



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2014-UNAT-433-Corr.1

Hersh

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT



Counsel for Ms. Hersh:

Miles Hastie/OSLA

Counsel for Secretary-General:

Rupa Mitra

Reissued for technical reasons on 12 September 2014

the offer of a fixed-term appointment for the period 1 July 2011 – 30 June 2012 for the position of BTO with UNMIS on 26 July 2011.

... Meanwhile on 26 June 2011, another Information Circular was issued by UNMIS announcing the formation of a Comparative Review Panel (“CRP”) to review international posts in the mission in cases where the number of current staff members exceeded the number of proposed posts in the new mission for particular job categories and post levels. The comparative review took place from 26 June to 5 July 2011. On 27 July 2011, the Applicant received a Letter of Separation, signed by Mr. Ojjerro, in his capacity as Chief Civilian Personnel Officer (“CCPO”), UNMIS.

... On 28 July 2011, Mr. Ojjerro and the UNMIS Visa Office advised the Applicant to check out of the Mission and to leave Sudan as soon as possible as Sudanese visas would only be effective and recognized as valid by the Sudanese Government until 7 August 2011. The Applicant left Sudan on 4 August 2011.

... The Applicant filed a request for management evaluation of the termination decision on 12 August 2011 and, on 23 August 2011; she also filed an application seeking suspension of that decision. The case was heard by the Tribunal on 29 August 2011.

... The Tribunal issued Judgment No. UNDT/2011/154 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 No. UNDT/2011/154 was appealed to the Appeals Tribunal which issued Judgment No. 2012-UNAT-243 on 29 June 2012. UNAT, *inter alia*, held that in ordering the placing of the application for suspension on the list of cases to be considered on the merits and requesting the parties to file written documents on the merits, the UNDT 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 11 November 2011.

3. In Judgment No. UNDT/2013/062, the Dispute Tribunal ordered rescission of the decision to separate Ms. Hersh from service, because it was the result of a series of violations of the pertinent administrative issuances. The UNDT found that as only one post of BTO was created for the new mission, thus equal to the number of posts in the old mission under the same occupational group and level, under the UNMIS Information Circulars No. 218/2011 (Movement of International Staff to South Sudan) and No. 327/2011 (Formation of a Comparative Review Panel to Review Transition of International Staff), the UNMIS Administration could not, as it did, fill the BTO post in UNMISS by using a comparative review process and Ms. Hersh “was to automatically walk across into the BTO post in the new mission”. Instead, she was wrongfully subjected to the comparative review process to her detriment. The UNDT also found that provisions of ST/AI/1998/9 (Reclassification) were disregarded, when the Chief of Radio, without the requisite authority, drafted the new terms of reference for UNMISS, and the proper procedure for reclassification was not followed. Thus, under UNMIS Information Circular No. 327/2011, when the profiles of the BTO changed, “the only viable course of action in the circumstances for the purpose of filling it would have been a regular, competitive selection process and not a comparative review as happened in this case. The so-called comparative review between the Applicant and Mr. Tobgyal for the only post of BTO in the new mission was manifestly fraudulent in the circumstances and amounted to a reckless abuse of power and position on the part of Ms. Herman[n].”

4. The Dispute Tribunal further found that the Chief of Radio employed her influence within the comparative review panel and successfully worked against Ms. Hersh’s right to a transition to the new mission. The UNDT decided to refer the Chief of Radio to the Secretary-General for accountability.

5. As remedy, the Dispute Tribunal ordered that Ms. Hersh be reinstated, or in the alternative, be paid two years’ net base salary. Furthermore, it awarded Ms. Hersh one year’s net base salary for substantive irregularity and four months’ net base salary for procedural irregularity.

The Secretary-General's Appeal

6. The Secretary-General submits that the UNDT erred in finding that Ms. Hersh should have been automatically transitioned to the new mission and that it was wrong to subject her

THE UNITED NATIONS APPEALS T

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2014-UNAT-433-Corr.1

25. A new staffing table was established for the new mission in South Sudan, in which only one post of BTO was created. Ms. Hersh wa the only holder of the BTO post in the old mission. Pursuant to the provisions of paragraph 2.A of UNMIS Information Circular No. 218/2011 and paragraph 3 of UNMIS Information Circular No. 327/2011, she was to automatically walk across into the BTO post in the new mission, unless she had performance issues.

26. According to the UNDT, Ms. Hersh had evidently performed satisfactorily and had no performance issues. So why then did the Respondent's agents overreach themselves and

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2014-UNAT-433-Corr.1

35. Article 10(5) of the UNDT Statute provides as follows:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, 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 and shall provide the reasons for that decision.

36. The Secretary-General submits that "the UNDT erred in awarding an amount equivalent to over three years' net base salary without providing any explanation as to why the case was an exceptional one that merited such higher compensation".

37. As explained in *Mmata*, "Article 10(5)(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation".⁸

38. The UNDT Judgment is replete with language speaking of the breaches and aggravating factors. The findings of fact made by the UNDT in paragraphs 97 to 109 of the Judgment point to evidence of blatant and reckless abuse of power, especially on the part of the Chief of Radio, and the manipulation of the transition process to the new mission in favour of Mr. Tobgyal, thereby preventing Ms. Hersh from automatic rolling-over to the new mission as provided in the transition guidelines.

39. The circumstances justify the principles of law applied by this Tribunal and the UNDT to justify increased compensation.⁹ Accordingly, we find no error on the part of the UNDT for an increased award under Article 10(5)(b) of the UNDT Statute. The alternative award of two years' net base salary was well within its jurisdiction having regard to the seriousness of the breaches, which occasioned a referral of the Chief Radio to the Secretary-General for accountability.

⁸ *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092, para. 33.

⁹ Cf. *Kasmani. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-305.

THE UNITED NATIONS APPEALS T

Judgment

46. The UNDT Judgment is affirmed subject to variation of award to two years and six months' net base salary, with interest at the US Prime Rate accruing from the date on which Ms. Hersh left South Sudan. This amount shall be paid within 60 days from the date this Judgment becomes executable. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar