



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

Judgment No. 2014-UNAT-450

Bali

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

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:¹

... On 10 February 2010, the Applicant was reappointed as a Radio Producer at

the mission which was being closed down. This

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written documents on the merits, the UNDT had exceeded the jurisdictional powers conferred on it by its Statute and rescinded the judgment.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.
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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

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.

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.²

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”.³

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.⁴

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.

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

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

⁴ 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.

31. We clearly distinguish this case from *Hersh v. Secretary-General of the United Nations*⁶ 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.

⁶ *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 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Lussick

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

(Signed)

Weicheng Lin, Registrar