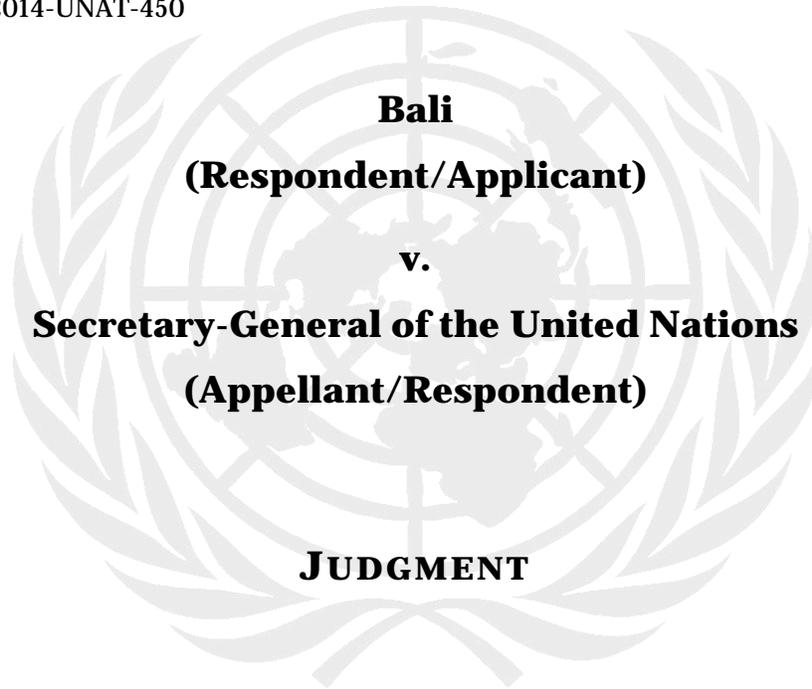




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-450



**Bali  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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**Before:** Judge Inés Weinberg de Roca, Presiding  
Judge Sophia Adinyira  
Judge Richard Lussick

**Case No.:** 2013-519

**Date:** 27 June 2014

**Registrar:** Weicheng Lin

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**Counsel for Mr. Bali:** Daniel Trup/Alexandre Tavadian/OSLA

**Counsel for Secretary-General:** Rupa Mitra

**JUDGE INÉS WEINBERG DE ROCA, 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/2013/094, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 1 July 2013 in the case of *Bali v. Secretary-General of the United Nations*.

**Facts and Procedure**

2. The facts established by the Dispute Tribunal in this case read as follows:<sup>1</sup>

... On 10 February 2010, the Applicant was reappointed as a Radio Producer at the P-4 level with UNMIS. He was then given a fixed-term appointment for one year from 10 February 2010 to 9 February 2011. His fixed-term appointment was further extended for one year to 9 February 2012.

... By its Resolution 1978 (2011) of 27 April 2011, the Security Council extended the mandate of UNMIS up until 9 July 2011 and announced its intention to establish a mission to succeed UNMIS. By Resolution 1997 (2011) of 11 July 2011, the Security Council, *inter alia*, decided to withdraw the mission 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.

... By a letter dated 18 May 2011 to the Chairperson of the UNMIS Field Staff Union ("FSU"), the Under-Secretary-General for Field Support ("USG/DFS") addressed the concerns earlier raised by the said Chairperson. He explained how the transition process would be undertaken by the Administration with regard to the transitioning of staff members from UNMIS to the proposed new mission in South Sudan.

... The UNMIS Administration having experienced difficulties in obtaining visa extensions for international staff members from the Government of Sudan undertook to move international staff members to Juba in South Sudan pending the completion of a comparative review process. The Applicant was like others issued with a Reassignment Form dated 25 May 2011 to record his movement and the movement of his post from Khartoum to South Sudan, effective 1 July 2011.

... UNMIS Administration published a number of Information Circulars to inform staff members of the policies which had been put in place for the transition process. Essentially, it was clear that there were fewer posts in the new mission than in

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<sup>1</sup> The following facts are taken from Judgment No. UNDT/2013/094, paragraphs 5 -19.

the mission which was being closed down. This meant that there was to be a system (a comparative review process) to determine those staff members who could be transitioned to the new mission since certain posts would be abolished.

