2013-UNAT-311.

evidence.”<sup>104</sup>

89. The Tribunal finds that the arbitrariness and lack of transparency exhibited by the ECA Administration authorize it to draw adverse inferences that the Applicant’s non-renewal had an improper purpose. Information had been withheld from the Applicant. From the submissions of the Respondent in the case, it is clear that the ECA Administration denies their obligation to give a reason for the non-renewal decision. Moreover, as discussed above, reasons provided under the insistence from the Tribunal shifted from lack of funding/funding constraints, which was found unsubstantiated, to reorganization, which was also found unsubstantiated. Notably, moreover, ECA administration avoids identifying the person who ultimately authored the impugned decision, with witnesses pointing to one another, whereas not a single document, even email communication, regarding the matter has been made available to the Tribunal, even though the matter required communication between offices in Senegal and Ethiopia.

90. In addition to negative inferences warranted by this obfuscation, there are, moreover, specific facts indicating that the decision was tainted by improper bias.

91. It is undisputed that Mr. Lopes had blamed the Applicant for his failure to suppress the expression by the Staff Association following their complaint concerning his sudden selection of a new IDEP director. Notwithstanding efforts that the Applicant put in trying to meet the demand of Mr. Lopes, the e-mail dated 28 June 2015, where Mr. Lopes warned that the failure to act “until tomorrow” would result in him handling the issue in a way that would “desauthorize” the Applicant, is intimidatory, both in its overall harsh language and the express threat. While the Respondent argues that it “only” referred to a possible removal of the Applicant as Oic/IDEP, which did not follow until the appointment of the Director, nothing in the case suggests that the attitude demonstrated by the email would have been only an incidental outburst, after which the relation between the Applicant and the Executive Secretary would have normalized. To the contrary, it transpires from the subsequent

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<sup>104</sup> *He* 2016-UNAT-686.

email of August from DES, Ms. Biha, that even after the issuance of the reprimand to the Staff Association, the Applicant continued to be criticized for his lack of obedience on this score.

92. With the Respondent assuring that performance issues played no part in the non-extension of the Applicant's appointment, it is not for the Tribunal to explore this area. The Tribunal will limit itself to noting that the Applicant had good reason to doubt the appropriateness of Mr. Lopes' request and his own role in its implementation. Neither the grade held nor the temporary position of officer-in-charge predisposed the Applicant for reprimanding the Staff Association. More importantly though, notwithstanding whether they were right or wrong, the Staff Association had been acting in the exercise of its statutory role and addressed another statutory organ of IDEP, that is, its Governing Council. Absent a specific regulation in the IDEP Statute, internationally recognized standards should be of guidance, and these support freedom of expression of employees' unions.<sup>105</sup> Whereas Mr. Lopes may not have been used to being challenged, the Staff Association's language was not insulting, rather, it communicated the employees' fears and doubts. Above all, however, Mr. Lopes' claim to prohibit the Staff Association's communication with the Governing Council was as unfounded and unreasonable as it would be to require the Staff Union of the United Nations Secretariat to not address the General Assembly.

93. In the circumstances of the case it is clear that the issue was not only that the Applicant was reluctant to reprimand the Staff Association but, rather, that he sympathized with the Staff Association's concerns and disagreed with the Executive Secretary's authoritarian manner of installing the new IDEP Director, which he

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<sup>105</sup> See Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth edition 2006, ILO, Geneva. General Principles: 154. The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language. [...]. 156. The right to express opinions without previous authorization through the press is one of the essential elements of the rights of occupational organizations.

expressed in his emails to the Executive Secretary and his Deputy. Even though there is no allegation that the Applicant would have been taking impermissible initiatives that were against the interests of IDEP without consultation with his hierarchy<sup>106</sup>, based on the reaction from Mr. Lopes, it is clear that this disagreement alone created a motive on the part of ECA leadership to get rid of the Applicant, both as a person whose opinions were uncomfortable and as a message to the Staff Association that disagreements with the hierarchy will not be tolerated (which worked, as demonstrated by the fact that the next communication from the Staff Association was sent anonymously).

94. The Tribunal moreover agrees with the Applicant that the way his separation was handled, without notice and whilst he was away on leave and with ECA Administration actively blocking any attempt to provide him an explanation, was symptomatic of repression.

95. The Tribunal is forced to conclude that the decision on non-extension of the Applicant's appointment was unlawful; it was animated by improper motive and purpose, which is retaliation and repression.

## **Remedies**

*Is the Applicant entitled to any remedies?*

96. Having found that the contested decision was unlawful, the Tribunal must exercise its remedial discretion in terms of art. 10.5 of the UNDT Statute which provides the following options:

- (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

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<sup>106</sup> *A contrario*, *El-Awar* 2019-UNAT-931, para 35.

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

97. Since at present the Applicant's post has been eliminated and subsumed by the revived P-5 post, a rescission of the impugned decision would not be appropriate. The question boils down to compensation for financial and moral harm.

#### *Financial harm*

98. The Appeals Tribunal found that "any consideration of an award of damages for persons who are recruited on FTAs must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the time of any alleged breach". It has also given consideration to the length of expectancy of renewal.<sup>107</sup>

99. Since the abolition of his Regional Advisor post, the Applicant was on short-term appointments from August to December 2014, then for one year from January to December 2015 and this was a standard duration of a fixed-term appointment. Normally, therefore, the Applicant could have expected a one year extension. Given that reorganization was indeed pursued, the extension could have been expected in tranches, reasonably until substantial advancement of the new staffing exercise, i.e., at least until the end of 2016. The Tribunal, however, recalls that the Applicant managed to obtain employment eight months after the non-renewal of his appointment with IDEP. The Tribunal was not offered evidence about the conditions of this employment, specifically, whether or not it negatively compares to those at IDEP. The Tribunal accepts, therefore, that the proven financial damage for the Applicant in nexus with the unlawful separation consisted of eight months of unemployment and the attendant loss of emoluments.

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<sup>107</sup> *Andreyev* 2015-UNAT 501; *Gakumba* 2013-UNAT-387; *Appellee* 2013-UNAT-341; *Ahmed* 2011-UNAT-153.

*Moral damages*

100. As held by the majority in *Kallon*, compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred and evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence affirming that moral harm has indeed occurred.<sup>108</sup>

101. Recently in *Ross*, UNAT has stated that the holding in *Kallon* applies without any temporal limitation related to its pronouncement, however, it allowed certain consideration to the fact whether it was available to the parties at the time of the closure of pleadings.<sup>109</sup>

102. The *Kallon* judgment was handed down in June 2017 whereas the pleadings in the present case closed on 16 August 2018. Indeed, the *Kallon* judgment is invoked as argument in the closing submissions. The Applicant in this case was represented by Counsel and had the opportunity to produce independent corroborating evidence of his non-pecuniary loss as required by jurisprudential developments, but he failed to do so. As a result, the Applicant relies solely on his testimony to justify his plea for moral damages. This plea must fail.

**Judgment**

103. The application is partially granted. By way of compensation for financial damage, the Respondent is ordered to pay the Applicant eight months' net base salary plus attendant entitlements, computed at the Applicant's category and level of employment at the time of the contested decision.

104. The awarded amount shall bear interest at the United States prime rate with effect from the date on which this Judgment becomes executable until payment of the said compensation. If the sum is not paid within 60 days from the date on which this

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<sup>108</sup> *Kallon* 2017-UNAT-742, paras. 67 and 69.

<sup>109</sup> *Ross* 2019-UNAT-926, para. 59.

Judgment becomes executable, an additional 5% shall be added to the United States prime rate until the date of payment.

105. All other pleas are rejected.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 9<sup>th</sup> day of September 2019

Entered in the Register on this 9<sup>th</sup> day of September 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi