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**Judgme**

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**Before**

**Case N**

**Date:**

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**Couns**

**Couns**

**JUDGE MARY FAHERTY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by the Secretary-General of the United Nations against Order No. 136 (NBI/2010) and Judgment No. UNDT/2014/007, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 20 July 2010 and 28 January 2014, respectively, in the case of Fiala v. Secretary-General of the United Nations .

2. The Secretary-General filed the two appeals on 31 March 2014 and Ms. Maja-Verena Fiala answered on 30 May 2014.

**Facts and Procedure**

3. The following facts are uncontested:<sup>1</sup>

**Facts**

... The Applicant joined the Organization in Vienna in 1979. She joined the United Nations Mission in Sierra Leone (UNAMSIL) on 16 February 2000 at the FS-4 level and served there until 31 December 2005 at the same level, when the Mission closed.

... While employed at UNAMSIL, the Applicant applied through the GALAXY system to a generic Vacancy Announcement, VA-05-ADM-PMSS-408823-R-Multiple D/S (VA 408823), issued on 22 December 2005, for an Administrative Assistant at the FS-5 level with the Department of Peacekeeping Operations (DPKO), and was technically cleared by the Office of Human Resources Management (OHRM) on 26 February 2006.

... From late 2005, UNAMSIL was downsizing to transition to the follow-up mission, the United Nations Integrated Office in Sierra Leone (UNIOSIL). UNAMSIL requested that the Personnel Management Support Service (PMSS) at United Nations Headquarters in New York provide re-assignments for their staff to other DPKO missions in accordance with a Master List for Redeployment.

... From 1 January 2006 to 31 May 2006, the Applicant was engaged in a series of short term assignments with UNIOSIL at the FS-4 step 10 level.

... [S]he was called for an interview in mid-April 2006 for the vacant FS-5 Administrative Assistant post in the Office of the Regional Administrative Officer (RAO) by Martin Bentz, Program Manager and RAO (Region One) and Alfred Podritshnig, Field Office Manager, [United Nations Organization Mission in the

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<sup>1</sup> Judgment No. UNDT/2014/007, paras. 3-42 (internal footnote omitted).



enable the Applicant to be regularized.

... On 28 September, Mr. Masaki Sato, OiC Africa II, Field Personnel Division of the Department of Field Support (FPD/DFS), sent a memorandum to the Applicant



Mr. Martin Bentz, Mr. Alfred Podritschnig and Ms. Ghislain Maertens. She described these witnesses as former MONUC officials “personally involved in [her] recruitment process”.

... In anticipation of an oral hearing in the matter, on 28 December 2011 the Registry wrote to the Applicant’s Counsel and asked him to inform the Tribunal of the witnesses the Applicant proposed to call. On 6 January 2012, the Applicant’s Counsel named the witnesses as the Applicant, Mr. Martin Bentz and Mr. Paulin Djomo. On 23 January 2012, the Respondent informed the Tribunal that since Mr. Djomo had been selected as a witness by the Applicant, he had no further witnesses to call.

... On 31 January 2012, the Applicant filed a request for leave to submit documentation in connection with the oral testimony of Messrs. Djomo and Bentz. The Applicant included a statement of Mr. Podritschnig in the bundle. By submission dated 31 January 2012, the Respondent objected to the Applicant producing the statement for the reason that Mr. Podritschnig had not been named as a witness.

... A hearing in this case was conducted on 7 and 8 February 2012. At the conclusion of the hearing, the Judge informed the Parties that the Tribunal would review the material presented in the case and consider whether or not the Tribunal would call an expert in Human Resources Management as a witness in the matter or, alternatively, the hearing was closed.

... On 20 February 2012, the Applicant filed her request for leave to submit additional evidence and closing arguments. The Applicant asserted that at the hearing “some additional issues have been raised with respect to the procedural requirements for staff selection for mission service during the period in question” and she requested leave to “introduce some additional evidence in the form of statements from the Field Service Union representative at the time and from Human Resources officials familiar with mission service”.

... By e-mail dated 22 February 2012, the Tribunal granted the application to submit additional evidence and indicated that upon receipt of the statements made subject to the Respondent’s views, the Tribunal would decide whether or not to hold a further hearing for the oral testimony of the witnesses to be heard.

... On 15 March 2012, the Applicant filed four additional statements which were served on the Respondent.

... The Respondent filed his response to the additional evidence on 28 March 2012. The Respondent argued that the Applicant had not established the grounds necessary to reopen her case in the manner sought as the new evidence could have been produced at the hearing, the proposed additional evidence was not relevant or probative and the Respondent was prejudiced by the late submission of this evidence. The Tribunal decided not to admit the additional statements into evidence in this case, nor to reopen the case for further hearing. The Tribunal subsequently directed the Parties to submit their closing submissions, which

were not to include references to the additional witness statements adduced by the Applicant on 15 March 2012.

... On 25 July 2012, the Applicant and Respondent both filed their closing submissions which were served the same day.

4. The UNDT issued Judgment No. UNDT/2014/007 on 28 January 2014. The UNDT found that the circumstances of Ms. Fiala's case were "exceptional" in that not only was she technically cleared and interviewed for an FS-5 position, she was in fact selected for the post and informed of the selection decision. The UNDT concluded that this created a legitimate expectation that she would be offered an FS-5 posi

time period in which to submit a request for administrative review. The June 2009 DFS communication was only one of many confirmations of the same decision that had been provided to Ms. Fiala over the years.

7. The UNDT erred in accepting a case that was filed more than three years after the contested decision had been communicated to Ms. Fiala. Ms. Fiala failed to follow the proper procedure for challenging the administrative decision. Once she was notified of the decision to recruit her at the FS-4 level, and this decision was confirmed by PMSS/DPKO, in May 2006, she should have requested administrative review within 60 days. Instead, she waited more than three years to request management evaluation.

8. The Secretary-General requests that the Appeals Tribunal vacate Order No. 136 (NBI/2010) in its entirety.

**Ms. Fiala's Answer to the Secretary-General's Appeal Against Order No. 136 (NBI/2010)**

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clearly distinguishable from the cases cited by the Secretary-General as examples of mere repeated requests to reset the deadline.

12. Ms. Fiala requests that the Appeals Tribunal admit into evidence the additional information contained in Annexes 10, 15, 18 and 19 to her answer in order to respond to new arguments presented by the Secretary-General.

13. Ms. Fiala asks that the Appeals Tribunal reject the appeal and award USD 5,000 in legal expenses for abuse of process.

Case No. 2014-596

**The Secretary-General's Appeal Against Judgment No. UNDT/2014/007**

14. The UNDT erred in fact in finding that Ms. Fiala was “interviewed and selected” for a post at the FS-5 level. Ms. Fiala applied for a generic vacancy announcement at the FS-5 level with DPKO, for which she was subsequently technically cleared and placed on a roster. However, MONUC did not consider Ms. Fiala in relation to her application for the generic vacancy announcement. MONUC considered her as a priority staff member for reassignment from a downsizing mission. The fact that she had been placed on a DPKO roster at the FS-5 level was completely unrelated to the MONUC recruitment exercise.

15. Mr. Bentz testified that in considering Ms. Fiala for the position in his office, he neither conducted a competitive promotion exercise for an FS-5 post nor did he receive a group of names of candidates cleared for appointment at the FS-5 level. Both of these steps would have been required in order to appoint Ms. Fiala to an FS-5 position. Moreover, there was no vacant FS-5 post in MONUC against which Ms. Fiala could have been placed.

16. The UNDT erroneously concluded that it was incumbent on the Administration to approve Mr. Bentz' recommendation for Ms. Fiala's appointment to the FS-5 level. The Secretary-General explained to the UNDT the reason why Mr. Bentz' recommendation was not approved. The post for which Ms. Fiala was considered was a FS-4 post and no FS-5 post existed in Mr. Bentz' office. He merely expressed his “suggestion” that he would “prefer” that this post should be upgraded to the FS-5 level. It is not unusual for a programme manager to request the mission leadership to classify positions at a higher level.

17. Furthermore, as Ms. Fiala was being considered for a position in the Regional Administrative Office, and not in the Office of the Special Representative of the

competitive selection process, Ms. Fiala contends that no system-wide competitive promotion exercise was conducted because that procedure did not apply to Field Service positions in Missions which utilize generic vacancy announcements and rosters as well as interviews to fill posts.

23. The documentation provided by Ms. Fiala, namely the listing of posts for the newly established Region One, prepared by the MONUC DOA Office, clearly shows that all Administrative Assistant posts at the RAO Offices were reflected at the FS-4 or FS-5 level. The Secretary-General merely repeats his argument that there was no FS-5 post without providing any supporting evidence. Furthermore, Ms. Fiala lists specific examples to rebut the Secretary-General's assertion that only the Special Representative of the Secretary-General and his Deputy had Administrative Assistants at the FS-5 level.

24. Ms. Fiala contends that the Secretary-General's arguments against the UNDT's conclusion that it was incumbent on the Administration to approve Mr. Benz' recommendation for her appointment to the FS-5 level "appear to be pure invention". In support of the UNDT's conclusion, she points to several written statements and a copy of "Department of peace-keeping operations comparative worksheet". Moreover, the Secretary-General's arguments are contradicted by the subsequent actions taken by MONUC's International Recruitment Unit, under the direct authority of the CCPO, to regularize Ms. Fiala's appointment at the FS-5 level by providing the necessary paperwork.

25. The conclusion that Ms. Fiala had a legitimate expectation that she would be appointed at the FS-5 level is supported by the evidence. She signed the offer of appointment after she was advised to proceed to avoid a break in service "pending movement to [a] higher level [as] formalities were supposed to be under way". She did not sign the letter of appointment which also reflected the wrong level and sought to obtain rectification through informal and formal requests.

26. The award of moral damages was justified by the "severe emotional impact this long ordeal has had on [Ms. Fiala]", especially in light of the "manipulation of her records, The concvcob.4





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her recruitment was undertaken at the FS5 level, but she had only received an offer for FS4 level, with a promise to subsequently rectify the matter. FPD did not resolve the issue in her favo[u]r.

2. However, in accordance with new evidence which was made available to Ms. Fiala only recently from archives of individuals involved, she has requested, and I support that her case be revisited.

3. From this additional information, it appears that there may have been an administrative error in her recruitment as the documents indicate she was technically cleared, interviewed and selected by the Program Manager Mr. Martin Bentz, and Field Operations Manager Mr. Alfred Podritschnig for the post of Administrative Assistant at the FS-5 level. (See attached document)

4. I would therefore be grateful if you could revisit the case and if applicable, retroactively rectify Ms. Fiala's recruitment level at your earliest convenience.

38. In our view, by virtue of that communication, the Administration unambiguously requested that the circumstances of Ms. Fiala's recruitment to MONUC in 2006 be revisited. This request was complied with. It matters not that the review requested by MONUC was instigated by the materials which Ms. Fiala had procured in the course of her investigations. The salient factor is that the Administration, by virtue of the 22 February 2009 correspondence, opened the door to the past events concerning her recruitment to MONUC.

39. Thus we are satisfied that the circumstances of the present case are entirely distinguishable from the situation which prevailed in Sethia, upon which the Secretary-General relies. In that case we held:

... The issue raised in this appeal is whether the Dispute Tribunal made an error in finding that Sethia's application is time-barred and not receivable. The Dispute Tribunal found that the contested decision regarding Sethia's entry level upon his appointment was communicated to him on 9 February 2001. Under Staff Rule

... We consider the repeated submission by Sethia for a correction of his entry level to be a mere restatement of his original claim, which did not stop the deadline for contesting the decision from running or give rise to a new administrative decision thereby restarting the time period in which to contest his entry level.

... The Dispute Tribunal went on to consider whether Sethia's case was an exceptional case under Article 8(3) of the UNDT Statute which justified the waiver or suspension of the time limit prescribed by former Staff Rule 111.2(a). The Dispute Tribunal found that it was not an exceptional case. In the Costa Judgment, this Tribunal held that the Dispute Tribunal does not have the power under Article 8(3) of the UNDT Statute to suspend or waive the deadlines for requesting administrative review under the old system of internal justice. Therefore the Dispute Tribunal erred in law in applying its decision in Rosca, which found that the Dispute Tribunal does have this power. The Judgment of the Dispute Tribunal in Rosca was disapproved by this Tribunal in Costa. This error does not affect the outcome in this case.

... We hold that Sethia's application is time-barred and not receivable as he did not make a request for administrative review of the contested decision within the two-month time limit set out under former Staff Rule 111.2(a). Therefore, there is no merit in this appeal.<sup>6</sup>

40. In the case of Ms. Fiala, notwithstanding the decision communicated to her in May 2006, a separate and distinct decision was made by the Administration in June 2009 regarding the re-examination requested by MONUC in February 2009. What was relayed to her was not a mere restatement of the position which was adopted by the Administration in its communications of 28 September 2006 and 28 September 2007, but rather the fruits of the review undertaken in 2009. We are fortified in this conclusion by the contents of a draft unsigned facsimile of 27 February 2009 from FPD/DFS where reference is made to a "careful review" having been carried out pursuant to MONUC's request of 22 February 2009. Thus, there was no re-setting of the deadline for challenging the May 2006 decision, as contended by the Secretary-General. Insofar as the Secretary-General relies on the e-mail of 17 June 2009 from Ms. Fiala to the Office of Staff Legal Assistance as evidence of an attempt to re-set the date of the 2006 administrative decision, we reject that argument. That e-mail must be viewed in its context. Ms. Fiala was awaiting the outcome of the re-examination of her file, as requested by MONUC, which was duly relayed to her on 29 June 2009. Her request for management evaluation on 29 August 2009 was a timely response to the administrative

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<sup>6</sup> Sethia v. Secretary-General of the United Nations, Judgment No. 2010-UNAT-079, paras. 18-22 (internal footnote omitted).



decision taken in June 2009 consequent on Ms. Fiala's recruitment process having been re-opened by the Administration. The Dispute Tribunal also correctly determined that Ms. Fiala's application was not time-barred, she having applied to the UNDT on 1 April 2010 in compliance with the Orders made by the UNDT on 18 and 19 March 2010.

41. Accordingly, there was no error of law or fact on the part of the UNDT in deeming Ms. Fiala's application receivable. The appeal on this ground is rejected.

The Secretary-General's appeal on the merits

Ms. Fiala's application to submit new evidence

42. In her answer to the appeal on the merits, Ms. Fiala requests that she be allowed to introduce "relevant material submitted in Annexes 12, 14, 17 and 20 in order to respond to the misinformation in the [Secretary-General]'s submission". Having reviewed the documents sought to be admitted, the Appeals Tribunal is not satisfied that their admission is necessary in the interests of justice or for the efficient and expeditious resolution of the appeal. The request is denied.

43. The Secretary-General challenges the Dispute Tribunal's Judgment on the Merits on the grounds that it erroneously concluded:

- (i) that Ms. Fiala was "interviewed and selected" for a post at the FS-5 level;
- (ii) that it was incumbent on the Administration to approve Mr. Bentz' recommendation for her appointment at the FS-5 level;
- (iii) that Ms. Fiala was informed of her selection at the FS-5 level and that this created a legitimate expectation that she would be appointed at the FS-5 level; and
- (iv) that an award of moral damages was warranted.

44. Article 2(1) of the Appeals Tribunal Statute provides:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;

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Unfortunately, this attempt failed because Mr. Bentz refused to fill out the comparative evaluation sheets on candidates he had not interviewed.”<sup>8</sup>

46. The unsigned FS-4 comparative evaluation sheet found on Ms. Fiala’s status file was averted to by the UNDT, as was the Administration’s explanation as to why such a document might have found its way into the file. The Dispute Tribunal also noted the evidence of Mr. Djomo who stated that Mr. Bentz could not have recommended Ms. Fiala for an FS-5 position because no such position existed.

47. It is clear from a reading of its Judgment that the Dispute Tribunal engaged in a

**Judgment**

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Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of February 2015 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 17<sup>th</sup> day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar