Procedural history

1. The applicant's fixed-term contract as an international staff member at the P-4 level with the United Nations Stabilization Mission in Haiti (MINUTAH) was not renewed. She subsequently sought review before the Joint Appeals Board (JAB), and the matter eventually was transferred to the United Nations Dispute Tribunal for further proceedings.

2. By Judgment UNDT/2010/039 of 4 March 2010, the prior Tribunal (Judge Adams) ruled in favour of the applicant on the question of liability, holding that the decision not to renew her contract was in breach of her contract of employment.

3. It should be noted that the only question before the prior Tribunal in Judgment No. 39 was the applicant's challenge to the non-renewal of his fixed-term contract which expired on 31 October 2008. The issue of applicant's pension rights—including whether applicant qualified for a pension—was not part of the Judgment.

4. The matter of "compensation" (including pension rights) was left for subsequent determination. The prior Tribunal made several preliminary orders on the issue of compensation, but did not render a final judgment on that topic.

5. As of 19 July 2010, the matter was transferred to the undersigned judge following the end of Judge Adams' tenure.

6. Thus, the matter of compensation is to be decided by the sitting Judge of the Tribunal.

7. Where findings of fact on liability have previously been made in a case and have been rendered to Judgment, the sitting Tribunal will accord due deference to these findings made by the prior Judge, since Judge Adams heard the evidence and assessed the credibility of witnesses.

8. In accordance with established legal principles, however, where findings of fact bear on an undecided issue—in this case compensation, including pension—that has not been decided as a final matter and has been left for this Tr

where questions of law need to be addressed, the sitting Tribunal will decide those matters *de novo*. Accordingly, this sitting Tribunal possesses the right to review the record to see if the prior Tribunal's factual findings on compensation have adequate support.

9. Finally, since this case has been the subject of a Judgment and a number of Orders issued on various dates, this Tribunal will quote the pertinent portions of those documents, for completeness and ease of reference. This makes the present Judgment rather long (it is recognised), but necessary.

Prior Tribunal's findings on compensation and pension

Compensation Findings

10. By Order No. 101 (NY/2010) of 20 April 2010, the prior Tribunal made the following findings (para. 12):

a) On economic loss, the Order stated as follows:

> The appropriate sum to award under this head of economic loss is, therefore, the applicable salary, plus post adjustment, less assessment, less pension deduction. There must be added the amount that would have been payable by way of pension, on the assumption that the applicant remained employed until 10 February 2011. In this respect the mode of calculation (not so

b)

> (v) In respect of the breach of the applicant's right to a proper consideration of her request for an exception to permit her to rebut her performance appraisal I awarded USD6,000.

These statements repeat, in different format, the findings of Order No. 101 (NY/2010) of 20 April 2010, para. 12.

13. By Order No. 116 (NY/2010) of 6 May 2010, para. 8, the prior Tribunal made the following findings concerning economic loss:

> The respondent's submission as to mitigation is correct and it is for the applicant to show what, if anything, she has done in order to mitigate her damage (such as disclosing her efforts to obtain alternative employment and disclosing her earnings). The correct approach to compensation is to ascertain the amount necessary to place the successful party in the same position he or she would have been in had the breach not occurred. In this case, this necessarily means that the contract would have been renewed and, as I have found, probably renewed to the date of the applicant's retirement. [emphasis added]

Pension findings by prior Tribunal

14. The matter of the applicant's pension bears some explaining to the reader not fully acquainted with the case file. Read as a whole, the prior Tribunal in its Judgment and Orders was attempting *both* 1) to compensate the applicant for the illegality of the non-renewal of her contract on 31 October 2008 *and* 2) to qualify the applicant for her pension benefits with the Organization on 10 February 2010.

15. The applicable time periods under consideration are the following:

a) The first contract. The applicant's first contract with MINUSTAH lasted from 21 June to 21 December 2007;

b) The second contract. The applicant's second employment contract with MINUSTAH lasted from 21 December 2007 to 31 October 2008 (it is this latter contract that did not get renewed and the non-renewal of which applicant has challenged). The applicant's second contract had a "term" of 10 months and 10 days;

c) The "third" contract. If no illegality had occurred, the applicant's second contract would have been renewed for an additional "term", and the applicant would have received a "third" contract. If the applicant's "third" contract were granted with a similar term as the second contract (10 months and 10 days), it would have expired on 10 August 2009. Considering also staff rule 4.13, this Tribunal finds that the maximum that applicant's contract would have been extended was for one year which, in this case, would have mean that the expiration date would have been 31 October 2009. The Tribunal will use this date of 31 October 2009 as the date of expiration of applicant's "third" contract;

d) The applicant's date of retirement was to be on 10 February 2010;

e) The "third" contract with an ending date of 31 October 2009 would have meant that applicant would not have qualified for her pension on 10 February 2010;

f) In Order No. 101 (NY/2010), para. 9, the prior Tribunal "inferred" that a "probability of further renewal to the applicant's date of retirement (a further sixteen months) is sufficiently high to regard it as very likely";

g) In Order No. 116 (NY/2010), para. 8, this inference was repeated by the prior Tribunal when it stated that "a probability as a matter of fact" existed that the applicant would have had her contracted extended until the time of her retirement.

15. By Order No. 116 (NY/2010) of 6 May 2010, the prior Tribunal further found that with the (court-ordered) renewal of applicant's "third" contract to 10 February 2010, the applicant would be entitled to a pension from the Organization (para. 10):

> The issue of the pension is not a simple one. I accept the submission of counsel for the applicant that the Pension Fund is a separate and independent entity and is not subject to the orders of the Tribunal. Nor can the payment of a pension be compensation: it is payable by virtue of the legal charter that governs the operations of UNJSPF on the

> occurring of certain events. The compensation amount is that sum that must be paid by the Organization in order to restore the applicant's entitlement to be paid the pension that she lost as a result of the breach of her contract by the respondent, in short to restore her to membership of the Fund or eligibility for the pension. As a part of the salary arrangements, both the applicant and the respondent paid certain sums to UNJSPF. Those amounts have been, I assume, repaid - certainly the applicant's contribution. To be restored, I have assumed (as I think the applicant contends) that she would need to repay to UNJSPF the amount refunded to her plus the additional amount that would have been her contribution had she remained in the employ of the Organization until retirement. For its part, the Organization will need to repay that part which (I assume) it received because of the applicant's early departure from UNJSPF and, in addition, pay the additional amount that would have been its contribution had the contract been renewed to the applicant's date of retirement. Thus the amount of compensation necessary to be paid (though to UNJSPF and not directly to the applicant) is that contribution which the Organization would have paid had the applicant's contract been renewed in accordance with her rights. [emphasis added]

Issues

16. The present case involves the following issues:

1. Is the applicant entitled to compensation for pension benefits?

2. What compensation is owing to the applicant for the non-renewal of her contract?

3. Have the presumptive compensation limits of art. 10.5 of the Statute been exceeded and, if so, are there "exceptional circumstances" justifying an award of compensation greater than that set forth in the statute?

Considerations

17. The relief provisions of the Statute arebeen ./TT6in the emp the Statu.000f thed65 -1.15 9.86

On the contrary: *even if* the Organization had properly renewed the applicant's contract on 31 October 2008 (i.e., if the applicant had received a "third" contract extending to 31 October 2009), clear evidence in the record before the Tribunal exists that the applicant's reporting officers both would have made the decision *not* to renew the applicant's contract for another (i.e. "fourth") term. Thus, the term of the applicant's "third" contract would have ended as of 31 October 2009 and the applicant would not have qualified for her pension benefits.

22. The eligibility requirements for pension entitlements are found in art. 28 of the Regulations, Rules and Pension Adjustment System of UNJSPF which states as follows:

make the decision on liability that it did. In para. 61 of the Judgment, the prior Tribunal stated:

> 61. There is another, and perhaps more fundamental reason, why the submission on behalf of the respondent that the applicant's contract was not renewed because of her lack of managerial competence must be rejected. This derives from the provisions of sec 10.2 of ST/AI/2002/3 [(Performance Appraisal System)], set out above. The

applicant and mentioned in the e-PAS". While they told the prior Tribunal that they were not influenced by these weaknesses when assigning the overall satisfactory rating, this does not mean that they would have reached a similar conclusion in the next following e-PAS evaluation. On the contrary, it would seem likely that, when becoming aware of the correct manner in which to write a performance appraisal (following Judgment No. 39), they would properly reflect the applicant's managerial deficiencies in their e-PAS rating for her.

29. Third, as a basis for the applicant's contract renewal until her retirement, under Order No. 101 (NY/2010), para. 10, it was assumed by the prior Tribunal that the productivity and working relations in the applicant's unit would have improved after her contract renewal (the "third" contract), which again would have lead to a further renewal (the "fourth" contract). Yet, considering the difficult work environment in her unit and her increasingly strenuous relationship with her supervisors, the situation could also—and in this Tribunal's view more likely—turn in the opposite direction and further deteriorate, making her unit incapable of continuing its former successful achievements. This would have resulted in an e-PAS that would not have supported an extension of the applicant's contract to her retirement date.

30. Finally, in accordance with ST/AI/2002/3, sect. 10.2, even though the applicant might receive another satisfactory overall rating, the renewal decision would still remain "within the discretionary authority of the Secretary-General". The applicant would therefore have no guarantee for such a renewal.

31. Thus, the sitting Tribunal finds that it is not "probable" that the applicant's "third" contract would have been renewed until her retirement date of 10 February 2010. A "probability as a matter of fact" does not exist that the applicant would have received a contract renewal to her retirement date. The "assumption" that the applicant "remained employed [by the Organization] until 10 February 2011" is only an assumption and is without factual support in the documents presented to the Tribunal.

32. The Tribunal instead finds that applicant's "third" contract would have been her final contract, which would have expired on 31 October 2009.

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h. Plus personal distress award of USD4,000

i. Plus e-PAS violation of USD6,000

38. The parties agree that the lump sum award of salary plus entitlements (Items a, b, c, d and e above) for the period from 1 November 2007 to 10 February 2009 (468 days) is USD116,533.73.

39. However, this figure needs to be adjusted, since this Tribunal has found that the duration of "third" contract would be only one year (366 days: 2008 was a leap year) and that applicant would not have received a "fourth" contract (for a total "period" of 468 (366+30+31+31+10) days). Based on this, the applicant's lump sum award is calculated as: (366/468) X USD116,533.73 = USD91,135.

40. However, to the (revised) figure of USD91,135, the applicant requests that the value of the applicant's annual leave "she could have accrued" should be added. The respondent counters and calculates that, based on past experience, for the time period, the applicant would have accrued unused annual leave of seven days.

41. The Tribunal finds that the full amount of annual leave that the applicant could have accrued shall be used. The applicant's prior vacation pattern may be of relevance, but in this case the Tribunal has chosen to include the entire sum; it cannot be excluded that the applicant would not have taken any vacation, as she would have been on her last contract with the UN.

42. According to the "Respondent's Response to Applicant's Observation dated 18 May 2010" of 28 May 2010 (and not contested by the applicant), the value of this annual leave was USD15,894.03. However, this amount also needs to be adjusted considering the shorter contract period and, applying the same principle for calculation as for her salary (para. 39 above), the value of applicant's annual leave is calculated as (366/468) X USD15,894.03 = USD12,430, which shall be added to the sums.

43. The applicant has informed the Tribunal that her revenues since her separation has been USD1,200. This amount has not been contested by the respondent and shall therefore be deducted from the sums.

44. Thus, the applicant's economic loss is calculated as: USD91,135 + USD12,430, less USD1,200 = USD102,365. To that sum is added the compensation awarded by the prior Tribunal for personal distress (USD4,000) and failure to give proper consideration to rebuttal of e-PAS (USD6,000), which means the compensation to be awarded applicant is USD112,365.

Issue No. 3

45. The parties agree that an award of two years net base salary for the applicant would be USD126,103.92. This would be the presumptive two-years' net base salary cap under art. 10.5(b) of the Statute.

46. Since the compensation owing to the applicant is less than the presumptive cap for compensation awards under art. 10.5(b), the Tribunal does not need to consider whether the applicant's case is "exceptional" under this Article.

Conclusion

47. Under art. 10.5 of the Statute, the respondent is ordered to pay the