... One of these Information Circulars No. 327/2011 was issued on 26 June 2011 by the UNMIS Director of Mission Support (“DMS”) announcing the formation of a Comparative Review Panel (CRP) which was to review the transition of international posts in UNMIS to the new mission. The same circular also set out the criteria to be considered during the said review by the CRP.

... On 30 June 2011, Information Circular No. 334/2011 (Update to UNMIS Staff regarding the UNMIS Draw-down process) was issued. The Information Circular noted that, for those staff members who were not selected or provisionally reassigned to a position in the new missions in South Sudan, Abyei or elsewhere in the Organization, their appointments could be terminated for reasons of reduction in staff or abolishment of post in accordance with Staff Regulation 9.3.

... The CRP sat from 26 June until 5 July 2011 during which period it reviewed for transition, international staff members occupying posts within the same category, where the number of posts in the new mission were fewer than what obtained in UNMIS.

... On 8 July 2011, the Security Council established the United Nations Mission in South Sudan (UNMISS) and adopted its mandate.

... On 11 July 2011, through Resolution 1997, the Security Council withdrew the mandate of UNMIS with effect from 11 July 2011 and requested the Secretary-General to transfer appropriate staff, equipment, supplies and other assets from UNMIS to UNMISS or to the United Nations Interim Security Force in Abyei (“UNISFA”), including appropriate staff and logistics necessary for achieving the new scope of functions to be performed.

... On 27 July 2011, the Applicant by memorandum was informed by Mr. Ojjeru, the Chief Civilian Personnel Officer (CCPO) of UNMIS, of the termination of his appointment effective 31 August 2011 following the completion of the human resources post-matching and comparative review exercise on the transition of international staff from UNMIS to either UNMISS or UNISFA.

... Upon receiving the memorandum, the Applicant on 12 August 2011 requested a management evaluation of the decision to terminate his appointment.

... On 24 August 2011, the Applicant applied for a suspension of the implementation of the decision. The Tribunal issued Judgment No. UNDT/2011/155 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.

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 UNDT/2011/155 was appealed to the United Nations Appeals Tribunal (UNAT) which issued UNAT Judgment No. 2012-UNAT-244 on 29 June 2012. UNAT, *inter alia*, held that in ordering the placing of the application for suspension of action on the list of cases to be considered on the merits and requesting the parties to file written documents on the merits, the UNDT had 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 3 February 2012.

3. In Judgment No. UNDT/2013/094, the Dispute Tribunal held that the comparative review process was flawed. It found that the Secretary-General had failed to properly answer Mr. Neeraj Bali's allegations, leaving it with no other choice than to accept his allegations that he had been harassed by the UNMIS Chief of Radio, and that the UNMIS Chief of Staff bore animus against Mr. Bali and pressured others to manipulate the review process to Mr. Bali's detriment. Finally, the Dispute Tribunal found that the termination decision was taken without the requisite delegated authority. As a remedy, the UNDT ordered rescission of the decision to separate Mr. Bali from service and his reinstatement, or in the alternative, two years' net base salary. It further awarded Mr. Bali one year's net base salary for substantive irregularity and four months' net base salary for procedural irregularity. Moreover, the Dispute Tribunal referred two staff members, Mr. W. and Ms. F. to the Secretary-General for accountability for alleged improprieties in the course of the comparative review.

4. The Secretary-General appealed on 3 September 2013, and Mr. Bali answered on 22 October 2013. On 29 October 2013, Mr. Bali filed a motion to introduce fresh evidence to show his continued but unsuccessful efforts to find alternative employment in order to rebut the Secretary-General's claim that the UNDT's award of compensatory damages was excessive. Mr. Bali's motion was granted by the Appeals Tribunal in Order No. 171 (2014).

**The Secretary-General's Appeal**

5. The Secretary-General submits that the UNDT erred in finding that the comparative review process was flawed, in that there was no evidence establishing that the comparative review panel had adopted any methodology in advance of the reviews. In his view, there was detailed and corroborated evidence showing that the review panel had developed a methodology for its comparative reviews. The evidence was the review panel's report. There was no requirement under the Staff Regulations or the Staff Rules or in any other administrative issuance that the review panel's methodology be recorded in the form of "minutes" or, that a separate record of methodology be drawn up. In addition, Ms. F., the Co-Chairperson of the review panel, gave evidence that the review panel had spent considerable time developing a methodology to be used during the comparative review, which was consistent with the content of the review panel's report.

6. The Secretary-General also submits that the Dispute Tribunal erred in fact and in law and exceeded its competence in conducting its own assessment of the candidates and concluding that Mr. Bali should have been awarded more points than Ms. P.

7. The Secretary-General further submits that the UNDT erred in finding that the Chief of Radio had harassed Mr. Bali, as it had no competence in reviewing the harassment allegations, because Mr. Bali did not make reference to the instructions and communications from the Chief of Radio as forming the basis of his allegation of harassment. During its review of the harassment allegation, the UNDT committed additional errors by reversing the burden of proof with respect to the harassment allegations and by rejecting the Secretary-General's request to call two key witnesses, thus denying the Secretary-General an opportunity to rebut Mr. Bali's allegation of harassment.

8. The Secretary-General maintains that it was an error to refer Mr. W. and Ms. F. for accountability, because their actions were valid and were far from meeting the high standard of personal wrongful action that the referral power was intended to address.

9. The Secretary-General finally submits that the UNDT's compensation awarded to Mr. Bali was manifestly excessive. He notes that Mr. Bali's appointment had been renewed for only one year to 9 February 2012, but was terminated on 31 August 2011. He thus had a little over five months remaining on his appointment. Yet, the UNDT awarded him

two years' net base salary. Moreover, the Dispute Tribunal erred in failing to reduce the two years' in-lieu compensation by the amount that Mr. Bali had received as termination indemnity.

10. Finally, the Secretary-General submits that the UNDT erred in awarding compensation purely for procedural and substantive irregularities. He notes that Mr. Bali did not describe any moral harm suffered in his UNDT application, nor did he specifically ask for moral damages or provide any evidence of moral harm.

**Mr. Bali's Answer**

11. Mr. Bali submits that the Secretary-General failed to demonstrate that the UNDT exceeded its jurisdiction or violated any of the five grounds for appeal as set forth in Article 2 of the Statute of the Appeals Tribunal.

12. Mr. Bali also submits that the Secretary-General is effectively requesting that the Appeals Tribunal reassess and reweigh all the evidence that the Dispute Tribunal had carefully and extensively examined over a period of three days. It is not the role of the Appeals Tribunal to conduct a retrial.

13. Mr. Bali further submits that the Secretary-General has made assertion that the comparative review process was fair without being able to demonstrate that it had followed its own rules with respect to the conduct of the comparative review process. The UNDT correctly concluded that the comparative review process was flawed, in that no methodology for rating staff had been developed before the comparative review process began.

14. Mr. Bali finally submits that contrary to the assertions made by the Secretary-General, the UNDT did not conduct its own assessment or deny the Secretary-General an opportunity to call witnesses. It did not err in deciding that Mr. W. had negatively influenced the review process and in referring Mr. W. and Ms. F. for accountability.

15. On the issue of quantum of compensation awarded by the UNDT, Mr. Bali requests that this Tribunal reject the Secretary-General's contention that the compensation awarded may not extend beyond the remaining term of his contract. Were such an approach to be adopted, any loss incurred by him would be under-compensated. It could be manifestly

unjust if, in a case of non-renewal or termination, the Secretary-General could contend that it owed no compensation beyond the separation date because of a speculative assumption that it would not have renewed the staff member's appointment. The Dispute Tribunal took into account Mr. Bali's employment situation in awarding damages, as he suffered both material damages and moral damages.

### **Considerations**

16. By Resolution 1997 of 11 July 2011, the Security Council, *inter alia*, decided to withdraw the mission in Sudan 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.

17. The UNMIS Administration undertook to move international staff members to Juba in South Sudan pending the completion of a comparative review process. On 30 June 2011, Information Circular No. 334/2011 (Update to UNMIS Staff regarding the UNMIS Draw-down process) was issued. The Information Circular noted that, for those staff members who were not selected or provisionally reassigned to a position in the new missions in South Sudan, Abyei or elsewhere in the Organization, their appointments could be terminated for reasons of reduction in staff or abolishment of post in accordance with Staff Regulation 9.3.

18. By memorandum dated 27 July 2011, Mr. Bali was informed by the CCPO of UNMIS of the termination of his appointment effective 31 August 2011 following the completion of the human resources post-matching and comparative review exercise on the transition of international staff from UNMIS to either UNMISS or UNISFA.

19. The UNDT, in its judgment on Mr. Bali's application for suspension of action dated 31 August 2011, decided, prior to hearing the merits of the case, that the decision to terminate Mr. Bali's contract was taken at the mission level, without the delegated authority required by ST/AI/234 and was therefore unlawful. It also decided that there was unchallenged evidence that no comparative review panel had considered the reassignment of Mr. Bali, and that

the Dispute Tribunal received evidence that showed that there was a position of Broadcast Technology Officer in UNMISS.<sup>2</sup>

20. The same UNDT Judge issued the Judgment on the merits on 1 July 2013 in very similar terms. The record of the case, nevertheless, does not support these conclusions.

21. Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) 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”.<sup>3</sup>

22. The seven-page report of the Comparative Review Panel on the review which took place between 26 June 2011 and 5 July 2011 indicates the composition of the panel (15 members and one observer), the purpose and terms of reference, review criteria and deliberations. An annex shows the redacted names of the staff members that were interviewed, among them Mr. Bali. Consideration was given to the last two ePAS, diversity, direct relevant experience, ePAS core values and personal history profile. Recommendations were made on the basis of those considerations. The determination by the UNDT that it was more likely than not that the Administration had not developed a methodology before comparing candidates is not supported by the record of the case.

23. Prior to the review, Information Circular 327/2011 announced the formation of a Comparative Review Panel to review the international posts in UNMIS where the number of current staff in UNMIS exceeded the number of proposed posts in the new mission for particular job categories and post levels.<sup>4</sup>

24. The criteria to be considered, and subject to review by the Comparative Review Panel, were set out in paragraph 4 of the said information circular and the composition of the Comparative Review Panel was listed in paragraph 5 of the same. That information circular was dated 26 June 2011 and was followed by the Comparative Review Panel when it met between 26 June and 5 July 2011.

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<sup>2</sup> Judgment No. UNDT/2011/155, subparas. 37 (a) and 37 (d).

<sup>3</sup> *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 22.

<sup>4</sup> Information Circular 327/2011, para. 1.

25. Information Circular 334/2011 issued by the UNMIS Administration on 30 June 2011 specified that the Department of Field Support would review and match profiles for the possible placement of international staff members who were not retained against vacant posts in field missions led by the Department of Peacekeeping Operations and the Department of Political Affairs.

26. The rating table attached to the Comparative Review Panel Report shows that the relative competence as characterized by the staff member's performance was allocated 70 per cent of the overall score, broken down into 40 per cent for the last two e-PAS reports and 30 per cent for relevant experience, integrity was allocated 10 per cent and length of service 20 per cent.

27. Staff who obtained the highest overall points were "rolled over" and the rest were pooled and ranked. Mr. Bali was reviewed along with two other staff members who were Radio Producers at the P-4 level at UNMIS and the better ranked was reassigned.

28. The extensive correspondence between Mr. Bali and management indicates that he was aware that his candidature would be considered along with all other applicants. Mr. Bali's name was placed on a roster of pre-approved candidates for potential consideration as of 3 November 2011 for future job openings with similar functions at the Secretariat and he was encouraged by OHRM's advocacy and information management branch to actively apply for other positions advertised on OHRM's job portal.

29. Under Article 101(1) 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. The jurisprudence of this Tribunal has clarified that, 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 have been applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.<sup>5</sup>

30. We find that the Secretary-General applied the specific Regulations and Rules in a fair, transparent and non-discriminatory manner.

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<sup>5</sup> *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

31. We clearly distinguish this case from *Hersh v. Secretary-General of the United Nations*<sup>6</sup> because in the latter the applicable Regulations and Rules were not applied in a fair, transparent and non-discriminatory manner, as a result of which Ms. Hersh did not automatically roll-over into her post in the new mission due to manipulation of the job description versus posting.

### **Judgment**

32. The appeal of the Secretary-General is upheld and the UNDT Judgment vacated in its entirety.

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<sup>6</sup> *Hersh v. Secretary-General of the United Nations*, Judgment No 2014-UNAT-433, also rendered at the 2014 summer session.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

*(Signed)*

Judge Weinberg de Roca,  
Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Lussick

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

*(Signed)*

Weicheng Lin, Registrar