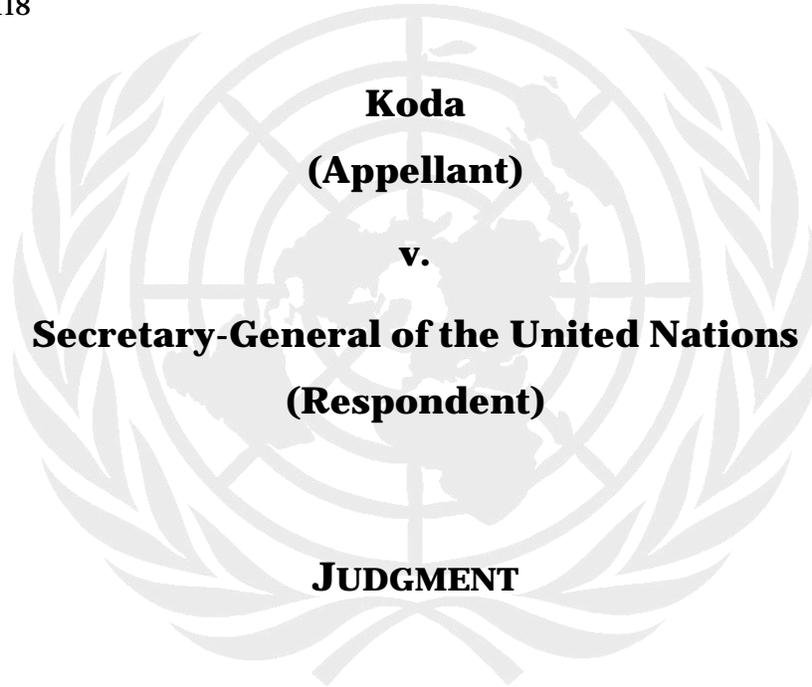




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2010-118



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**Before:** Judge Mark P. Painter, Presiding  
Judge Sophia Adinyira  
Judge Inés Weinberg de Roca

**Judgment No.:** 2011-UNAT-130

**Date:** 8 July 2011

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Steven Powles

**Counsel for Respondent:** John Stompor

**JUDGE MARK P. PAINTER**, Presiding.

### Synopsis

1. We hold that, in a case of alleged constructive termination, the actions of the *employer* must be such that a reasonable person would believe that the employer was “marching [them] to the door”.<sup>1</sup> The trial court applied the proper standard, and found no constructive termination. In fact, the Administration continued to extend the employee’s contract, even in the face of the negative reports.

2. The Office of Internal Oversight Services (OIOS) operates under the “authority” of the Secretary-General, but has “operational independence”.<sup>2</sup> As to the issues of budget and oversight functions in general, the General Assembly, in its resolution 48/218B, calls for the Secretary-General’s involvement. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) also has no jurisdiction to do so, as it can only review the Secretary-General’s administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System. To the extent that any OIOS decisions are used to affect an employee’s terms or contract of employment, the OIOS report may be impugned. But in this case, the report did not do so, as held by the trial court, and we decline to intervene.

3. Because neither party contested the trial court’s factual findings, we need not review a transcript of the proceedings. But we caution that the appellate review of facts, with which we are charged, requires a record. Article 2(1)(e) of our Statute requires that we decide, in some cases, whether the UNDT “[e]rrred on a question of fact, resulting in a manifestly unreasonable decision”. Obviously, in a case with oral evidence, we cannot review the UNDT’s findings unless we have a transcript of that testimony. In a case that turns on disputed facts, we would have no choice, in the absence of a written transcript, but to remand to the trial court for a new, and recorded, hearing. The cost, in time, money, and duplicated effort associated with a remand surely outweighs the cost of

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<sup>1</sup> *Balestrieri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-41, para. 24.

<sup>2</sup> General Assembly resolution 48/218B (12 August 1994).

providing a transcript. If the budget does not exist it must be created, or the Organization's system of internal justice will fail. The lack of budget has already brought us close to that situation.

