UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2014-UNAT-433

Hersh

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Inés Weinberg de Roca Judge Luis María Simón
Case Nos.:	2013-495
Date:	27 June 2014
Registrar:	Weicheng Lin

Counsel for Ms. Hersh:	Miles Hastie/OSLA
Counsel for Secretary-General:	Rupa Mitra

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/062, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 28 March 2013 in the case of *Hersh v. Secretary-General of the United Nations*. The Secretary-General appealed on 7 June 2013, and Ms. Nanci Hersh answered on 12 August 2013.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:[1]

> ... The Applicant joined [the United Nations Mission in Sudan (UNMIS)] on 26 July 2005 as a Broadcast Technology Officer ("BTO") within the Public Information Office ("PIO") on an Appointment of Limited Duration under the former 300 series of the Staff Rules. Following contractual reforms in 2009 the Applicant was reappointed under a fixed term appointment at the FS 5 level effective 1 July 2009. Her appointment was subsequently renewed on an annual basis.
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> ... In January 2010, she was promoted to the only P-4 post of BTO in the mission following a competitive process in respect of VA-09-PUB-UNMIS-423099-R-KHARTOUM.
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> ... By its Resolution 1978 (2011) of 27 April 2011, the Security Council extended the mandate of UNMIS until 9 July 2011. By Resolution 1997 (2011) of 11 July 2011, the Security Council, inter alia, decided to withdraw UNMIS effective 11 July 2011 and called upon the Secretary-General to complete the withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011.
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> ... On 1 June 2011, Mr. Nicholas Von Ruben, Director of Mission Support, UNMIS, issued Information Circular No. 218/2011 (Movement of International Staff to South Sudan). The purpose of the Circular was to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan. The said circular also provided guidelines for the transition to the new mission.
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> ... Also on 1 June 2011, the Applicant received an email with an attached Reassignment Form stating that she had been reassigned to Juba effective 1 July 2011. The Reassignment Form was signed by Mr. Martin Ojjerro, Officer-in-Charge of the Human Resources Services Section and by Nicholas Von Ruben. The Applicant signed

[1] The following text is taken from Judgment No. UNDT/2013/062, paragraphs 3-13.

the offer of a fixed-term appointment for the period 1 July 2011 – 30 June 2012 for the position of BTO with UNMIS on 26 July 2011.

... Meanwhile on 26 June 2011, another Information Circular was issued by UNMIS announcing the formation of a Comparative Review Panel ("CRP") to review international posts in the mission in cases where the number of current staff members exceeded the number of proposed posts in the new mission for particular job categories and post levels. The comparative review took place from 26 June to 5 July 2011. On 27 July 2011, the Applicant received a Letter of Separation, signed by Mr. Ojjerro, in his capacity as Chief Civilian Personnel Officer ("CCPO"), UNMIS.

... On 28 July 2011, Mr. Ojjerro and the UNMIS Visa Office advised the Applicant to check out of the Mission and to leave Sudan as soon as possible as Sudanese visas would only be effective and recognized as valid by the Sudanese Government until 7 August 2011. The Applicant left Sudan on 4 August 2011.

... The Applicant filed a request for management evaluation of the termination decision on 12 August 2011 and, on 23 August 2011; she also filed an application seeking suspension of that decision. The case was heard by the Tribunal on 29 August 2011.

... The Tribunal issued Judgment No. UNDT/2011/154 and refused the application for suspension of action on 31 August 2011. The Tribunal, however, found that the decision to terminate the Applicant's contract was *prima facie*, unlawful. The Tribunal further found as follows:

> 45. It is the finding of this Tribunal that the subject matter of this suit cannot properly be addressed and determined in a suspension of action application. The Application for suspension of action is hereby refused for not having satisfied one of the three conditions required under the Statute and Article 13 of the Tribunal's Rules of Procedure for its grant.
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> 46. In view of its finding above, the Tribunal, in the interests of justice and in exercise of its inherent powers and the provisions of Articles 19 and 36 of its Rules of Procedure, hereby transfers the instant Application to the general cause list to be heard on the merits.

... Judgment No. UNDT/2011/154 was appealed to the Appeals Tribunal which issued Judgment No. 2012-UNAT-243 on 29 June 2012. UNAT, inter alia, held that in ordering the placing of the application for suspension on the list of cases to be considered on the merits and requesting the parties to file written documents on the merits, the UNDT exceeded the jurisdictional powers conferred on it by its Statute and rescinded the judgment.

... On 7 October 2011, the Applicant filed the present Application on the merits. The Reply was filed on 11 November 2011.

