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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 9 4t1nd Ms.81.1803(0)1838

... 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

... 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.

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 law.

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 Administrati

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' netbase 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. 7 TD -0087 2 resciss7-7.5(g)1.2(a)6(raiga a)6(ras2.7(ak.3)

22. As a consequence, it becomes unnecessary to receive the evidence offered by

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