#### **Facts and Procedure**

4. In April 2006, Charmine Hiroyo Koda (Koda) began a one-year contract with the United Nations Information Centre in Tokyo (UNIC Tokyo), part of the Department of Public Information (DPI), as Director (D-1).

5. In September 2006, Koda reported to the Director of the Strategic Communications Division (DSCD), DPI that a UNIC Tokyo vendor had gone into bankruptcy and obtained approximately USD 10,000 in pre-payment made for fictitious invoices. Koda was asked to make enquiries into the irregularities and obtain reports from the staff members involved.

6. In January 2007, six of the seven staff members at UNIC Tokyo made a joint written complaint to the DSCD about Koda's conduct as Director, alleging mismanagement of UNIC Tokyo, mistreatment of UNIC Tokyo staff and private business activities conducted from the United Nations premises.

7. By letter dated 1 February 2007, the Under-Secretary-General for DPI (USG/DPI— for simplicity, both the former USG/DPI and the current USG/DPI are referred to as the USG/DPI) informed Koda of the allegations and the constitution of a panel (DPI Panel) to investigate them. On 4 March 2007, in response to questions from Koda, the USG/DPI informed Koda that the investigation was being conducted under Chapter X of the Staff Rules and the Administrative Instruction on Revised Disciplinary Measures and Procedures (ST/AI/371).

8. In early March 2007, the DPI Panel conducted its investigation, interviewing Koda, UNIC Tokyo staff, and others. According to Koda, she was denied permission to record her interview with the DPI Panel. The DPI Panel's report, submitted to the USG/DPI on 2 April 2007, was critical of Koda, but did not find any misconduct.

9. By letter dated 10 May 2007, the USG/DPI informed Koda about the outcome of the DPI Panel's investigation, but did not make it available to her. Instead, the USG/DPI summarized that Panel's findings.

10. In August 2007, OIOS conducted an audit of UNIC Tokyo following Koda's earlier request for a full financial audit. On 24 December 2007, OIOS provided a draft of the audit report to DPI for comments. On 17 January 2008, the Director of DSCD provided Koda with a copy of the OIOS draft audit report along with DPI's comments. On 22 February 2008, Koda submitted to the USG/DPI a detailed response to the OIOS draft audit report. On 25 February 2008, Koda's response was forwarded by DPI to OIOS.

11. On 11 March 2008, the final version of the OIOS audit report was issued. The audit report noted the existence of the DPI Panel's report and included a recommendation that Koda be re-assigned until her managerial competencies improved. DPI rejected the recommendation to reassign Koda and kept Koda in her position.

12. In a note dated 3 April 2008, the USG/DPI reiterated his commitment to extend Koda's appointment for an additional year from 3 June 2008. On 27 May 2008, a Letter of Appointment was issued extending Koda's appointment for another year.

13. On 2 June 2008, Koda resigned from her position as Director of UNIC Tokyo. On 3 June 2008, the USG/DPI asked Koda to withdraw her resignation. Koda declined to do so.

14. On 10 June 2008, a 16-page article by Koda about her decision to resign was published in the *Bungeishunju*, a popular Japanese monthly magazine.

15. On 12 June 2008, the USG/DPI held a press conference with the Japanese media in response to media queries about Koda's resignation.

16. In October 2008, Koda filed an appeal with the Joint Appeals Board (JAB). The Secretary-General filed a reply on 30 January 2009. Koda filed observations on the Secretary-General's reply on 8 June 2009.

17. The JAB did not review Koda's case before its abolition on 30 June 2009. Koda's case was then transferred to the Dispute Tribunal. On 30 September 2009, the UNDT

issued Judgment No. UNDT/2009/024 on Production of Documents, ordering the Secretary-General to provide a copy of the DPI Panel's report together with all notes of the proceedings to Koda's counsel within three days.

18. On 24 June 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/110 in which it dismissed Koda's application, finding that she was not constructively dismissed and declining to quash the DPI Panel's report. The Dispute Tribunal found that OIOS' decision as to the content of its audit report was not within its jurisdiction. The Dispute Tribunal also found that the USG/DPI could not be criticized for expressing his opinion on the controversy and was entitled to refer to the allegations against Koda in responding to her article.

19. On 8 August 2010, Koda submitted her appeal. On 24 September 2010, the Secretary-General submitted an answer to the appeal. On 5 October 2010, Koda submitted an application for leave to respond to the Secretary-General's answer and a request for an oral hearing. On 15 October 2010, the Secretary-General submitted observations on Koda's application for leave to respond and her request for an oral hearing. On 26 October 2010, Judge Garewal, as Duty Judge, issued Order No. 20 (2010) rejecting Koda's application for further comment. Later, the panel of judges assigned to the case granted Koda an oral hearing, which took place on 1 July 2011 in Geneva.

### **Submissions**

#### **Koda's Appeal**

20. Koda submits that, in light of the factual findings of the UNDT on the DPI Panel's investigation process and report, the UNDT erred in not quashing the DPI Panel's report on the following grounds:

- (i) The DPI failed to identify the precise legal basis of the inquiry to Koda;
- (ii) The DPI failed to inform Koda of the allegations against her in sufficient detail to enable her to properly respond to them;
- (iii) Koda was denied the right to counsel to advise her on the investigation;

- (iv) Koda was “unreasonably” and “arbitrarily” refused permission to record her interview;
- (v) Some of the DPI Panel’s statements and questions recorded in the notes of the interviews indicated that particular members had “prejudged particular issues against Koda without yet having heard from her”;
- (vi) The Chair of the DPI Panel went sight-seeing with a principal complainant against Koda before submission of the report to the USG/DPI;
- (vii) The DPI Panel report failed to consider the staff allegations against the factual background of Koda’s exposure of financial irregularities;
- (viii) The USG/DPI’s response to the DPI Panel report to Koda was “judgmental, heavy-handed ... one-sided and unjust”;
- (ix) The USG/DPI failed to provide Koda with a copy of the DPI Panel report in circumstances where administrative action was taken on the basis of that report;
- (x) The confidentiality of the DPI Panel report was breached as a result of its provision to OIOS, which in turn disclosed the content of the DPI Panel’s report in its report, which entered into the public domain. Moreover, it was unfair for DPI to use the DPI Panel’s report for a purpose for which it was not directed, namely, the provision to OIOS to make factual conclusions.

21. Koda submits that, in finding that the OIOS audit report was inadequate, unfair and one-sided, the UNDT erred in holding that the failings of the audit process were not within its jurisdiction.

22. Koda submits that the UNDT failed to apply the appropriate legal test or to properly evaluate all of the evidence weighing upon Koda’s decision to resign.

23. Koda submits that the UNDT erred in holding that the USG/DPI was entitled to make the statements he made to the Japanese media at a press conference.

**Secretary-General's Answer**

24. The Secretary-General submits that Koda has failed to establish any errors warranting a reversal of the Dispute Tribunal's finding that Koda was not constructively dismissed. First, the test applied by the UNDT was no more stringent than the test set forth by the International Labour Organization's Administrative Tribunal (ILOAT) in Judgment No. 2745, and the UNDT's conclusion was broad. Second, the UNDT's conclusion is consistent with the observations of the United Nations Appeals Tribunal (Appeals Tribunal) regarding constructive dismissal in *Balestrieri*<sup>3</sup>. Third, the UNDT did not err as a matter of procedure because Koda was responsible for her own decision not to "pursue the evidence previously requested" of the USG/DPI and the Director of DSCD.

25. The Secretary-General submits that Koda has failed to establish any errors warranting a reversal of the Dispute Tribunal's decision not to quash the DPI Panel's report.

26. Koda has failed to establish any errors warranting a reversal of the Dispute Tribunal's conclusion that OIOS' decision, regarding the content of the audit report, was not within the Tribunal's jurisdiction.

27. Koda has failed to establish any errors warranting a reversal of the Dispute Tribunal's finding that the USG/DPI was entitled to refer to the allegations against Koda in responding to her article.