3. In Judgment No. UNDT/2013/062, the Dispute Tribunal ordered rescission of the decision to separate Ms. Hersh from service, because it was the result of a series of violations of the pertinent administrative issuances. The UNDT found that as only one post of BTO was created for the new mission, thus equal to the number of posts in the old mission under the same occupational group and level, under the UNMIS Information Circulars No. 218/2011 (Movement of International Staff to South Sudan) and No. 327/2011 (Formation of a Comparative Review Panel to Review Transition of International Staff), the UNMIS Administration could not, as it did, fill the BTO post in UNMISS by using a comparative review process and Ms. Hersh "was to automatically walk across into the BTO post in the new mission". Instead, she was wrongfully subjected to the comparative review process to her detriment. The UNDT also found that provisions of ST/AI/1998/9 (Reclassification) were disregarded, when the Chief of Radio, without the requisite authority, drafted the new terms of reference for UNMISS, and the proper procedure for reclassification was not followed. Thus, under UNMIS Information Circular No. 327/2011, when the profiles of the BTO changed, "the only viable course of action in the circumstances for the purpose of filling it would have been a regular, competitive selection process and not a comparative review as happened in this case. The so-called comparative review between the Applicant and Mr. Tobgyal for the only post of BTO in the new mission was manifestly fraudulent in the circumstances and amounted to a reckless abuse of power and position on the part of Ms. Herman."

4. The Dispute Tribunal further found that the Chief of Radio employed her influence within the comparative review panel and successfully worked against Ms. Hersh's right to a transition to the new mission. The UNDT decided to refer the Chief of Radio to the Secretary-General for accountability.

5. As remedy, the Dispute Tribunal ordered that Ms. Hersh be reinstated, or in the alternative, be paid two years' net base salary. Furthermore, it awarded Ms. Hersh one year's net base salary for substantive irregularity and four months' net base salary for procedural irregularity.

The Secretary-General's Appeal

6. The Secretary-General submits that the UNDT erred in finding that Ms. Hersh should have been automatically transitioned to the new mission and that it was wrong to subject her

to a comparative review process. The Secretary-General has broad discretion in determining the new mission's operational needs, including the application of a transition process under which staff members of a mission whose mandate is ending are chosen for reassignment to a new mission. In the present case, the Secretary-General validly exercised his discretion by accepting the comparative review panel's recommendations about reviewing staff based on the functions they performed, rather than by the functional titles of their posts.

7. The Secretary-General also submits that the Dispute Tribunal erred in law and exceeded its competence in finding that Ms. Hersh's challenge of the classification of the BTO post in the new mission was receivable, because she did not request management evaluation of that administrative decision.

8. The Secretary-General further submits that the UNDT erred in referring the Chief of Radio to him for accountability.

9. The Secretary-General maintains that the compensation awarded by the UNDT was manifestly excessive. He notes that Ms. Hersh's appointment had been renewed for only one year to 30 June 2012, but was terminated on 31 August 2011. She thus had ten months remaining on her appointment. The UNDT's award of two years' net base salary was consequently excessive. In his view, even ten months' net base salary could be considered as inordinate under the Appeals Tribunal's jurisprudence. Moreover, the Dispute Tribunal erred in failing to reduce the two years in-lieu compensation by the amount that Ms. Hersh had received as termination indemnity.

10. Finally, the Secretary-General submits that the UNDT erred in awarding compensation purely for procedural and substantive irregularities, without making any determination as to whether Ms. Hersh had suffered any moral harm as a result of the administrative actions at issue in this case. He notes that Ms. Hersh did not describe any moral harm suffered in her UNDT application, nor did she specifically ask for moral damages or provide any evidence of moral harm.

Ms. Hersh's Answer

11. Ms. Hersh submits that the Dispute Tribunal did not err in law in finding that she should have been transitioned to the new mission.

12. Ms. Hersh also submits that the Dispute Tribunal did not err in law in referring the Chief of Radio to the Secretary-General for accountability.

13. Ms. Hersh further submits that the Dispute Tribunal did not err in law in awarding compensation for non-pecuniary damages and moral damages, given the presence of aggravating factors. She stresses that she expressly claimed moral injury.

14. Ms. Hersh requests affirmation of the UNDT Judgment and dismissal of the appeal.

Considerations

15. By the Security Council's decisions extending the mandate of UNMIS for a final time to 9 July 2011 and withdraw UNMIS effective 11 July 2011, all posts within UNMIS were abolished. In accordance with the Security Council's request that the Secretary-General transfer appropriate staff from UNMIS to UNMISS, the Administration established a transition process under which UNMIS staff members had the opportunity to be considered for retention in the new mission in South Sudan, UNMISS.

16. Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization have held that it is well settled jurisprudence that "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff".[2]

17. This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

18. In *Sanwidi*, this Tribunal held:

> [A]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of

[2] *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 22.

> proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.[3]

19. In *Ljungdell*, this Tribunal also clarified that the Administration has the duty to follow its own Regulations and Rules in matters of staff selection. "[I]in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration."[4]

20. The Secretary-General submits that the UNDT erred in fact and law and exceeded its competence in substituting its own views for those of the Secretary-General for holding that Ms. Hersh should have been automatically transitioned to the new mission.

21. Quite properly, the starting point for the UNDT was to consider whether the applicable Regulations and Rules and the additional guidelines in the UNMIS Information Circulars Nos. 218/2011 and 327/2011 which had been issued to govern the transition and comparative review process from UNMIS to the new mission UNMISS were properly followed with respect to Ms. Hersh.

22. UNMIS Information Circular No. 218/2011 provides in paragraph 2 in respect of the mandate of the Comparative Review Panel as follows:

> A. In cases where the number of posts in the new mission is equal to or higher than the number of posts in UNMIS under the same occupational group and level, staff members currently encumbering the those posts in UNMIS will automatically be reassigned to the new mission ...
>
> B. In cases where the number of posts in new mission are lower than the current encumbered posts in UNMIS at the same occupational group and level, then a comparative review process will be instituted through a comparative review panel ...

[3] *Sanwidi. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 38.
[4] *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

23. UNMIS Information Circular No. 327/2011 provides:

> **Purpose**
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> 1. The purpose of this Information Circular is to announce the formation of a Comparative Review panel to review the international posts in UNMIS where the number of current staff in UNMIS is in excess of the number of proposed posts in the new mission for particular job categories and post levels.
>
> **General**
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> 2. The Panel will be guided by Article 101, of the U.N. Charter to ensure that the staff members who are considered and recommended meet the highest standards of efficiency, competency and integrity.
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> 3. The Panel will not review posts where staffing is equal to or less than the proposed numbers in the new mission. However, it should be noted that the staffing table of the new mission is still in draft form and the number of some posts may be reduced. It should further be noted that the profiles of some of the existing posts may change and they will be filled through the regular competitive selection process.
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> 4. The criteria to be considered, and subject for review by the Panel, are broadly as follows:
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> (a) Core Values (integrity, respect for diversity and professionalism) as provided in the last 2 e-PAS reports;
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> (b) Performance (e-PAS) as recorded in the last 2 reports;
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> (c) Length of Service;
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> (d) Seniority/Experience in a given field;
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> (e) Gender;
>
> (f) Geographical Representation [.]
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> 5. The Panel members have been nominated after consultation with the Field Staff Union (FSU) and UNMIS Management taking into consideration the representation of the entire categories of employment. [Names of 11 voting members, one non-voting member and two secretaries are omitted.]
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> 6. The Panel's recommendations will be submitted to N.Y. through UNMIS Management for approval and implementation.

24. It is thus noted that the provisions of paragraph 2.A of UNMIS Information Circular No. 218/2011 and paragraph 3 of UNMIS Information Circular No. 327/2011 enjoined the Secretary- General from reviewing posts where staffing was equal to or less than the proposed numbers in the new mission.

25. A new staffing table was established for the new mission in South Sudan, in which only one post of BTO was created. Ms. Hersh was the only holder of the BTO post in the old mission. Pursuant to the provisions of paragraph 2.A of UNMIS Information Circular No. 218/2011 and paragraph 3 of UNMIS Information Circular No. 327/2011, she was to automatically walk across into the BTO post in the new mission, unless she had performance issues.

26. According to the UNDT, Ms. Hersh had evidently performed satisfactorily and had no performance issues. So why then did the Respondent's agents overreach themselves and compromise the Organization's standards for transparency by undertaking a comparative review process in respect of the only BTO post in UNMIS and UNMISS?

27. The UNDT's findings were that Ms. Herman, the Chief of Radio, took upon herself to rewrite the terms of reference of the BTO post for UNMISS in order to fit the profile of Mr. Tobgyal a Radio Producer . Ms. Herman also convinced the CCPO into accepting that Mr. Tobgyal had been doing the job of a BTO at the P-4 level under a borrowed post and ought to undergo a competitive review process with Ms. Hersh.

28. The UNDT rightly opined:

> Even if it could be argued that the profile of the BTO P-4 post had changed due to the drafting of new TOR by Ms. Herman, the only viable course of action in the circumstances for the purposes of filling it would have been a regular, competitive selection process and not a comparative review as happened in this case. The so-called comparative review between the Applicant and Mr. Tobgyal for the only post of BTO in the new mission was manifestly fraudulent in the circumstances and amounted to a reckless abuse of power and position on the part of Ms. Herman.[5]

29. Under Article 101 of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. While the Tribunal's role is not to substitute its decision for that of the Administration, the Tribunal can intervene where the Administration failed in its duty to act fairly, justly and transparently in dealing with its staff members and failed to follow its own Regulations and Rules.[6]

[5] Judgment No. UNDT/2013/062, para. 107.
[6] *Brisson v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-371, para. 16; *Obeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33.

30. This Tribunal has examined the arguments made by the parties and the evidence and rules and guidelines pertaining to the transition and is satisfied that the UNDT correctly determined that the Administration manipulated the job description and posting and failed to apply the relevant Regulations and Rules and guidelines in a fair and transparent manner, thereby preventing Ms. Hersh from automatically rolling-over into the BTO post in the new mission. We accordingly affirm the decision of the UNDT.

31. We clearly distinguish the present case from *Bali v. Secretary-General of the United Nations*, also issued during the 2014 Summer Session,[7] because in the latter case, there were less Radio Producer posts at the P-4 level for the new mission than qualified staff at UNMIS. Consequently, in accordance with Information Circular No. 334/2011 of 30 June 2011 entitled "Update to UNMIS Staff regarding the UNMIS Draw-down Process", Mr. Bali, a Radio Producer, had to go through a comparative review process with two other Radio Producers. This Tribunal held in that case that the Secretary-General had applied the specific Regulations and Rules in a fair, transparent and non-discriminatory manner and therefore vacated the UNDT judgment.

32. The Secretary-General further submits that the UNDT erred in exercising jurisdiction over Ms. Hersh's challenge of the classification of the BTO post in UNMISS, since she did not request management evaluation.

33. We do not find any merit in this submission, as the UNDT's review of the factual situation by necessity involved a consideration beyond the mere fact of termination of Ms. Hersh's contract.

The Appeal against compensation

34. As a remedy, the Dispute Tribunal ordered that Ms. Hersh be reinstated, or in the alternative, be paid two years' net base salary. Furthermore, it awarded Ms. Hersh one year's net base salary for substantive irregularity and four months' net base salary for procedural irregularity.

[7] *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450.

35. Article 10(5) of the UNDT Statute provides as follows:

> As part of its judgement, the Dispute Tribunal may order one or both of the following:
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> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

36. The Secretary-General submits that "the UNDT erred in awarding an amount equivalent to over three years' net base salary without providing any explanation as to why the case was an exceptional one that merited such higher compensation".

37. As explained in *Mmata*, "Article 10(5)(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation".[8]

38. The UNDT Judgment is replete with language speaking of the breaches and aggravating factors. The findings of fact made by the UNDT in paragraphs 97 to 109 of the Judgment point to evidence of blatant and reckless abuse of power, especially on the part of the Chief of Radio, and the manipulation of the transition process to the new mission in favour of Mr. Tobgyal, thereby preventing Ms. Hersh from automatic rolling-over to the new mission as provided in the transition guidelines.

39. The circumstances justify the principles of law applied by this Tribunal and the UNDT to justify increased compensation.[9] Accordingly, we find no error on the part of the UNDT for an increased award under Article 10(5)(b) of the UNDT Statute. The alternative award of two years' net base salary was well within its jurisdiction having regard to the seriousness of the breaches, which occasioned a referral of the Chief Radio to the Secretary-General for accountability.

[8] *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092, para. 33.
[9] C*f. Kasmani. v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-305.

Non-pecuniary or moral damages

40. The Secretary-General submits that the UNDT erred in awarding compensation purely for procedural and substantive irregularities, without making any determination as to whether Ms. Hersh had suffered any moral harm as a result of the administrative actions at issue in this case. He also submits that Ms. Hersh did not describe any moral harm suffered in her UNDT application, nor did she specifically ask for moral damages or provide any evidence of moral harm.

41. Ms. Hersh submits that the Dispute Tribunal did not err in law in awarding compensation for non-pecuniary damages and moral damages, given the presence of aggravating factors. She stresses that she expressly claimed moral injury.

42. As a matter of fact, Ms. Hersh in her application before the UNDT referred to "significant moral damage as a result of the deliberate manipulation of the Organization's processes". In any event, the breach of Ms. Hersh's rights was so fundamental that she was entitled to both pecuniary and moral damages.[10]

43. However, we find the sum of one year and four months' net base salary excessive and reduce it to six months' net base salary.

44. In sum, we award Ms. Hersh a total of two years and six months' net base salary.

Referral

45. The referral is well within the discretion of the UNDT under Article 10(8) of its Statute. On the facts and circumstances of the case the UNDT rightly exercised its discretion.[11]

[10] *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.
[11] *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410.

Judgment

46. The UNDT Judgment is affirmed subject to variation of award to two years and six months' net base salary, with interest at the US Prime Rate accruing from the date on which Ms. Hersh left South Sudan. This amount shall be paid within 60 days from the date this Judgment becomes executable. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)	*(Signed)*	*(Signed)*
Judge Adinyira, Presiding	Judge Weinberg de Roca	Judge Simón

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar