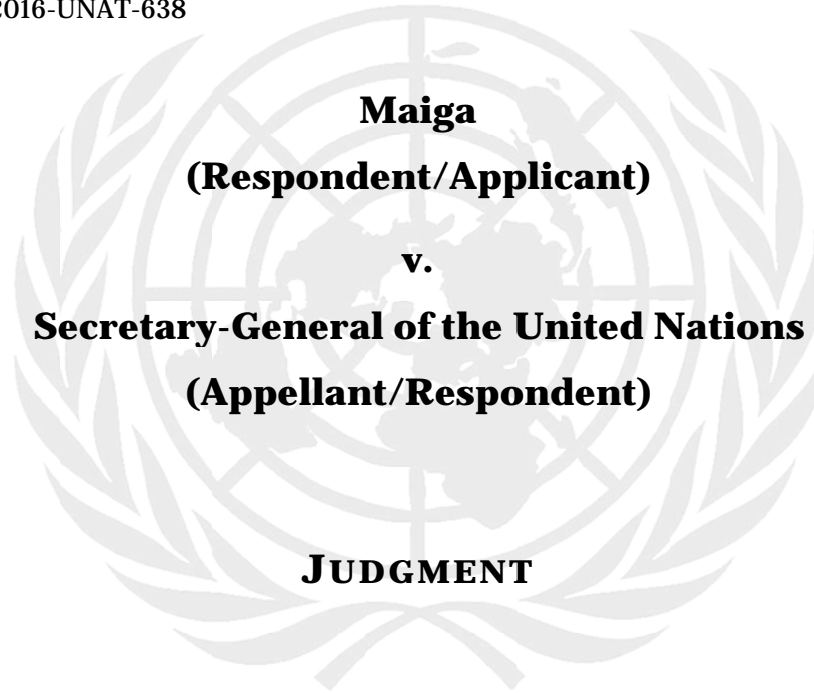




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-638



**Maiga
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Mary Faherty Judge Richard Lussick
Case No.:	2015-847
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Ms. Maiga:	Miles Hastie, OSLA
Counsel for Secretary-General:	Simon Thomas

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/048 (Judgment on Liability and Relief), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 11 June 2015. The Secretary-General filed an appeal on 11 August 2015 and Ms. Fatima Maiga filed her answer on 12 October 2015.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant joined the United Nations Development Fund for Women (“UNIFEM”) on 1 April 2010 as the Country Programme Manager of the Côte d’Ivoire office at the P-4 level. She headed the country office which before her arrival had been headed by Ms. Matenin Coulibaly, the National Programme Officer (NPO). UNIFEM was the predecessor of [the United Nations Entity on Gender Equality and the Empowerment of Women (UN Women)].

... In May 2010, the Applicant reported orally and in writing to the Regional Director, Ms. Odera, who headed the West Africa Regional Office (WARO) of UN Women based in Dakar, Senegal, that the NPO in the C[ôte] d’Ivoire office seemed to have been involved in inappropriate transactions with Non-Governmental Organizations (NGOs) that were recipients of UN Women funds. Ms. Odera was the Applicant’s supervisor.

... The Applicant alleged that there were many irregularities associated with projects that were to be implemented by the NGOs, including that appropriate terms of reference were missing, the project activities were reported as not carried out by the NGOs and project funds [were] allegedly refunded to the NPO but without any records of such refunds.

... The Applicant also made a similar report to WARO Deputy Regional Director, Mr. Houinato, orally and by emails on 28 June and 8 August 2010. She copied the Chief of Africa Division of UN Women based in New York, Ms. Letty Chiwara, and Mr. Houinato in another email on the same issue she had sent to Ms. Odera in December 2011. On 30 January 2012, she made the same report to the Chief, Programme Support Division, Ms. Turkoz-Cosslett, also at headquarters.

¹ Impugned Judgment, paras. 4-20.

... On 24 December 2011, the Applicant filed a further report of the matter to UN Women management and requested that it be forwarded to the United Nations Development Programme (UNDP) Office of Audit and Investigations (OAI).

... Having received no convincing feedback on the concerns she had raised since 2010, the Applicant filed her report directly to OAI on 17 April 2012 which thereafter commenced a joint investigation with the United Nations Population Fund (“UNFPA”) Division of Oversight Services (DOS).

... Shortly after the Applicant’s post was upgraded to the P-5 level in the first half of 2012, Ms. Odera conducted a managerial support mission to the Côte d’Ivoire country office between 11 and 14 June.

... On 18 June 2012, the upgraded post was advertised. The Applicant applied for the position, was shortlisted and invited for a competency-based interview to be held by teleconference on 29 August 2012.

... Joint OAI/DOS investigations into the Applicant’s report were conducted between August and December 2012 and many persons were interviewed including the Applicant, Ms. Odera, Mr. Houinato and Ms. Coulibaly.

... The Applicant’s Results and Competency Assessment (“RCA”) for 2010 was not completed during the prescribed deadline but was instead signed off on 27 March 2013 after several exchanges between the Applicant and Ms. Odera.

... During the 2011 reporting cycle, the Applicant had received a negative performance appraisal. On 6 April 2012, she formally requested an opportunity to rebut the performance appraisal before an RCA Recourse Panel.

... For 2012, the RCA process was not completed until after the contested decision and the Applicant’s separation from the Organization. On 25 April 2013, the Applicant informed the Chief of Human Resources at Headquarters that she wished to contest her performance appraisals for 2011 and 2012.

... On 8 October 2012, the Chief of Human Resources verbally informed the Applicant of the decision not to select her for the upgraded Post and, on 17 December 2012, the Applicant received written notification of the said decision.

... On 28 December 2012, the joint investigation report of OAI/DOS was issued and transmitted to the UN Women Management.

... The Applicant was separated from service upon the expiration of her contract on 31 December 2012.

... She requested management evaluation of the decision not to select her for the upgraded post on 6 December 2012.

[On 22 April 2013, Ms. Maiga filed an application before the UNDT contesting her non-selection.]

... The Tribunal held a hearing of the case on the merits from 2-4 September 2014 and on 9 September 2014 during which *viva voce* evidence w[as] received from two witnesses for the Applicant and four witnesses for the Respondent [...].

3. On 11 June 2015, the UNDT issued its Judgment. The UNDT found that Ms. Maiga's non-selection for the upgraded post and her subsequent separation from the Organization were "motivated by bias, procedural breaches, retaliation and other improper motives".² The UNDT ordered the rescission of the contested decision, Ms. Maiga's reinstatement and deployment in the next available P-5 country representative position, or a similar post, together with payment of salary at the upgraded P-5 level since the time of her separation. In the alternative to reinstatement, the UNDT awarded compensation in the amount of two years' net base salary at the rate in effect at the time of the UNDT Judgment. The UNDT also awarded three months' net base salary as compensation for substantive irregularities and three months' net base salary for procedural irregularities, and interest. The UNDT referred the case to the Secretary-General under Article 10(8) of the Statute of its Tribunal.

Submissions

The Secretary-General's Appeal

4. The Secretary-General seeks leave to admit annexes 4, 6, 7 and 8 to his appeal. The exceptional circumstances justifying admission are that the UNDT went far beyond matters raised in the application to the UNDT and that admission of these documents would allow the Appeals Tribunal to evaluate the "egregious financial scam" that Ms. Maiga alleges preceded the impugned decision, to clarify that no wrongful influence existed, and to identify errors regarding the calculation of her compensation.

5. The UNDT failed to follow the Appeals Tribunal's jurisprudence regarding how a selection exercise should be judicially reviewed. Once the Administration had met the minimal showing required to establish a presumption of regularity, neither Ms. Maiga nor the UNDT identified any evidence that the Administration could not have reasonably concluded that the selected candidate was the preferable candidate, on the basis of her experience and performance during the interview. The UNDT failed to review the merits of Ms. Maiga's candidacy and performance at the interview as well as those of the selected candidate.

² Impugned Judgment, para. 155.

6. The panel report shows that an assessment against objective standards allowed the interview panel to conclude that a candidate other than Ms. Maiga was the best candidate. The selected candidate demonstrated superior experience and ability. She gave articulate and comprehensive answers, illustrating specific examples of when she had displayed the competencies being tested. The report also shows that the selected candidate had over 20 years' experience with the Organization and UN Women, whereas Ms. Maiga had less than five years' experience with the Organization at the time of the interview. The UNDT failed to take these matters into account.

7. The UNDT erred in fact and law in finding that there were procedural irregularities which materially affected the selection decision. First, the UNDT erred in finding that UN Women failed to properly accord Ms. Maiga priority consideration. UN Women gave Ms. Maiga priority over 95 other candidates by automatically short-listing her to interview for the post. Second, the UNDT's finding that the Selection Guidelines require that reasons be given where a hiring manager does not wish to be included as part of the interview panel is immaterial as there was no evidence that this procedural error had any effect on Ms. Maiga's non-selection. Third, the UNDT erred in finding that the short duration and poor quality of Ms. Maiga's interview was evidence of a procedural flaw, as opposed to being related to her performance during the interview. Finally, the panel's failure to consider Ms. Maiga's performance appraisal during the interview did not result in any harm to Ms. Maiga, as her performance ratings were inferior to those of the selected candidate.

8. The UNDT also erred in fact and law in finding the existence of bias. The records show a selection exercise that was undertaken with propriety, transparency and impartiality, absent bias, or apprehension of it. For the UNDT's narrative to hold, one would have to accept a "vast institutional conspiracy on the part of UN Women, spanning not just individual interests, but the leadership of the West African and headquarters operations, over years". The UNDT's inferences were manifestly flawed and had no basis in evidence or law.

9. The UNDT erred in fact and law in finding unlawful and illegal acts and retaliation by Ms. Maiga's superiors and by making a referral of the case. For the reasons outlined above, the Appeals Tribunal should overturn the erroneous finding that the selection process was wrongfully influenced. If this finding is overturned, the logical consequence is that the referral of the case should also be vacated. In addition, the UNDT erred in fact and law in finding that there was a cover-up of a financial scam.

Ms. Maiga's allegations triggered an OAI investigation, which concluded that some of the allegations against the NPO were established and UN Women management dealt with the matter in accordance with the applicable legal framework. The UNDT further erred in fact and law in referring to Ms. Maiga as a whistleblower and in finding the Regional Director's actions to be retaliatory, when Ms. Maiga's case was never one of retaliation. Finally, the UNDT's failure to afford fair notice and the right to be heard to the Regional Director before making findings against her and referring her for possible accountability measures represent an error of law.

10. The UNDT erred in law by making its award of compensation. The UNDT awarded compensation far in excess of any harm suffered in circumstances where Ms. Maiga had no significant chance of being promoted and would, in any event, not have been awarded an appointment of more than one year had she been selected. Moreover, the UNDT made veiled awards of compensation for moral damages, without meeting the threshold required for such awards. Finally, the UNDT erred in law by awarding over two years' net base salary without justifying that this was an "exceptional case".

11. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Maiga's Answer

12. The additional documents the Secretary-General seeks to adduce on appeal were known to the Administration and predate the hearing and filing of the UNDT application itself. Ms. Maiga does not object to their admission, but in partial response, she herself seeks to adduce new evidence.

13. The Administration erroneously asks that the Appeals Tribunal consider *de novo* the panel report, to reach its own finding of whether the candidates were fairly considered. It is, however, not the function of the Appeals Tribunal to conduct a merit-based review of the selection exercise; rather, the function of the Appeals Tribunal is to review the UNDT Judgment for statutory grounds of errors. The panel report was recorded by a human resources officer who testified that Ms. Maiga was not fluent in the language in which the interview was conducted, no one retained notes, the report was not signed by the panel members and the panel scored a criterion that should not have been scored,

thereby giving the selected candidate an advantage. These issues, and others, deprived Ms. Maiga of full and fair consideration.

14. The Administration's contention that Ms. Maiga was given priority consideration because she was "automatically shortlisted and invited to interview" is erroneous. As the UNDT correctly held, priority consideration requires precisely the reverse, i.e. that candidates must first establish themselves as eligible and suitable for the position. Only then does priority consideration operate to permit their selection, even over preferred or first-ranked candidates. The UNDT correctly held that the application of priority consideration must be properly documented to establish that the Administration, at best, "did not as much as avert [its] mind to whether the Applicant was entitled to any priority consideration".³

15. Contrary to the Administration's claim, any procedural error in not providing reasons for the absence of the hiring manager is not academic. If the default hiring manager does not participate in the interview panel, apparently because of concerns of the appearance of bias, but endeavors to influence the process through the Deputy, that is plainly material. Far from providing reasons for the hiring manager's alleged absence, the new evidence raises new concerns.

16. The Administration misunderstands the evidence when it contends that the UNDT erred in fact in finding that Ms. Maiga's interview was unusually short, as all candidates were allocated the same amount of time. The candidates were intended to be given the same amount of time, but Ms. Maiga's interview lasted 23 minutes while the other candidates were interviewed for 45 minutes. Ms. Maiga's interview was short because the panel only asked her the questions listed without probing with follow-up questions, as required. This demonstrates disinterest in Ms. Maiga's candidature, consonant with other evidence. Finally, contrary to the Administration's contention, the interview panel's failure to review the candidates' performance appraisals was not of assistance to Ms. Maiga as it further impaired the panel's ability to probe and foreshortened her interview.

17. The UNDT's findings of bias and retaliation are reasonable. Initially, the West Africa Regional Office was simply delinquent in addressing Ms. Maiga's concerns. The delinquency was borne out by the fact that the NPO was separated shortly after the OAI investigation,

³ Impugned Judgment, para. 154 (i).

but not in the prior two years of Ms. Maiga's complaints, which was an embarrassment for the Director. Moreover, a review of the Director's report following her mission reflects an explicit statement that the reclassification exercise would be an opportunity to remove Ms. Maiga. The Administration's further argument that no one relevant saw the report is also "remarkable". There is evidence that it was discussed with the office in headquarters in the same month or the month before the selection process began.

18. The Secretary-General's argument concerning the award of compensation is based upon a misapprehension of the relief awarded. The UNDT did not award four and a half years' salary in total making the award excessive and duplicative. It ordered full rescission, or, as an alternative, two years' net base salary; and six months' net base salary as moral damages. The exceptional circumstances warranting compensation in excess of two years' net base salary are amply described in the Judgment. The Secretary-General argues for the first time on appeal that Ms. Maiga had no significant chances of promotion and, in any event, would not have received more than a one-year contract. However, her chances of securing the post were almost certain.

19. Finally, the hearing recordings reflect that the award of moral damages was supported by Ms. Maiga's testimonial evidence.

20. Ms. Maiga asks that the appeal be dismissed in its entirety. She asks that an oral hearing be held should the Appeals Tribunal wish to address issues not addressed in her brief.

Considerations

The Secretary-General's request for leave to submit new evidence and Ms. Maiga's request in response

21. As a preliminary matter, this Tribunal denies the Secretary-General's request for leave to produce new documentary evidence at this stage, since the Secretary-General could have presented it before the UNDT and did not timely avail himself of that opportunity. That omission precludes the Administration, which was in a position to procure the respective documents, from producing them at this late stage. Accordingly, the strict criteria set out in Article 2(5) of the Appeals Tribunal Statute are not fulfilled. Thus, the Registry is instructed to exclude annexes 4, 6, 7 and 8 of the appeal from the case file.