28. The Secretary-General requests that the appeal be dismissed in its entirety.

**Considerations**

29. The UNDT heard extensive evidence, considered it, and rendered a 34-page decision, fully discussing all the issues here. We decline to duplicate all the findings in this opinion, as they were fully set out by the UNDT, and we concur with its findings.

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<sup>3</sup> *Balestrieri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-41.

30. We note that neither party contests the UNDT's factual findings. In any event, we could not review the factual findings, as there is no full recording which could be reviewed or rendered into a transcript. We have received the following from the UNDT:

MESSAGE TO THE PARTIES WITH REGARD TO AUDIO RECORDING OF ORAL PROCEEDINGS

The Office of Administration of Justice does not have the budgetary means to make and preserve a full and accurate record of the UN Dispute Tribunal's oral proceedings. Thus, there is no official record of any Dispute Tribunal's proceedings.

The Registries of the Dispute Tribunal are not required under the Statute and Rules of Procedure to make audio recordings of oral proceedings.

Audio recordings, when made, are for the internal use of the Dispute Tribunal and its Registries. Consideration may be given to providing copies of such recordings to the parties upon reasoned written request, subject to the consent of the judge who presided over the proceedings, and when the recordings are of sufficiently acceptable quality.

However, as these audio recordings are not official records of the proceedings, the parties can under no circumstances rely on them.

31. The appellate review of facts, with which we are charged, requires a record. Article 2(1)(e) of our Statute requires that we decide, in some cases, whether the UNDT "[e]rrred on a question of fact, resulting in a manifestly unreasonable decision". Further, Article 2(7) provides that "[f]or the purposes of the present article, 'written record' means anything that has been entered in the formal record of the Dispute Tribunal, including submissions, evidence, testimony, motions, objections, rulings and the judgement, and any evidence received in accordance with paragraph 5 of the present article". Does that section not require oral testimony to be preserved in reviewable form?

32. Obviously, in a case with oral evidence, we cannot review the UNDT's findings unless we have a transcript of that testimony. In a case that turns on disputed facts, we would have no choice, in the absence of a written transcript, but to remand to the trial court for a new, and recorded, hearing. The cost in time, money, and duplicated effort associated with a remand surely outweighs the cost of a transcript. If the budget does not exist it must be created, or the Organization's system of internal justice will fail. The lack of budget has already brought us close to that situation.

33. Because there is no dispute as to the facts in this case, only the legal characterization of them, we will proceed. But we caution that other cases may require reversal.

34. Koda resigned. She claims that she was constructively dismissed.

35. The UNDT found that Koda was not constructively dismissed. This is a question of fact, but the facts must be considered under the proper legal standard. The UNDT set the standard thus, “[a] constructive dismissal occurs when the employer engages in a scheme of action which, in effect, makes it so difficult for the employee to continue with his or her work, that the latter has no realistic option but to resign”.<sup>4</sup> In a further elaboration, the UNDT judge opined that “this was not the result of improper actions on the part of management calculated to achieve her resignation or reckless whether she resigned or not”.<sup>5</sup>

36. The Administration asserts that the question of constructive dismissal must be viewed from the perspective of the actions of management, and that management must intend a dismissal. Of course, intent can usually only be determined by actions. Koda counters that the issue should be viewed from the employee’s side—did she feel that she had no alternative but to quit? The difference in the standard will usually be slight. We hold that, in a case of alleged constructive termination, the actions of the *employer* must be such that a reasonable person would believe that the employer was “marching them to the door”.<sup>6</sup> This was not the case here—the Administration continued to extend Koda’s contract, even in the face of the negative reports.

37. Any error in the two reports—and, as found by the UNDT, there were many—were thus not instrumental in any administrative action—the UNDT found that the employer tried to help Koda, not fire her.

38. Koda asked the trial court, and now asks this Court, to “quash” the DPI Panel’s report. We are not sure that the report itself is an “administrative decision” subject to the UNDT’s—and this Court’s—jurisdiction. But even assuming it would be, we will not

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<sup>4</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/110, para. 56.

<sup>5</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/110, para. 57.

<sup>6</sup> *Balestrieri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-41, para. 24.

overrule the finding of the UNDT judge, who, having heard and considered all aspects of the request, ruled: “Accordingly, although I am far from persuaded that the conclusions of the panel were correct or that the reasoning they adopted was convincing, I decline to quash the report of the investigation panel for formal shortcomings and am not prepared to conclude that its findings were not reasonably open.”<sup>7</sup> We believe that this was a decision for the trial court, and we should not substitute our judgment at this juncture.

39. Did the UNDT, after finding that the OIOS audit report was inadequate, unfair, and one-sided, err in holding that the failings of the audit process were not within the jurisdiction of the UNDT? The UNDT found that

[s]o patent were the shortcomings of the audit report in respect of the administrative and management problems in UNIC Tokyo, that it should not have been presented. Of course, I do not know whether the conclusions were incorrect or the recommendation unjustified as such: what I do conclude, however, is that there is no process of investigation described or reasoning expressed that justifies any confidence in the propriety of the conclusion or utility of the recommendation. Such a document should never have been published.<sup>8</sup>

40. The Administration claims that OIOS’ decisions are not administrative decisions of the Secretary-General, and thus not subject to review by this, or necessarily any other, Court. But

[t]he Office of Internal Oversight Services shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties and, in accordance with Article 97 of the Charter, have the authority to initiate, carry out and report on any action which it considers necessary to fulfill its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations as set forth in the present resolution...<sup>9</sup>

41. Thus OIOS operates under the “authority” of the Secretary-General, but has “operational independence”. As to the issues of budget and oversight functions in general, the General Assembly resolution calls for the Secretary-General’s involvement. Further, the Secretary-General is charged with ensuring that “procedures are also in

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<sup>7</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/110, para. 26.

<sup>8</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/110, para. 37.

<sup>9</sup> General Assembly resolution 48/218 B (12 August 1994), para. 5(a).

place” to protect fairness and due-process rights of staff members.<sup>10</sup> It seems that the drafters of this legislation sought to both establish the “operational independence” of OIOS and keep it in an administrative framework. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General’s administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.

42. To the extent that any OIOS decisions are used to affect an employee’s terms or contract of employment, OIOS’ report may be impugned. For example, an OIOS report might be found to be so flawed that the Administration’s taking disciplinary action based thereon must be set aside.

43. Though the UNDT judge found flaws in the OIOS’ report, no disciplinary action was based upon it—its recommendation for reassignment was *disregarded* by the administration, which renewed Koda’s contract. The trial court found that

[a]lthough I have concluded that the audit report was inadequate, unfair and one-sided so far as it concerned [Koda], it does not seem to me that the Secretary-General has any powers in respect of the content of an audit report and that OIOS is independent in respect of that part of its functions involving the conduct of audit investigations. No rule or regulation has been cited to me that gives the Secretary-General such power. I do not consider therefore that a decision as to the content of the audit is within the jurisdiction of the Tribunal unless it is incidentally material. Here, [Koda] has relied on the inappropriate use of the panel report, arguing, as I understand it, that since the panel report was fundamentally flawed both legally and factually and it was in part cited in the audit report, that its use in that way exacerbated the shortcomings of the audit report and, accordingly, the Tribunal should hold that she is entitled to compensation for the wrongful panel report, measured by the adverse effects on her reputation ensuing from the consequential audit report. Since, however, I have held that the panel report did not constitute a breach of her contractual rights, this argument must fail.<sup>11</sup>

44. Again, we see no reason to intervene. All claims of error are denied.

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<sup>10</sup> General Assembly resolution 48/218 B (12 August 1994), para. 7.

<sup>11</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/110, para. 45.

**Judgment**

45. We affirm the UNDT's Judgment.

Original and Authoritative Version: English

Dated this 8<sup>th</sup> day of July 2011 in Geneva, Switzerland.

*(Signed)*

Judge Painter, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 29<sup>th</sup> day of August 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar