Keywords: Fixed-term contracts; Time limits (filing, application); notification (general manager); waiver clause (admissibility, interpretation); estoppel; constructive dismissal; pension fund contributions (acquired rights, equal treatment); subject matter of the claim (prior request to the general manager, claim made in the application to the tribunal); employment relationship (employment records, termination, legitimate expectation of contract renewal, job change); duty of care and fair treatment (harassment)

Schlagworte: Befristete Arbeitsverträge; Fristen (Klage, Verjährung); Benachrichtigung (Generaldirektor); Klageverzicht (Zulässigkeit, Auslegung); Einwand (estoppel); rechtsmissbräuchliche Kündigung (construcitve dismissal); Pensionskassenbeiträge (wohlerworbene Rechte, Gleichbehandlungsgebot); Streitgegenstand (Begehren an Generaldirektor, Klage ans Gericht); Arbeitsverhältnis (Personalakten, Beendigung, legitime Erwartung der Vertragserneuerung, Änderungen des Arbeitseinsatzes); Fürsorgepflicht und faire Behandlung (Belästigung)

Mots-clefs: Contrats à durée déterminée ; Délais (demande, prescription) ; notification (directeur général) ; clause de renonciation (admissibilité, interprétation) ; objection (estoppel) ; résiliation abusive (constructive dismissal) ; contributions à la caisse de pension (droits acquis, égalité de traitement) ; objet de litige (requête au directeur général, demande au tribunal) ; emploi (dossier, fin, attente légitime de renouvellement, changements) ; devoir de sollicitude et de traitement équitable (harcèlement)

1/2018

Judgment of 11 April 2019

Administrative Tribunal of the Bank for International Settlements

Prof. Dr. Tobias Jaag, President,
Prof. Dr. Abbo Junker, Reporting Judge,
Prof. Geneviève Bastid Burdeau, Judge,
Prof. Dr. Ramon Mabillard, Registrar,

X. _____,

represented by Z. _____,

Applicant

versus

the Bank for International Settlements, international organisation with registered office in Basel,

represented by V. _____,

Respondent

re

Payment of damages for non-renewal of a fixed-term employment contract as well as for lack of care and fair treatment;
Compensation for loss of pension benefits resulting from a restructuring of the Pensions System

As to the facts

A.

1 On 8 February 2010 the Applicant started to work as a "[…]" in the Respondent's […] department on the basis of a service rental contract between the Respondent and an employment agency. The Applicant was recruited by the London Branch of that agency. His country of residence at the time of recruitment was the United Kingdom. The service rental contract was a "contract of maximum duration" ending on 30 July 2010. It stated that the Respondent was allowed to hire the Applicant after the termination of the service rental contract.

2 On 30 July 2010 the Respondent offered the Applicant a three-year fixed-term employment contract for the position of […], accompanied by a job description with details of the position (hereafter "First Contract"). The Applicant accepted the offer on 2 August 2010, changing the starting date from "26 August 2010" to "27 August 2010". The expiry date was 31 August 2013. The contract included the following clause:

> *"This fixed-term appointment expires automatically at the end of the term, without prior notice, or indemnity. It follows that there should be no expectation either of any renewal of the fixed-term employment, or its subsequent conversion to any other type of appointment."*

3 By letter of 11 April 2013 the Respondent offered the Applicant a two-year contract extension from 1 September 2013 to 31 August 2015 for the position of "[…]" attached by a job description with details of the new position. The change in position should, according to the offer, already become effective as of 1 May 2013. The offer referred to the Respondent's letter of 30 July 2010 and included the following clause:

> *"Other conditions of your employment remain unchanged."*

The Applicant signed the document containing the offer on 17 April 2013 and returned the signed document to the Respondent on 25 April 2013 (hereafter "Second Contract").

B.

4 Before the conclusion of the First Contract, the parties dealt with the question whether the Applicant would be eligible for expatriation allowance under a Special Staff Rule relating to Article 12 paragraphs 1 and 2 of the Staff Regulations. The Respondent declined the Applicant's eligibility for such allowance. On 1 July 2011 the Applicant initiated an official grievance procedure against the Respondent's decision not to provide him expatriation allowance.

5 On 6 September 2011 the Respondent offered to pay, with retroactive effect as of 27 August 2010 (the starting time of the First Contract), the requested expatriation allowance in exchange for a reduction of the Applicant's base salary by [-] %, also with retroactive effect as of 27 August 2010. The Applicant accepted the offer on 13 October 2011. The reason for the offer and the circumstances under which the grievance procedure took place are in dispute.

C.

6 During the parties' employment relationship the line manager (hereafter "LM") of the Applicant changed three times. The Applicant's first LM was A. _____, Head of the Respondent's […] Department. After his retirement A. _____ was replaced as the Applicant's LM by B. _____, (A. _____'s successor), effective 1 July 2011. Subsequent to the Applicant's change of position to "[…]" on 1 May 2013, C. _____, Head of […], became the Applicant's new LM. When C. _____ left the Respondent in mid-2014, he was replaced by D. _____ as the Applicant's LM.

7 The Respondent's offer of a two-year contract extension ("Second Contract") of 11 April 2013 (see para. 3, supra) was preceded by a Memorandum sent on 18 March 2013 by B. _____, to E. _____, in the Human Resources Department of the Respondent. With reference to "Justification for contract extension or expiration for [the Applicant]" the Memorandum states, *inter alia:*

> *"… [the Applicant] has performed well, and meets expectations. … The position [of the Applicant] today is the sole* […] *operations role. It will shortly be merged into the larger […] Operations team, and combined with other* […] *operations work. This will improve back-up for the role; reducing dependency on a key individual. … To facilitate this change, it is necessary to extend [the Applicant] so that he can cross-train the other* […] *Operations team members on* […] *processes."*

8 On 26 March 2013 B. _____ requested E. _____ to reassign the Applicant to C. _____ as his new LM and to change the Applicant's job title to […]. B. _____ further noted that the two changes could take place with immediate effect and did not have to wait until the Applicant's contract was renewed.

9 In reaction to this message, on 2 April 2013 E. _____ raised the concern that these changes would "probably entail quite some changes to [the] accountabilities [of the Applicant]" and inquired whether B. _____'s request meant an alignment in job titles only or a more substantial change in responsibilities. B. _____ answered, *inter alia:*

> *"This is primarily an alignment in job titles – the work of an* […] *is* […] *operations which is substantially the same as [the Applicant's] work today."*

10 On 17 April 2013, the day the Applicant signed the document containing the Second Contract, he sent a message to F. _____, identifying F. _____ as the Human Resources (hereafter "HR") contact for contracts and asking F. _____ whether F. _____ had time to discuss the contract extension. After a second attempt to contact F. _____ one week later (24 April 2013), the Applicant returned the document containing the Second Contract to the Respondent on Thursday, 25 April 2013, and on the same day asked F. _____ for a meeting on Monday/Tuesday.

11 On 3 May 2013 the Applicant sent a message to F. _____ thanking F. _____ for F. _____ 's time and forwarding F. _____ a draft of the message he intended to send to B. _____. In this draft the Applicant expressed doubts about the new tasks mentioned in the job description and asked B. _____ for feedback and for the opportunity to discuss this issue. On 16 May 2013 the Applicant informed F. _____ that he had decided not to send the message to B. _____ and that he "was just happy to talk it over with HR".

12 The review of the Applicant's performance (dated 31 May 2013) states under the headline "Manager Comments", *inter alia:*

> *"The views on [the Applicant] are mixed. On the one hand, he is seen as a capable and experienced* […]*. On the other hand, he is seen as someone who is not proactive. … I think [the Applicant] could have been more proactive to ensure that we meet deadlines, and to ensure that he has the detailed knowledge needed to excel at his role. … We have given [the Applicant] a two-year extension on his contract, and changed his reporting line to bring him into the* […] *team. This will help [the Applicant] to learn about the business of the BIS, and the quality of his work will benefit from the challenge of more regular peer review. As a result, this coming year is a key opportunity for [the Applicant] to demonstrate his worth to the BIS, by being recognised as a key member of the* […] *team. Thanks [to the Applicant] for everything over the last year. [The Applicant has] a challenging year ahead of [him in his] new team!"*

13 On 19 May 2014 the Applicant sent a message to C. _____, his LM at the time, with reference to "Some things I would like to say confidentially". In this message he asserted that, over the course of the past 14 months, he had come "to feel extremely demotivated and overly stressed at work". He complained that the management was unaware of his workload and the level of stress he suffered.

14 From 6 August through 11 September 2014 the Applicant was absent on sick leave. After the Applicant returned to work the Respondent provided him with a counsellor, H. _____, to assist the Applicant with personal and work-related difficulties. The counsellor held sessions with the Applicant and discussed the Applicant's concerns with the Respondent's HR department.

D.

15 On 31 October 2014 the Applicant's LM, D. _____ informed the Applicant that the Second Contract would not be renewed beyond 31 August 2015. On 11 December 2014 D. _____ and E. _____, met with the Applicant. The tenor of this meeting is in dispute.

16 In a letter dated 27 August 2015 (hereafter "Offer Letter") the Respondent offered an outplacement (career transition) programme or, at the Applicant's choice, the equivalent in cash (CHF […]). The Applicant signed the Offer Letter on 4 September 2015 choosing the cash equivalent. This letter included the following clause:

> *"This offer is presented by the BIS without any admission of a legal obligation by the Bank, and is in full and final settlement of all claims or rights of actions that you may have arising out of your employment with the BIS and its termination, but excluding any claims you may have to enforce this offer. We would also like to draw your attention to the fact that the content of this offer is personal and confidential and is therefore not to be shared or discussed."*

17 The parties' employment relationship ended on 31 August 2015.

E.

18 The Applicant had been admitted, with the first pensionable remuneration of CHF […], to the Respondent's Pensions System according to Article 1 paragraph 2 of the Regulations on the Respondent's Pensions System of 1 October 1998, last revised on 1 October 2014 (hereafter "Pensions Regulations").

19 The Respondent's Pensions System is a defined benefits system under which participants accrue benefits at a rate of 2,5 % of the average pensionable remuneration per year during their first 25 years of service, and 1,25 % during the following 10 years of service (Article 2 paragraphs 1 and 2 and Article 10 of the Pensions Regulations).

20 The Pensions Regulations provide that participants of the Pensions System *"who leave the* Bank's *service before having completed 15 years of service and before having reached the compulsory retirement age will receive a lump sum indemnity in settlement of the entirety of their pension entitlement"* (Article 11 paragraph 1 of the Pensions Regulations).

21 The lump sum *indemnity "will correspond to the actuarial value of the participant's acquired pension rights at the time of leaving the [Respondent's] service and will be calculated in accordance with the relevant conversion tariff in force at the time of conversion"* (Article 11 paragraph 4 of the Pensions Regulations). The conversion tariff reflects the actuarial value of pension rights depending, *inter alia,* on the expected long-term return on Pension Funds' assets (the "real discount rate") and on the life expectancy.

22 Effective 1 October 2014, the conversion tariffs were updated to reflect an increase in the real discount rate (the *higher* the real discount rate, the *lower* the actuarial value of pension rights) and an increase in life expectancy (the *higher* the life expectancy, the *higher* the actuarial value of pension rights).

23 The net result of the two reverse effects depends on the age of the participant at the time of departure. Since the effect of the increase in the real discount rate does more than compensate for the effect of the increased life expectancy the updated conversion tariffs had a decreasing impact up to a departure age of 54. The Applicant, born on […], was […] years old when leaving the Respondent's service on 31 August 2015.

F.

24 With regard to the *grievance procedure* concerning *expatriation allowance* the Applicant denies that under the First Contract a […] % increase in salary compared with the initial offer was granted as a compensation for an alleged ineligibility to expatriation allowances; at least the Applicant had not been made aware of such a connection before signing the First Contract. According to the Applicant's submissions, the salary reduction of […] % should be deemed a retaliation for winning the grievance procedure.

25 With regard to the *development of the employment relationship* the Applicant states that the contacts with his LM from 1 July 2011 through 30 April 2013 had been infrequent and irregular. The Applicant's position, role, and job title were changed, effective 1 May 2013, without prior information or consultation. He had been expected to

fulfil two different positions without a change of the salary level. Therefore, the Applicant considers the decision to change his position, role, and job title arbitrary.

26 The Applicant submits that the pressure to perform two different roles at a time had put him in a state of stress and anxiety and damaged his health. He had been consistently harassed for information by a member of the […] department, whose behaviour had been tantamount to bullying. The Applicant alleges that he had complained to the HR department about the bad treatment suffered from certain members of the […] department, but did not receive adequate support.

27 With regard to the *termination of the Second Contract* the Applicant alleges that he was informed of the non-extension and non-conversion of the contract in his first meeting with the new LM D. _____ and was given no reason or justification. He had been highly recommended for the conversion of his employment contract to an open-ended contract and therefore had a legitimate expectation of contract renewal or conversion.

28 Regarding the Respondent's Offer Letter of 27 August 2015 the Applicant states that he had been in a weak and disadvantageous position. He further claims that the Respondent had exercised undue pressure on him to sign the letter; because of the stress and harassment he suffered he had not been in a healthy state of mind to make a proper decision when he signed the letter on 4 September 2015.

29 The Applicant alleges that *subsequent to the termination* of the Second Contract he suffered damages to his health (both physical and mental), his career, and his future well-being. In his letter of 16 July 2017 to the Respondent's General Manager (see para. 36, infra) he states that he had only recently made a reasonable (but not full) recovery from stress, anxiety, and other conditions after many months of treatment, some as an in-patient. According to the Applicant the fact that the claim against the Respondent had been initiated almost 18 months after the Applicant's departure demonstrates the impact the Respondent had on the Applicant's health and well-being.

G.

30 With regard to the *grievance procedure* concerning the *expatriation allowance* the Respondent submits that the initial offer of an annual base salary of CHF […] was explicitly increased by […] % to CHF […] in order to address the Applicant's concerns about the lack of expatriation benefits. Because the Applicant had already been in Switzerland under the service rental contract, he was not deemed eligible for expatriation allowance. In the course of the grievance procedure the Respondent reverted to the base salary originally offered plus expatriate benefits, in consideration of the Applicant's […] residence before the starting of the service rental contract.

31 With regard to the *development of the employment relationship* the Respondent alleges that the change in the Applicant's position, role, and job title reflected the business need to transfer […] into the […] team as a part of a larger reorganization of the […] department. The Respondent states that the new role had been mentioned in the 2011/2012 performance review, recorded in the 2012/2013 performance review and discussed by the Applicant and B. _____before the Applicant signed the Second Contract.

32 The Respondent further submits that the new position was expected to be beneficial to the Applicant's career by offering new opportunities. The Respondent denies that the Applicant had to fulfil two roles in one by arguing that the Applicant's former functions were rotated among the members of the […] team. The Respondent claims that the Applicant had been fully supported in his new position and through any medical conditions, and that he did not provide evidence for his medical issues or treatments either resulting from circumstances at the Respondent or induced by the Respondent.

33 The Respondent denies that persons responsible at the Respondent were aware of the alleged nature of the medical conditions. It maintains that the Applicant did not use the process for reporting harassment set forth in the "Questions and Answers on the BIS Code of Conduct", and refers to the "Special Staff Rule: Disciplinary procedure for misconduct under Article 16 of the Staff Regulations".

34 Regarding the *termination of the Second Contract* the Respondent argues that the Applicant had been given a 10-months' notice instead of the usual 6-months' notice in order to give him extra time for his transition to a future position. Further, the Respondent claims to have complied with its own rules by following the due diligence process for fixed-term contracts when taking this decision. The Respondent states that extension or conversion rates of fixed-term contracts were low. It denies that the Applicant had been promised a contract renewal or conversion.

35 As to the Applicant's conditions *subsequent to the termination* of the Second Contract the Respondent refers to a LinkedIn profile allegedly showing that the Applicant worked at […] from November 2015 through March 2016 and at […] from March 2016 through November 2016. Further, the Respondent alleges that the Applicant had been able to study for, take, and pass a […] examination paid by the Respondent during the 18 months following his departure.

H.

36 On 16 July 2017, the Applicant made a request pursuant to Article VI paragraph (2)(a) of the Statute of the Tribunal (hereafter "Statute") to the Respondent's General Manager seeking the equivalent of one year's remuneration as compensation for damages to health and for personal suffering as well as an additional equivalent of one year's remuneration as compensation for the damages to his career.

37 The request was preceded by an exchange of e-mails between the parties. This exchange started with the Applicant's request of 23 January 2017, addressed to the Respondent's HR department, to provide him with a copy of his personal file. In his message of 26 April 2017 to the Respondent's HR department the Applicant asked "for the contact details of the most appropriate person in order to deal with a case of constructive dismissal/failure in the [Respondent's] duty of care". On 16 May 2017 and on 6 June 2017 the Applicant was informed of the procedure described in Article VI paragraph (2)(a) of the Statute.

38 On 5 October 2017 the General Manager rejected the claim for compensation.

39 The Applicant submitted his Application for payment of damages in the amount of CHF […] by letter of 23 December 2017, posted on 2 January 2018 and received by the Tribunal's Registrar on 8 January 2018. The President of the Tribunal appointed on 12 January 2018 the following members of the panel which would deal with the Application: Prof. Dr. Tobias Jaag (as Presiding Judge), Prof. Dr. Abbo Junker (as Reporting Judge) and Prof. Geneviève Bastid Burdeau (as Judge).

40 On 19 January 2018, the President of the panel granted the Applicant an extension of time to complete and correct his Application until 22 February 2018. On 22 February 2018 a further extension of time was granted until 15 March 2018. The Applicant submitted by mail of 22 February 2018 (received 26 February 2018) the completed and corrected Application.

41 The Application requests that the Tribunal:

(a) acknowledges that the non-renewal of the Applicant's employment contract amounts to constructive dismissal;

(b) grants the Applicant compensation and moral damages (inclusive of reputational damages) to compensate him for the unfairness experienced at the Respondent in the amount of two years' salary quantifiable in CHF […];

(c) grants the Applicant pension contributions in the amount of CHF […]or in the precise amount to be disclosed by the Respondent;

(d) orders the Respondent to clean the Applicant's employment records by deleting any negative remark; and

(e) awards reasonable legal costs.

42 On 29 June 2018, the Respondent filed its Answer. The Answer requests the Tribunal to dismiss the Application in its entirety.

43 On 30 August 2018, the Applicant filed the Reply to the Respondent's Answer. The Reply requests that the Tribunal:

(i) acknowledges the Respondent's lack of duty of care, which led to the Applicant's illness and ultimately to his constructive dismissal through the decision of non-renewal of his contract;

(ii) grants the Applicant compensation for material and moral damages in the amount of two-years' salary (CHF […]);

(iii) orders reimbursement of pension contributions in the amount of CHF […] or the amount that the Tribunal deems appropriate;

(iv) orders the Respondent to clean the Applicant's employment records;

(v) awards reasonable legal costs; and

(vi) awards the Applicant a further year's salary as a compensation for the impossibility to find a suitable job due to the difficulties arising from his fragile health, for the slanderous discredit by the Respondent of his professionalism, as portrayed in the Answer, as well as for the procedural failures and delay by the Respondent in disclosing the alleged reasons of non-renewal (underperformance) and for not adhering to the performance review process and improvement plan as established in the Staff Rules and Regulations.

44 On 26 November 2018, the Respondent filed his Rejoinder to the Applicant's Reply. The Rejoinder reiterates the request made in the Answer.

45 On 10 December 2018, the President of the panel invited each of the parties to submit another written statement it may deem necessary to rebut the other party's claims and allegations. The Applicant filed an additional written statement on 14 January 2019. The Respondent declared by mail of 30 January 2019 (received 31 January 2019) not to submit another written statement in response.

46 The Applicant requested the Tribunal to hold an oral hearing. The Tribunal decided, after the receipt of the Applicant's additional written statement, that the case will be decided without oral hearings in accordance with the general rule laid down in Article 18 paragraph 1 of the Rules of Procedure of the Tribunal (hereafter "Rules of Procedure"). It follows that this judgment is based upon the written submissions and written evidence of the parties according to Article VIII paragraph (3) of the Statute and Article 18 paragraph 1 of the Rules of Procedure.

As to the law

47 Article X paragraph (1) of the Statute provides that if the Tribunal finds that the Application is well-founded it may quash the General Manager's decision to reject the Applicant's claims and, if necessary, grant an appropriate remedy.

1.
Admissibility

48 The Application is admissible, save to the extent it seeks a declaratory remedy on the alleged fault of the Respondent and a "cleaning" of the Applicant's employment records.

a) Formal Requirements

aa) Time Limit to File an Application

49 The Tribunal holds that the Applicant did fulfil the requirement of Article VII paragraph (1)(a) of the Statute. According to this provision, an application must be filed with the Registrar of the Tribunal within 90 days of receipt of the General Manager's response to an applicant's request according to Article VI paragraph (2)(b) of the Statute.

50 The General Manager's response is dated 5 October 2017; the date of receipt by the Applicant is not established. The Applicant sent his Application of 23 December 2017 on 2 January 2018 (received by the Registrar on 8 January 2018), that is 89 days later than 5 October 2017.

51 Based on these facts the Tribunal needs not to further assess the date of the Applicant's receipt of the General Manager's response. According to Article 10 paragraph (2) of the Rules of Procedure written documents must be sent to the address of the Registrar no later than the last day of the relevant period. Thus, even if the Applicant had received the General Managers' response on 5 October 2017 (the very same day it was issued), the relevant time period would have elapsed (not counting the day on which the relevant period begins) on 3 January 2018 and the Applicant would have met the deadline of 90 days set out in Article VII paragraph (1)(a) of the Statute. Further, the Respondent does not question the fulfilment of the statutory period for filing the Application. Therefore, the Tribunal concludes that the Application is not barred by the time limit set out in Article VI para. (2)(e) of the Statute.

bb) Notification to the General Manager

52 The Applicant did not comply with the requirement set forth in Article VI paragraph (2)(d) and Article VII paragraph (2) of the Statute. According to these provisions an applicant has to notify the General Manager of the Respondent in writing, within the time limit of 30 days laid down in Article VII paragraph (2) of the Statute, of the intention to file an application. The General Manager did not mention this requirement in his letter to the Applicant of 5 October 2017, and the Applicant did not meet this time limit.

53 In Case 1/2015 the Tribunal faced the same circumstances and dealt with them by assuming that Respondent's senior management was aware that the applicants might file an application, as evidenced by the last sentence in the General Manager's answer letter. The answer letter in the present case ends on a similar note. The non-mentioning of the notification requirement in the answer letter could, therefore, reasonably be understood as a waiver of this requirement. As concluded in Case 1/2015 these circumstances qualify as "exceptional" according to Article VI paragraph (2) of the Statute (ATBIS Judgment 1/2015 sub 1.b).

54 In the present case this reasoning is even more convincing since the Respondent does not mention the requirement of notification in its pleadings as to the admissibility of the Application. Therefore, the Tribunal finds that exceptional circumstances render the Application admissible despite the Applicant's failure to write to the General Manager in order to inform him of his intention to file an application with the Tribunal.

b) Inadmissibility as Result of a Waiver

55 The Tribunal finds that the Applicant's claims are not barred by the waiver clause included in the Offer Letter. This clause has been validly included into the parties' agreement and covers most of the claims. However, the Respondent's conduct prevents it from relying on this clause.

56 By signing the Respondent's Offer Letter on 4 September 2015 the Applicant entered an agreement on, *inter alia,* the full and final settlement of all claims or rights of actions that he might have arising out of his employment with the Bank and its termination (see ATBIS Judgment 1/2015 sub 2. on the interpretation of a similar clause).

57 The Tribunal observes that the agreement concluded by the parties and signed by the Applicant on 4 September 2015 is not a separation agreement (or severance agreement) in a legal sense since the parties' separation already had come into effect due to the contract's expiry on 31 August 2015. In such case there is no need for a separation agreement. Though possible it is not necessary for the parties to agree on certain issues inherent to their separation or the expiry of the employment contract.

aa) Validity of the Agreement

58 The Applicant challenges the validity of the agreement containing the waiver clause on the grounds that the Respondent exercised undue pressure on him to sign the Offer Letter and that he had not been in a healthy state of mind to make a proper decision (see para. 28, supra).

59 With regard to a separation agreement pertinent case law ascertains that an employee, signing a waiver clause, does not waive his right to challenge the validity of this

clause (ILOAT Judgment No. 3750 consideration 5). This rule applies to any agreement containing a waiver clause. In the present case, the wording of the clause in question ("claims arising out of employment and termination") sustains this concept of law.

60 An exercise of undue pressure by the employer to sign an agreement or a temporary incapacity of the employee to enter into legal transactions may lead to the invalidity of an agreement. The employee, who bears the burden of proof regarding such allegations, has to support his allegations by evidence or, in the absence of affirmative evidence, by arguments or submissions of substance (UNDT Judgment No. UNDT/2013/050 para. 9).

61 The Applicant, however, does not give any particulars on the ways and means by which the Respondent allegedly pressured him to sign the Offer Letter, and he does not demonstrate any details nor does he offer any proof for his medical condition on 4 September 2015. Accordingly, there is no case for the Respondent to answer, and no basis for the Tribunal to assess these allegations.

62 The mere fact that an employee is generally considered to be the weaker party in an employment relationship does not in itself call for invalidation of a clause disadvantageous to the employee. The present case does not constitute an exception to this rule: The Applicant did not have to make the potentially stressful decision whether to sign a separation agreement but had to choose whether he would accept the benefits offered by the Respondent in return for signing the agreement including a waiver clause (ILOAT Judgments No. 1075 and No. 3680; WBAT Judgments No. 25, No. 29 and No. 35).

63 The confidentiality clause included in the Offer Letter (see para. 16, supra) is not an annex to the waiver clause, but may be separated from the waiver clause: If one of the two provisions is struck out, the other one keeps its full meaning (Blue-Pencil-Test). A defect of the confidentiality provision, as alleged by the Applicant, would not affect the waiver clause. Therefore, the Tribunal needs not to decide on the validity of the confidentiality clause.

64 For these reasons, the Tribunal concludes that the waiver provision in the Offer Letter has been validly included into the parties' agreement.

bb) Interpretation of the Waiver Clause

65 As to the interpretation of a waiver clause such as used in the Offer Letter the Tribunal decided in Case 1/2015 that the clause applies (1) to any outstanding claims that an employee might have had in relation to sums due to him for the services provided under the employment contract, (2) to any liability that the Respondent might have owed the employee in relation to matters arising during his employment, and (3) to any liability that might have arisen as a result of the termination of the employment (ATBIS Judgment 1/2015 sub 2.).

66 The Tribunal, however, made clear that the clause did not cover pension entitlements arising after the termination of employment, even if they had been already in dispute before termination of employment (ATBIS Judgment 1/2015 sub 2.). The rationale of this exception is that an employee cannot be deemed to fully and finally settle claims that come into being after the settlement.

67 In any case, further damages suffered subsequent to the termination of the Second Contract (see para. 29, supra), as alleged by the Applicant, are not covered by the

waiver clause. These *damages,* which constitute a prerequisite for a damage claim, arose after the conclusion of the agreement included in the Offer Letter (ATBIS Judgment 1/2015 sub 2.; WBAT Judgment No. 35). This applies independent of the fact whether the alleged *unlawful acts*, i.e. the other element of a damage claim, had been committed before the termination of the employment contract and, therefore, the conclusion of the agreement including the waiver clause.

68 The pension claim, in contrast, is covered by the waiver provision because the employee's claim to a lump sum indemnity according to Article 12 paragraph 1 of the Pensions Regulations is arising not after the termination of employment, but at the time of the termination of employment (see para. 20, supra).

69 Therefore, the Tribunal concludes that the waiver clause covers the Applicant's claims with the exception of the compensation for damages allegedly suffered after the termination of employment.

cc) Estoppel by the Respondent's Conduct

70 Yet, the Respondent is barred from invoking the waiver clause based on the rule of estoppel, in particular estoppel by acquiescence. As a general principle of the law of international civil service, as referred to in Article IX paragraph 2 of the Statute, the rule of estoppel prevents a party from asserting a right that contradicts the party's conduct (similar to the ban of *venire contra factum proprium*; ILOAT Judgment No. 2435; see *Streng*, Dienstrecht in Internationalen Organisationen, 2002, p. 145). The principle must be invoked by the staff member or the former staff member in order to be operative and is, in the event of an estoppel by acquiesence, subject to the condition of the Respondent's acquiescence (see *Amerasinghe,* The Law of the International Civil Service as Applied by International Administrative Tribunals, Volume I, 2nd Edition 1994, p. 154, 168).

71 In his letter of 5 October 2017 (see para. 38, supra), the General Manager of the Respondent argued on the substance of the Applicant's request and concluded that the claim for compensation for damages had to be rejected as unfounded. Parts of the contents of the Offer Letter were repeated without mentioning the waiver provision and without other indications that the Respondent had the intention to rely on the waiver clause.

72 From this conduct, the Applicant could draw in good faith the conclusion that the Respondent would not invoke the waiver clause. This conclusion is, from the view of an average person in the position of the Applicant, justified. This applies even more given the fact, that in the final sentence of the General Manager's letter the Applicant was advised of the procedure for filing an application to this Tribunal (on the significant bearing of the final sentence see ATBIS Judgment 1/2015 sub 1.b). Accordingly, by acquiescing, the Respondent has lost its right to invoke the waiver clause against the bona fide Applicant.

73 By invoking the waiver clause in the proceedings before this Tribunal, the Respondent contradicts its own conduct during the preliminary proceedings set forth in Article VI paragraph (2)(a), (b) of the Statute. The Applicant is protected by the principle of estoppel because an average person in the position of the Applicant might have abstained from filing an application to the Tribunal if he or she had been aware that the Respondent would rely on the waiver.

74 The Applicant did not explicitly address the principle of estoppel, but it can be deduced from his pleadings that he opposes the invoking of the waiver clause.

75 Therefore, the Tribunal concludes that the Respondent is estopped from relying on the waiver clause as a result of its own conduct, i.e., its acquiescence during the preliminary proceedings.

c) Time Limitation for the Application

76 The Application is not barred due to lapse of time from the Second Contract's expiry through the Applicant's acts relevant to the present proceedings.

77 The parties express different views on the Applicant's acts relevant to judge whether a limitation of time should apply. The Respondent points out the fact that the Applicant's letter to the General Manager pursuant to Article VI paragraph (2)(a) of the Statute was dated 16 July 2017 (22 months and 16 days after the termination of employment). The Applicant draws the Tribunal's attention to the fact that he made preliminary enquiries as to his employment at the Respondent on 23 January 2017 (16 months and 23 days after the termination of employment) and in the following months collected information with regard to a possible claim (see para. 37, supra).

aa) Rules of Other International Organizations

78 The Respondent is of the opinion that the Application is inadmissible because it was not filed timely. In support of this opinion, the Respondent suggests that the Tribunal considers the limitations of time to contest administrative decisions from other international organizations. The Respondent argues that these limitations are considerably shorter than the time that has passed from the impugned decision in the Applicant's case through the date of the Application. The Respondent refers, e.g., to Article II of the Statute of the World Bank Administrative Tribunal (120 days).

79 This argument, however, is not accurate. In general, the limitations of time, the Respondent refers to, do not operate from the time the event giving rise to an application occurred *(e.g.,* the termination of employment) through the point in time application is filed. Rather they apply from the time notice is received that relief will not be granted through the point in time an application is filed (see, *e.g.,* Article II paragraph (2)(ii)(c) of the Statute of the World Bank Administrative Tribunal), or, e.g., from the time the Secretary-General's decision on a staff member's request is issued through the time the corresponding application is filed (Article 7 paragraphs (2)(a), (4) of the Statute of the Administrative Tribunal of the United Nations: 60 days).

80 Subsequently, the Tribunal does not need to consider the formal time limitations introduced by other international organizations, because Article VII paragraph (1)(a) of the Statute provides for such limitation (90 days).

81 According to all these rules the impugned decision relevant to judge the inadmissibility *ratione temporis* is, but for special circumstances (see, *e.g.,* Article II paragraph (2)(ii)(a) of the Statute of the World Bank Administrative Tribunal), the administrative decision of the international organization not to grant relief (see Article X paragraph (1) of the Statute, and, generally, *Amerasinghe,* op cit., Volume I, pp. 216-217).

82 There are, but for exceptional circumstances, no fixed time limitations from the time an event giving rise to an application occurs *(e.g.,* the expiration of a fixed-term contract) through the time the employee attempts to resolve the subject matter with the international organization (see, *e.g.,* Rule 11.1.(a) of the Staff Rules and Staff Regulations of the United Nations: "A staff member should approach the Office of the Ombudsman *without delay").*

83 Therefore, the Tribunal finds that there is *per se* no cause for the Application's inadmissibility based on the period of time elapsed from the time the event giving rise to the Application occurred through the Applicant's request to the General Manager.

bb) Applying a General Principle

84 The Respondent invites the Tribunal to apply a general principle according to which submitting a formal request after excessive delay is to be found unreasonable. Such request would impend the ability of a respondent to timely obtain facts and witnesses and therefore forecloses a fair outcome of the procedure. However, the Tribunal needs not to decide whether such general defence exists in the law of the international civil service (see *Amerasinghe,* op. cit., Volume I, p. 217: When there is no explicit time-limit in the governing instruments for an application, no time-limit is applicable). For, the Applicant did not act unreasonably nor in excessive delay when filing his Application on 2 January 2018.

85 In judging whether the Applicant acted unreasonably because of excessive delay, three periods of time are to be distinguished: (1) The time that elapsed from sending the Request to the General Manager on 16 July 2017 through the filing of the Application on 2 January 2018. Given that this time period results from Articles VI and VII of the Statute it cannot to be taken into account. (2) The time period from the initial request to the Respondent's HR department on 23 January 2017 through the request to the General Manager on 16 July 2017, *inter alia,* the Applicant's attempt to settle his claims without formal proceedings. Such attempt cannot be judged unreasonable. This leaves only (3) the time period from 31 August 2015 through the initial request to the Respondent's HR department on 23 January 2017 to judge whether the Applicant acted unreasonably because of excessive delay.

86 As to this period of time, the Applicant alleges that only after his release from inpatient treatment on 7 January 2017 his health condition allowed for taking his claim forward, given that he was in an unfit and unwell condition since he had left the Respondent. In consideration of such circumstances where an applicant claims that he was unable to act earlier due to his medical condition, allegedly caused by the other party, it is in the interest of justice to decide the case on the merits rather than dismissing it on an uncertain concept of excessive delay. The obtaining of facts and witnesses after a long period of time is not only a challenge to the Respondent, but also to the Applicant.

87 Furthermore, the Applicant alleges that he suffered damages to health, career and well-being after the termination of employment (see para. 29, supra). Accordingly, the compensation he seeks from the Respondent is partly based on damages allegedly suffered after 31 August 2015. In any case, this part of the claim would not be time barred and the Tribunal would have to decide on this part of the damage claim anyway.

88 For these reasons, the Tribunal concludes that the Application is not barred by limitation of time.

d) Acknowledgment of Constructive Dismissal

89 The Tribunal finds the Application inadmissible to the extent the Applicant seeks a remedy for declaratory relief.

90 The Applicant's request to acknowledge that the non-renewal of his contract amounts to a constructive dismissal (see para. 41, supra) qualifies as a request for a declara-

tory relief: The Tribunal is moved to ascertain that the Respondent has constructively dismissed the Applicant. The same qualification applies to the modified request to acknowledge the Respondent's alleged lack of duty of care, which led ultimately to the Applicant's alleged constructive dismissal (see para. 43, supra).

91 Constructive dismissal, as an English Common law concept, is unknown in Civil law jurisdictions. It is doubtful whether the concept of constructive dismissal is embedded in the general principles of the law of international civil service to be applied by the Tribunal according to Article IX paragraph (2) of the Statute (see ILOAT Judgment No. 2587).

92 However, the question whether the term "constructive dismissal" could be interpreted in a sense which is compatible with the general principles of the law of international civil service needs not to be decided if a declaratory decision has to be denied on other grounds.

93 According to a generally accepted principle of the procedural law applied by administrative tribunals of international organizations, a request for a declaratory judgment is admissible only if the person requesting it has a legal interest in obtaining such a type of decision. In the law of international civil service, the absence of interest is a case of inadmissibility of a claim (see *Amerasinghe,* op. cit., Volume I, pp. 233-235).

94 The Tribunal has constantly held that an applicant lacks interest to obtain a declaratory relief if he also requests the Tribunal to grant a relief for performance (such as the payment of money allegedly due to him) which would give him complete satisfaction with regard to his complaint. This rule has been applied regardless of the conclusions that are reached by the Tribunal on the substantive issue (ATBIS Judgment 1/2015 sub 1.d; Judgment 1/1998 sub 2.d; Judgment 1/1996 sub 2.a).

95 In Case 1/2015 the applicants asked for an order requiring the Respondent to pay children's annuities as well as for a declaration to the effect that the Pensions Regulations do allow for payment of such annuities under certain circumstances. The Tribunal decided that it is not appropriate to make a declaration on the preliminary question what the Regulations do allow or not allow where an Applicant has made a request for performance (ATBIS Judgment 1/2015 sub 1.d).

96 In the present case the Applicant requests compensation and moral damages in the amount of CHF […] (request for performance) to compensate the alleged unfairness experienced as an employee of the Respondent (cause of action). The non-renewal of the contract is submitted by the Applicant as an element of the alleged unfairness. Therefore, the breach of contract inherent to the concept of constructive dismissal is a preliminary (or incidental) question to the damage claim.

97 A request for declaratory relief preliminary to a claim for a particular amount of money is admissible only subject to the condition that the Applicant may show substantiated cause as to why he should obtain such judgment, for example, where there is a legitimate interest in an immediate declaration to rights which have not yet emerged (ATBIS Judgment 1/2015 para. 53). In the present case there is no such cause.

98 Therefore, the Applicant's request to acknowledge that the non-renewal of his contract amounted to constructive dismissal or, respectively, to acknowledge the Respondent's lack of duty of care, which led ultimately to his constructive dismissal, is denied as inadmissible.

e) Reimbursement of Pension Contributions

99 The Tribunal finds the pension claim admissible although the Applicant did not fulfil the requirement of prior request to the Respondent's General Manager with regard to this claim.

100 The Applicant requests the Tribunal to grant him pension contributions in the amount of CHF […] or the amount that the Tribunal deems appropriate (demand for performance). The Applicant argues that the Respondent unilaterally amended the Applicant's pension rights with the effect of reducing the Applicant's lump sum indemnity by approximately CHF […] in breach of the contractual terms and conditions of the employment (cause of action).

101 Article VI paragraph (2)(a) of the Statute provides that a request shall not be admissible, save in exceptional circumstances, unless the applicant has previously submitted a request on the same subject to the General Manager of the Respondent. This requirement serves the legitimate purpose not only to protect the Respondent, but also the Tribunal as an institution from unnecessary litigation.

102 Further, the requirement also protects the Respondent's employees or former employees. If he or she hires a lawyer, who files an application, and the Respondent immediately gives in stating it would have granted a simple request, the Tribunal will be reluctant to award costs to be borne by the Respondent as indemnity for the Applicant's expenses according to Article XIV paragraph (2) of the Statute. Accordingly, an applicant would have to bear unnecessary costs.

aa) Request on the Same Subject

103 The interpretation of the term "request on the same subject" needs to comply with the principal purpose of Article VI paragraph (2)(a) of the Statute, that is the protection of the Respondent and the Tribunal against unnecessary litigation. Therefore, the request needs to be specific enough to allow the General Manager to grant or deny the claim (demand for performance combined with a cause of action) which the Applicant subsequently brings before the Tribunal. Otherwise the requirement of prior request would not serve its legitimate purpose.

104 The Applicant's request of 16 July 2017 to the Respondent's General Manager does not fulfil this requirement because it reflects only general concerns over the handling of the pension scheme and voices regrets about the downward revision of the Applicant's pension capital. An objective reader of the text could not draw the conclusion that the Applicant seeks reimbursement of pension contributions.

bb) Mandatory Nature of the Requirement

105 Since the requirement of a previous request to the General Manager protects not only the Respondent but also the Tribunal, the Respondent's waiver regarding this prerequisite in its Rejoinder (see para. 44, supra) has no binding effect on the Tribunal. As a procedural rule, the prerequisite laid down in Article VI paragraph (2)(a) of the Statute is not at the parties' disposal.

cc) Existence of Exceptional Circumstances

106 The Tribunal, however, finds that exceptional circumstances according to Article VI paragraph (2) of the Statute are justifying an exception from the requirement of prior request. First of all, there is already a proceeding pending between the parties and

the inclusion of the pension claim will serve the goal of just, speedy, and cost-efficient resolution of disputes. Secondly, concerns over the Respondent's handling of the pension scheme were at least mentioned in the request to the General Manager. Thirdly, the Respondent does not oppose the inclusion of the pension claim into this proceeding.

107 Combining these three factors leads the Tribunal to use its discretion to acknowledge exceptional circumstances. Therefore, the request to the Tribunal to grant the Applicant pension contributions is admitted.

f) "Cleaning" of Applicant's Employment Records

108 The Tribunal finds the request to "clean" the Applicant's employment records inadmissible for lack of clarity.

109 The Applicant requests the Tribunal to order the Respondent to clean the Applicant's employment records by deleting any negative remark. The Respondent's pleadings remain silent with regard to this claim. Yet, if the Tribunal dismisses the claim *ex officio*, no acknowledgment will derive from the Respondent's silence.

110 Article 14 paragraph 1 Rules of Procedure provides that the Tribunal shall by virtue of its office examine the admissibility of an application. A possible reason for inadmissibility is that the Applicant did not raise the "clean records"-claim in his request to the General Manager according to Article VI paragraph (2)(a) of the Statute. However, this argument may be rebutted by the counter-argument that the "clean records"-claim is inherent to the damage claim insofar as the "cleaning" of the records is part of the compensation sought due to the alleged injustice suffered from Applicant. The validity of this argument, however, has not to be tested if there is another ground for inadmissibility.

111 In the law of international civil service insufficient clarity of a claim is a case of inadmissibility. An application lacks clarity if the subject-matter of a claim had not been indicated with sufficient precision to enable it to be examined profitably (see *Amerasinghe,* op. cit., Volume I, pp. 229-230). The same standard applies to the proceedings held before the Tribunal based on Article 12 paragraph 2 and Article 14 of the Rules of Procedure. Accordingly, the request to delete negative remarks lacks clarity because the Applicant did not show sufficient objective criteria in order to assess what is "negative" in his employment records: Some may even qualify the absence of praise as a "negative remark". To order the Respondent to "delete negative remarks" would leave it with the unsolved question what remarks exactly it would have to delete. Thus, an applicant may not find any relief in this regard unless he states properly which particular remarks in his employment records he wishes to be erased.

112 Therefore, the Tribunal holds, that the request to order the Respondent to clean the Applicant's employment records is too vague and subsequently inadmissible.

g) Payment of an Additional One Year's Salary

113 The Tribunal finds the Applicant's request to award him a further one year's salary admissible although it was raised for the first time in the Applicant's Reply to the Respondent's Answer.

114 The claim for additional compensation to the amount of one year's salary was only raised in the Applicant's Reply and based on different causes of action, some of them

relating to the Respondent's conduct in the present proceedings, others founded on alleged revelations in the course of the proceedings (see para. 43, supra).

115 The Statute and the Rules of Procedure do not provide for amendments of claims made in an application. The silence on this issue originates from the rule maker's assumption that at first, in order to be admissible, any claim needs to be submitted to the Respondent's General Manager according to Article VI paragraph (2)(a) of the Statute.

116 Therefore, the admissibility of the claim to a further one year's salary depends on whether the Applicant has previously made "a request on the same subject" to the General Manager (as to the interpretation of this term, see para. 103, supra).

117 It would not be practicable to demand absolute consistency of the claims submitted to the General Manager and those made in the Application. Otherwise, the Tribunal would have to decide on the existence of exceptional circumstances such as provided in Article VI paragraph (2) of the Statute every time new circumstances relevant to the requests appear or are revealed in the course of the proceedings, *e.g.* in relation to the extent of the damage suffered by an applicant.

118 With regard to the consistency required for the requests to the General Manager with the requests subsequently submitted in an application to the Tribunal, an applicant can increase his request for payment if he demonstrates that this increase depends on changed circumstances. For, an applicant, in his request to the General Manager, may limit himself to indicate a mere frame of the amount of damages requested.

119 In the present case, the request for an additional compensation is essentially based on the same complaints as the request to the General Manager of the Respondent. The increase of the sum in dispute is, however, substantiated by the allegations that the circumstances appeared to be worse after the first exchange of pleadings and the Respondent committed additional wrongdoing. Accordingly, the increased request still deals with the "same subject" as mentioned in Article VI paragraph (2)(a) of the Statute.

120 For all these reasons, the Tribunal concludes that the Application is admissible save to the extent it seeks a separate acknowledgement of the Respondent's fault and a "cleaning" of the Applicant's employment records.

2.
Substantive Issues

121 To the extent the Application is admissible, the Applicant's claims are without merits.

a) Payment of Damages in the Amount of CHF […]

122 The Applicant requests the Tribunal to grant him compensation and moral damages (including reputational damages) in the amount of two years' salary quantifiable in CHF […]. The claim is motivated by the allegations that the Applicant had a legitimate expectation of renewal of his fixed-term contract or conversion into an open-ended contract and the Respondent violated its duty of care and fair treatment towards the Applicant in the course of their employment relationship.

aa) Termination of the Employment Relationship

123 International administrative tribunals generally accept the termination of an employment relationship by expiry of a fixed-term contract, but impose substantive and procedural limits on the exercise of the discretion of the international organization not to renew or convert the contract (see, *e.g.,* UNAT Judgment No. 2013-UNAT-298 para. 23). Possible *substantive irregularities* are the breach of a promise of renewal, errors of fact or law or mistaken conclusions. *Procedural irregularities* may occur if the international organization fails to stick to its own rules (see, generally, *Amerasinghe,* op. cit., Volume II, pp. 92-149). The *burden of proof* regarding irregularities lies with the employee (see, *e.g.,* UNAT Judgment 2013-UNAT-298 para. 23; UNDT Judgment UNDT/2013/166 para. 35). The *remedy* in case of irregularities is usually not reinstatement, but compensation in form of damages (see *Amerasinghe,* op. cit., Volume II, p. 140).

aaa) No Legitimate Expectation of Renewal or Conversion

124 The Applicant had to be well aware that he was employed on a fixed-term contract which was to expire *ipso facto* on 31 August 2015. The Second Contract included by reference (see para. 3, supra) the clause of the First Contract that the appointment expired automatically and that there should be no expectation of renewal or conversion (for the exact wording of a clause, see para. 2, supra). The clause was not hidden somewhere in a lengthy document but easy to recognize on the second page of the First Contract.

125 Furthermore, the clause warning the employee that there should be no expectation either of any renewal of the fixed-term appointment, or of its subsequent conversion to any other type of appointment, was quoted verbatim from the Respondent's "Guidelines for staffing and recruitment" of 1 October 2007 (as revised on 28 November 2012). As an employee of an international organization the Applicant is deemed to have knowledge of the applicable staff rules (see, generally, ILOAT Judgment No. 1168 consideration 3).

126 The Applicant failed to prove that the Respondent made a promise of renewal or conversion of the Second Contract. The Written Statement of C. _____, the Applicant's LM from 1 May 2013 through 30 June 2014 (see para. 6, supra), expresses only C. _____'s belief that the Applicant "deserved to have his contract extended or converted" based on his performance under C. _____'s supervision, which ended ten months after the starting and 14 months before the expiration of the Second Contract.

127 A statement of this kind does neither furnish evidence of a promise of renewal or conversion nor was C. _____ empowered to give such a promise. According to the Guidelines of the Respondent (see para. 125, supra), the decision *to extend* a fixed-term contract or to let it expire falls upon the LM only after consulting with the relevant Head of Department. Further, the decision *to convert* a fixed-term contract into an open ended one requires the relevant Head of Department's approval. The witness does not declare that he consulted anyone on a possible extension or sought approval of an envisaged conversion.

128 In the absence of any other evidence of a promise on the part of the Respondent, the Tribunal concludes that the Applicant had no legitimate expectation of renewal or conversion.

bbb) The Decision not to Renew the Contract was not Procedurally Deficient

129 Article IX paragraph (1) of the Statute provides that the Tribunal has to apply the *regulations* established by the Respondent and the *contracts* concluded between the Respondent and its officials.

130 Notwithstanding the clause of the Applicant's *contract* that the fixed-term appointment did not carry any expectancy of renewal and would be *ipso facto* extinguished on expiry, the Respondent's non-renewal decision is an administrative decision that can be challenged by the employee (see, generally, UNDT Judgment No. UNDT/2013/166 para. 32; UNAT Judgment No. 2013-UNAT-298 para. 23; ILOAT Judgment No. 3837 consideration 10).

131 A decision not to renew a fixed-term contract may be challenged on the ground that it is procedurally deficient (UNAT Judgment No. 2013-UNAT-298 para. 23). The international organization has a duty to act *fairly and transparently* in its dealings with employees. Due process requires that a staff member needs to know the *reasons for a decision* not to renew his or her appointment (UNDT Judgment No. UNDT/2013/166 para. 34).

132 According to Article IX paragraph (1) of the Statute the evaluation whether the Respondent's decision to let the Second Contract expire was procedurally defective is to be based on the Respondent's *regulations*. The Guidelines (see para. 125, supra) provide a process "through which the case for a contract extension, conversion or expiration is assessed in a structured, consistent and comprehensive manner" (due diligence process).

133 The Guidelines determine that the decision to extend a fixed-term contract or to let it expire is made by the LM, after consultation with the competent Head of Department (see para. 127, supra). The Human Relations (HR) department has to provide assistance in order to support consistent implementation of the due diligence process throughout the Respondent. The staff member affected has to be given sufficient time to adjust to the decision of the LM.

134 According to these rules, the decision on renewal or non-renewal is a unilateral decision that does not require the approval of the staff member affected nor does it have to be discussed with the staff member in order to give him or her an opportunity to influence the decision. Therefore, the Applicant's assertion that he was not consulted about the decision of non-renewal to the effect that he was unable to influence or "adjust" the decision is not relevant.

135 The requirement to inform a staff member well in advance of the decision not to extend his fixed-term contract emanates from the policy that staff members must be given sufficient time to adjust to the decision (see para. 133, supra). The Respondent did fulfil this requirement: It was within the Respondent's discretion to grant the Applicant a ten-month notice instead of a usually applicable six-month notice.

136 The documents provided by the Respondent furnish proof that the non-renewal decision communicated to the Applicant on 31 October 2014 was made by D. _____, the Applicant's LM at the time, after consultation with B. _____. The Respondent was under no obligation to deliver the Applicant the internal due diligence memorandum of 14 October 2014.

137 It does not constitute an abuse of discretion that D. _____ was LM of the Applicant only since 1 July 2014 and had, due, *inter alia,* to a sick leave of the Applicant (see

para. 14, supra), only little contact with the Applicant before he made the non-renewal decision. Management changes are a usual state of affairs, and the Respondent has produced documentary evidence of the fact that D. _____ acted on the basis of discussions and shared views of the Applicant's previous line managers. This conclusion can also be drawn from the reliable Witness Statement of E. _____ […].

138 The due diligence procedure described in the Guidelines, a regulation of the Respondent in the sense of Article IX paragraph (1) of the Statute, constitutes a fair and transparent process consistent with the general principles of the law of the international civil service as applied by international tribunals (see para. 131, supra).

139 The Respondent did not have to follow the procedure as described in the Special Staff Rule relating to Article 14 paragraph 2 (a) of the Staff Regulations ("Management of Unsatisfactory Performance"). The evidence produced by the Respondent shows that this procedure is not deemed to be mandatory and is, in cases of non-renewal of fixed-term contracts, overruled by the Respondent's fixed-term policy laid down in the Guidelines for staffing and recruitment (Witness Statement of E. _____, […]).

140 According to the law of the international civil service as applied by international administrative tribunals a staff member needs to be informed of the reasons for the decision not to renew a fixed-term appointment (see para. 131, supra). The rationale of this requirement is to allow the person concerned to challenge the decision (ILOAT Judgment No. 3837 consideration 10).

141 The case law, however, does not require to include the reasons in the text by which notice of the non-extension is given (ILOAT Judgment No. 3837 consideration 10; UNDT Judgment No. UNDT/2013/166 para. 34). Unless otherwise stated in the regulations of the international organization concerned, the cause for the decision of non-renewal may be given after the communication of this notice and needs not to be issued in writing. Therefore, the Applicant's statement that he was presented with a decision already taken and not given any opportunity to "rectify" it, is not relevant.

142 The Tribunal is satisfied that the Applicant was informed at a meeting with D. _____ and E. _____ on 11 December 2014 as well as that there was not a fit between the position in question and the business requirements on the one side and the motivation and commitment of the Applicant on the other side. This conclusion can be drawn from the preparatory document produced by the Respondent and the detailed and reliable Witness Statement of E. _____ […].

143 Therefore, the Respondent met the requirement to give reasons as specific as necessary to allow the person concerned to evaluate the chances to successfully challenge the decision (see para. 140, supra). It does not matter whether the meeting during which the reasons were explained was held on the initiative of the Respondent or on the insistence of the Applicant, and it is equally irrelevant that the preparatory document produced by the Respondent denies an obligation to provide reasons since the reasons have been provided.

144 Given that the due diligence process was correctly applied and additional procedural requirements were fulfilled, the Tribunal concludes that the decision not to renew the contract is procedurally correct.

ccc) The Decision not to Renew the Contract was not Substantially Deficient

145 Article X paragraph (2) of the Statute provides that in matters of appointments, which include the decision not to extend a fixed-term contract, the Tribunal cannot substitute its decision for the Respondent's discretionary power.

146 Therefore, the Tribunal is not free to weigh the different factors underpinning a decision in matters of appointment, but only has to determine whether there was an abuse of discretion. Additionally, the Tribunal has to review whether the Respondent followed the due diligence process established by the Guidelines (see para. 125, supra).

147 An administrative decision not to renew a fixed-term appointment constitutes an abuse of discretion if it is arbitrary (i.e., founded on prejudice or preference rather than on reason or fact), the result of improper motives (UNAT Judgment No. 2013/UNAT/298 para. 23; UNDT Judgment No. UNDT/2013/166 para. 34), or based on errors of fact or law (see *Amerasinghe,* op. cit., Volume II, p. 106-107). The burden of proving that the decision was substantially deficient lies with the staff member contesting it (UNAT Judgment No. 2013/UNAT/298 para. 23).

148 The Respondent's Guidelines (see para. 125, supra) provide that the due diligence process will assess three key elements: a) whether the position, as well as the expertise required to effectively perform the duties associated with it, will be needed over the longer term, b) whether the position holder's achievements, demonstrated skills and performance, as well as adherence to the Respondent's culture and values, make the position holder fit for longer-term employment at the Respondent; and c) an element assessed particularly for conversion to an open-ended contract of no relevance in the present case (i.e., whether the position holder has displayed a sufficient degree of versatility that would make it likely that the position holder could be employed in another function).

149 The due diligence memorandum of 14 October 2014 submitted by the Respondent comes to a negative evaluation of the Applicant's performance in his position, his commitment to and interests in his role and function, his attitude towards performing his role, timekeeping and presence in the office, his attitudes to serve the needs of the external clients of the unit, and his adherence to the Respondent's culture and values.

150 The Witness Statement of E. _____ describes frequent unexplained absences and a lack of motivation and commitment. E. _____ credibly states that the Applicant had expressed to his LM that he did not want and did not like his position […]. E_____ further describes details of communication problems […]. In the light of the e-mail communication presented by both parties the Tribunal has no doubt about the credibility of the witness and the correctness of the substance of E. _____'s statement.

151 Since the decision to let the Second Contract expire is subject to limited review (see para. 147, supra), the Tribunal is not in a position to go into details of the performance evaluations. The Tribunal follows the Respondent's statement that previous performance evaluations do not retain their relevance indefinitely. In the light of the documentary evidence produced by the parties it is comprehensible that the deterioration of the Applicant's evaluations over the time supported the Respondent's decision of non-renewal.

152 The Applicant's allegations that the decision of non-renewal was based on mistakes of fact and law and was the result of prejudice and improper motives are without

substance. As to the development of the employment relationship, the Applicant confronts his opinion on the subject with the opinion of his former superiors without showing relevant errors of fact or law. The unspecified allegation that the witnesses produced by the Respondent were all directly involved in the present claim and therefore appeared to have conflicts of interest, resulting in necessarily biased statements, is without evidence and substance. It is too vague to be the subject of a call for the production of evidence according to Article 19 paragraph 4 Rules of Procedure.

153 The Tribunal concludes that the Respondent's decision to let the Second Contract expire on its terms was the result of a proper exercise of managerial authority, which cannot be the basis of a damage claim.

bb) Lack of Care and Fair Treatment

154 The Applicant's request to grant him compensation and moral damages in the amount of two years' salary is further motivated by the allegation that the Respondent violated its duty of care and fair treatment in the course of the employment relationship (see para. 122, supra).

155 The principle of fair and equal treatment according to the rules and regulations of the international organization concerned is a generally accepted principle of the law of the international civil service (see *Amerasinghe,* op. cit., Volume II, pp. 190-195). An international organization has a duty to act fairly, justly, and transparently in its dealings with employees (UNDT Judgment No. UNDT/2013/166 para. 34). The remedy in case of a failure to perform according to its duty of care may be compensation in form of damages (UNAT Judgment No. 2010-UNAT-095 para. 20; Judgment 2012-UNAT-201 para. 42).

aaa) Information on and Consequences of the Job Change

156 The Applicant asserts that he had been subjected to a fundamental job change without prior information or consultation. The decision to change his position, role, and job title appeared arbitrary to him. The Applicant further asserts that he had to fulfill two different positions at a time, and the pressure to perform two different roles put him in a state of stress and anxiety (see paras. 25, 26, supra).

157 The documentary evidence shows that the Applicant was offered a new contract (the Second Contract) with a new job description as […]. The new position had already been announced in the Applicant's performance evaluation of 31 May 2012. The Applicant deliberately signed the offer of the Second Contract two weeks before the deadline set for acceptance and then asked for additional information, which was subsequently provided.

158 The Tribunal is satisfied that the Applicant was duly informed that he would not continue to work in his former job as […]. The job description associated with the offer is clear and concise in respect to the changes. The Applicant was not offered just a renewal in terms of contractual duration but a new role with regard to his responsibilities as evidenced by the new job description. Therefore, the Respondent acted fairly and transparently in its dealings with the Applicant before he signed the Second Contract.

159 The Respondent provided proof that the reorganization of the […] department in the year 2013 was not arbitrary but a legitimate response to evolving business needs. The Tribunal has not to evaluate business decisions (ATBIS Judgment 1/2005 sub 1.)

but only to decide whether there was an abuse of managerial discretion which affected the Applicant. The Witness Statement of B. _____ shows that this was not the case […].

160 There is no evidence that the Applicant had to fulfil two full time-jobs at a time. The Witness Statement of B. _____ confirms that previous holders of the Applicant's position in the former […] team had been able to perform the regular work with notable spare capacity. The combined work of the team was the same as before the change, as was the combined headcount […].

bbb) Behaviour of the Colleagues and Superiors

161 The Applicant further submits that the working conditions in the Respondent's […] department, especially the harassing and bullying behaviours of colleagues and superiors, put him in a state of stress and anxiety that damaged his health conditions.

162 The international organization's duty of care and fair treatment encompasses the obligation to prevent conduct of colleagues and superiors that might offend or humiliate another person and the obligation to provide a working environment free form harassment (see, *e.g.,* ILOAT Judgment No. 3660 consideration 7; Judgment No. 3337 consideration 11; Judgment No. 3065 consideration 10).

163 International administrative courts have consistently held that incidents causing embarrassment to staff members do not necessarily lead to an award of compensation (UNAT Judgment No. 2010-UNAT-095 para. 20; Judgment No. 2012-UNAT-201 para. 42; ILOAT Judgment No. 3593 consideration 14). Generally, compensation in form of damages is justified only if the organization tolerates a hostile work environment or, as the General Court of the European Union decided on 13 July 2018, refuses assistance to an employee harassed by a colleague (Case T-275/17 para. 115) or fails to prevent the harassment of an employee by a superior (Case T-377/17 para. 162).

164 The Respondent's "Information note: Questions and Answers on the Code of Conduct for Members of Staff" (hereafter "Q & A") of 6 October 2008 (as revised on 1 June 2015) defines *harassment* as "any improper and unwelcome conduct that might reasonably be expected or perceived to cause offence or humiliation to another person" (Q & A 9). *Bullying* occurs when a single individual deliberately intimidates, humiliates, or isolates a work colleague (Q & A 11).

ccc) Relationship with a Member of the […] Department

165 The Applicant specifically submits that he had been consistently harassed for information by a member of the […] department, whose behaviour had been tantamount to bullying, to the extent that the LM at the time, C. _____, had to intervene (see para. 26, supra).

166 The wording of the allegation does not support a conclusion that harassment in the sense of Q & A 9 occurred: "To harass someone *for information"* may simply mean that a person is urged to give an information necessary for accountancy purposes. The Written Statement of C. _____ says that the person in question "was difficult to work with", but does not mention an intervention in a case of harassment or bullying (UNAT Judgment No. 2015-UNAT-518 para. 31).

167 In the absence of other evidence or submissions of substance the Tribunal is not convinced that acts of harassment or bullying as defined in Q & A 9, 11 occurred in

the working relationship between the Applicant and the member of the […] department named by the Applicant.

ddd) Conversation with G. _____, B. _____'s Deputy

168 The Applicant further refers to the transcript of an audio recorded conversation with G. _____ held on 23 April 2014. The Swiss Criminal Code applies for actions within the Respondent's buildings. Since G. _____ was not aware of being recorded, the behaviour of the Applicant is subject to Art. 179ter of the Swiss Criminal Code. According to this provision, recording a conversation without consent of all participants constitutes a criminal offence. Additionally, the secret recording violates G. _____'s personal rights.

169 The Statute and the Rules of Procedure contain no specific provision on the exclusion of evidence obtained in an illegal way. However, the question whether the Tribunal may take into account the transcript of the conversation as valid evidence needs not to be decided since the incident, taken as a single and isolated event, gives no grounds for a damage claim.

170 The verbal abuses uttered by G. _____ constitute, on the one hand, harassment in terms of Q & A 9 since they qualify as an unwelcome conduct that might reasonably be perceived to cause offence to another person. On the other hand, the evidence produced by the parties shows that G. _____ had reasons to be angry, and undisputed evidence suggests that the Applicant provoked the event to trap G. _____ into a secret audio recording. In such case the moral damages potentially suffered by the Applicant are neutralized by the moral damages suffered by G. _____ whose personal rights were violated by the secret audio recording.

171 In any case the Respondent may not be held accountable for a potential moral damage the Applicant suffered from the incident of 23 April 2014. In establishing a compliance system as described in the Q & A information note the Respondent took appropriate measures to prevent harassment. According to the law of the international civil service as applied by international administrative tribunals an organization cannot be held accountable for every single misbehaviour of its staff members (see para. 163, supra).

eee) General Allegations of Harassment

172 Inasmuch as the Applicant submits that the working conditions at the Respondent's […] department in general and, especially, the senior management's harassing and bullying behaviour put him in a state of stress and anxiety, there are no further accounts or descriptions of relevant incidents that a victim of harassment or bullying, usually would remember. The details given in the Applicant's submissions depict the usual challenges and difficulties in everyday's office life. They do not call for further evidence based on the Applicant's allegations according to Article 19 paragraph 4 of the Rules of Procedure.

173 If there were other incidents of improper behaviour than the one audio recorded incident of 23 April 2014, it would not be plausible why the Applicant did not avail himself of the procedures provided for by the Respondent and described in the Q & A. The Applicant presents himself in the written request to the General Manager as someone who "will readily make a challenge when [he feels] there is an error or injustice", and he deliberately availed himself of the grievance procedure to obtain expatriation benefits.

174 Even if there had been more acts of harassment or bullying, the Applicant would have had to avail himself of the Respondent's proceedings for addressing complaints and grievances. The established process for reporting alleged harassment serves the interests of both parties because it allows the claims to be investigated at a time near to the alleged events. The Applicant did not act in good faith when he chose not to report the incident of 23 April 2014 but only to introduce it in the course of the present proceedings. An employee who gives the other party no opportunity to investigate and to stop the acts of misconduct, eventually, may request compensation for damages later only under exceptional circumstances not present in the case at hand.

fff) Responsibility for the Applicant's Medical Condition

175 The Applicant relies on medical certificates mentioning "stress and anxiety" as the main causes for his medical condition and suggests that these causes were obviously work-related. He alleges that the pressure to fulfil two different roles at a time and the working conditions at the Respondent's […] department, especially, harassing and bullying behaviours put him in a state of stress and anxiety (see paras. 156 and 172, supra).

176 Since the Tribunal has found that the Applicant neither was obliged to fulfil two roles at a time nor exposed to harassment which the Respondent is liable for, there is no lack of care and fair treatment of the Respondent as required by a damage claim such as purported by the Applicant.

177 Even if the Applicant's medical condition were related to a violation of the Respondent's duty of care and fair treatment, the Applicant would be under an obligation to make the Respondent aware of the nature of his condition. It is not self-evident that "stress and anxiety" mentioned in a medical certificate are work related and an employer is under no obligation to address medical issues of a private nature.

178 The same obligation to inform the employer would apply if the medical condition was work-related, but not caused by an employer's lack of care and fair treatment. The message of 19 May 2014 to C. _____, classified confidential […], does not fulfil the Applicant's obligation to inform the Respondent in a proper and timely manner of a work-related medical condition. As the evidence shows, the Respondent was made aware of an alleged work-related medical condition only towards the end of the employment relationship, i.e. during the meeting with E. _____ on 11 December 2014 (Witness Statement of E. _____, […]).

179 The Tribunal concludes that the Applicant's allegations as for the Respondent's unlawful acts are unfounded and his request for compensation and moral damages in the amount of two years' salary is to be dismissed.

b) Payment of an Additional One Year's Salary

180 The Applicant's request for payment of an additional one year's salary is without substance. The Respondent did not violate its obligations against the Applicant and is, therefore, not accountable for an alleged failure of the Applicant to find a suitable job or difficulties arising from his fragile health conditions. The Respondent made no mistake in disclosing its reasons for non-renewal of the Second Contract (see para. 142, supra), and was under no obligation to follow the procedure described in the Special Staff Rule relating to Article 14 paragraph 2(a) of the Staff Regulations (see para. 139, supra). The Respondent's submissions in the present proceedings are no

cause of action. Therefore, the Applicant's request for payment of an additional one year's salary is to be dismissed.

c) Reimbursement of Pension Contributions

181 The Applicant requests the Tribunal to grant him pension contributions in the amount of CHF […] or the amount the Tribunal deems appropriate. He does not contest the Respondent's power to amend the Pensions Regulations but holds that such amendments should not be carried out retroactively at the staff members' disadvantage because their rights granted by the Pensions System prior to the update of the conversion tariffs had to be preserved and grandfathered. The Applicant further complains about the inequality of treatment between staff members holding an open-ended contract and staff members on a fixed-term contract to the detriment of the latter. The Tribunal finds that these submissions are without merits.

aa) Preservation and Grandfathering of Acquired Rights

182 In Case 1/2006 the Tribunal had to decide on the grandfathering of acquired rights on the occasion of a premium increase in the Respondent's health and accidents insurance scheme. According, to the Tribunal's finding the doctrine of acquired rights applies not only to rights already acquired but also to fundamental rights for which the foundation has already been laid although they fall due in the future (ATBIS Judgment No. 1/2006 sub 3.d).

183 Fundamental rights such as the participation of staff members in the Respondent's health and accident insurance may, however, be amended. The amendments must not touch the core of the staff members' fundamental right and the amendment has to be objectively justified by a legitimate goal. Further, the means of achieving that goal have to be appropriate and necessary (ATBIS Judgment No. 1/2006 sub 4.a, 4.b). To this effect the Tribunal's ruling in Case 1/2006 sets some boundaries to the preservation and grandfathering of the staff members' fundamental rights.

184 The Tribunal's reasoning in Case 1/2006 applies just as well to the present case. The participation in the Respondent's Pensions System is, like the access to health and accident insurance, a fundamental right of a staff member.

185 The amendment in question is comparable as well. An update in the conversion tariffs of the Pensions System operates, just as the increase in the insurance premium in Case 1/2006, not, as the Applicant suggests, retroactively, but retrospectively: The update did not affect a claim that had already materialized on the date the updated conversion tariffs became effective (1 October 2014) but affected only claims which came into existence after the change of conversion tariffs. The entitlement to a lump sum indemnity arises on the date the participant leaves the Respondent's service (Article 11 paragraph 1 of the Pensions Regulations). For this reason, the Respondent advised staff members on fixed-term contracts to examine the possibility of leaving the Respondent's service prior to the effective date of the revised Regulations.

186 The amendment of the Pensions System which became effective 1 October 2014 does not touch the core (in terms of ATBIS Judgment 1/2006 sub 3 d) of a staff member's right to a lump sum indemnity in settlement of the pension entitlement (Article 11 of the Pensions Regulations). The Tribunal follows the argumentation of the Respondent that the net effect of the changes depends on the age at the time of departure so that it works to the advantage of some staff members and to the disad-

vantage of some others (see para. 23, supra). Such an adjustment of the rules does not touch the core of the system.

187 The Tribunal is convinced that the update of the conversion tariffs was objectively justified by a legitimate goal because it reflects the massive changes of interest rates and the increased life expectancy in an aging society (see para. 22, supra). Given the fact that pensions systems create long-term obligations in a changing environment, the possibility of a retrospective change of rules is inherent to pensions systems.

188 The Tribunal further finds that the means of achieving the goal of the tariff update are appropriate and necessary. The evidence produced by the Respondent shows that the update was carried out in accordance with the Respondent's internal rules and was communicated in a transparent manner to the participants. The restructuring was carried out based on the advice of the Respondent's actuaries and reflected the need for adjustments.

bb) Discrimination of Fixed-Term Employees

189 Although the update of the conversion tariffs was not targeted at any particular group of employees, it affects employees on a fixed-term contract more than those on an open-ended contract. According to the Respondent's allegations the extension or conversion rates of fixed-term contracts are low (see para. 34, supra), so that most fixed-term employees leave the Respondent's service before having completed the 15 years of service required in order to qualify for pension entitlement (Article 11 paragraph 1 of the Pensions Regulations).

190 Since persons leaving the Respondent's service with a lump sum indemnity calculated based on the conversion tariffs are usually younger than participants enjoying a retirement pension, the updating of the conversion tariffs works to the detriment of persons such as the Applicant. This group of participants suffers an indirect discrimination on grounds of age. Indirect discrimination occurs where an apparently neutral provision puts persons having a particular age at a particular disadvantage compared with other persons (with regard to nationality CEJC Judgments No. 147/79 and No. 1322/79; UNAT Judgment No. 85).

191 In Case 1/2015 the Tribunal ruled that the principle of equality or the prohibition of discrimination is acknowledged to be a general principle of law in terms of Article X paragraph (2) of the Statute (ILOAT Judgment No. 344). The Tribunal further decided that the principle of equality and the prohibition of discrimination are not absolute or unrestricted. Not all inequalities of treatment represent an infringement of the general principle of equality, only those that are not founded on objective reasons (ATBIS Judgment No. 1/2015 sub 4.l with reference to ATBIS Judgment No. 1/1998 sub 4.b).

192 The indirect age discrimination inherent to the update of the conversion tariffs can be justified by the same arguments as the amendment of the staff members' acquired rights. Since pensions systems create long-term obligations, staff members cannot assume that they will keep the same pensions scheme for a lifetime. The system would collapse if everyone affected by a change in the beginning of his career could demand, as the Applicant submits, complete grandfathering of acquired rights. Further, one cannot help but note that the update of the conversion tariffs did not change the different treatment of different groups of staff members. The Respondent's Pensions System distinguished the situation of staff members with fixed term contract and those holding an open-ended contract already before the update. By

treating the different groups of staff members differently the new Pensions System continues a traditional distinction.

193 For these reasons the Applicant's request to grant him pension contributions is to be dismissed.

d) Awarding of Reasonable Costs

194 The Applicant requests the Tribunal to award reasonable legal costs. According to Article XIV paragraph (2) of the Statute the Tribunal may award costs to be borne by the Respondent if it rules in an applicant's favour. Under exceptional circumstances, the Tribunal may award costs even though it did not rule in an applicant's favour. In the present case, the Tribunal finds no exceptional circumstances which justify an order for payment of costs against the Respondent. The various steps taken by the Respondent in this case were not likely to encourage the Applicant to submit his Application to the Tribunal.

3.
Conclusion

195 In view of the foregoing, the Tribunal finds:

1. The Application is dismissed to the extent it is admissible.

2. The Respondent bears the costs incurred by the Tribunal for this proceeding.

3. Each party bears its own costs.

Basel, 11 April 2019

The President:	The Registrar:
Prof. Dr. Tobias Jaag	Prof. Dr. Ramon Mabillard