22. As a consequence, it becomes unnecessary to receive the evidence offered by Ms. Maiga in response to the Administration's request or to conduct an oral hearing, which Ms. Maiga requested in case the Appeals Tribunal wished to address issues not addressed in her brief. We are satisfied that the parties' submissions adequately clarify the issues before the Appeals Tribunal for consideration.

Appeal against the Judgment on the merits

23. Although the Tribunal does not endorse the strong language used in the impugned Judgment, it affirms its findings and conclusions about illegality.

24. The Dispute Tribunal conducted a thorough judicial review of the administrative decision under challenge. It did not erroneously substitute itself for the Administration as argued by the Secretary-General. It simply examined the facts and their interpretation led to the conclusion that several procedural and substantial irregularities vitiated the contested result of the selection process.

25. As established at the trial level, appropriate priority consideration was not accorded to Ms. Maiga's candidacy. The evidence supports that finding. The Tribunal is satisfied with the detailed analysis of the whole evidence as undertaken by the Dispute Tribunal and agrees with its well-reasoned conclusion. Thus, we will not interfere with the determination as to the existence of bias against the staff member.

26. Furthermore, the requirements of Article 2(1)(e) of the Appeals Tribunal Statute are not fulfilled since the impugned decision is not manifestly unreasonable due to an error of fact. Neither was there any error of law or procedure, excess of jurisdiction or failure to exercise jurisdiction such as to vitiate the contested decision pursuant to Article 2(1)(a) to (d).

27. Therefore, this Court agrees with the rescission of the administrative decision not to select Ms. Maiga for the position she had applied for and affirms the Judgment with regard to this issue and its consequences.

28. It follows from that conclusion that the referral for accountability also stands.

29. However, the Tribunal holds that the compensation awarded in lieu of rescission, coupled with the award of lost salary at the upgraded P-5 level, is excessive taking into account that, even if selected, the chance for Ms. Maiga was to be appointed for one year. As the nature of this compensation is “in lieu”, the award of two years’ net base salary is excessive and accordingly reduced to one year’s net base salary at the rate applicable at the time of the non-selection, plus interest.

30. Similarly, the Appeals Tribunal vacates the award of compensation in the amount of six months’ net base salary for procedural and substantive irregularities, since that compensation effectively constitutes an award of moral damages that is not supported by evidence as required by the recent amendment of the Dispute and Appeals Tribunal Statutes⁴ and our jurisprudence.⁵

Judgment

31. The appeal is allowed in part. The compensation to be paid in lieu of rescission and reinstatement is reduced to one year’s net base salary at the rate applicable at the time that Ms. Maiga was notified of her non-selection. The compensation in lieu is payable with interest at the US Prime Rate accruing from the date on which Ms. Maiga was notified of her non-selection to the date of payment. If the amount is not paid within the 60-day period counting from the date of issuance of this Judgment, an additional five per cent shall be added to the US Prime Rate until the date of payment. The award of compensation in the form of payment of net base salary at the upgraded P-5 level shall be calculated from the date of separation of Ms. Maiga to the date of issuance of this Judgment. If the amount is not paid within the 60-day period counting from the date of issuance of this Judgment, interest at the US Prime Rate plus an additional five per cent

⁴ Under Article 9(1)(b) of the Appeals Tribunal Statute, the Appeals Tribunal may *only* order “[c]ompensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.” Emphases added. Similarly, Article 10(5)(b) of the Dispute Tribunal Statute provides that the Dispute Tribunal may *only* order “[c]ompensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.” Emphases added.

⁵ See *Hasan v. Commissioner-General of United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-541, paras. 23 and 24 citing *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009.

shall accrue until the date of payment. The remaining compensation awarded by the UNDT is vacated.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Simón

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 24th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar