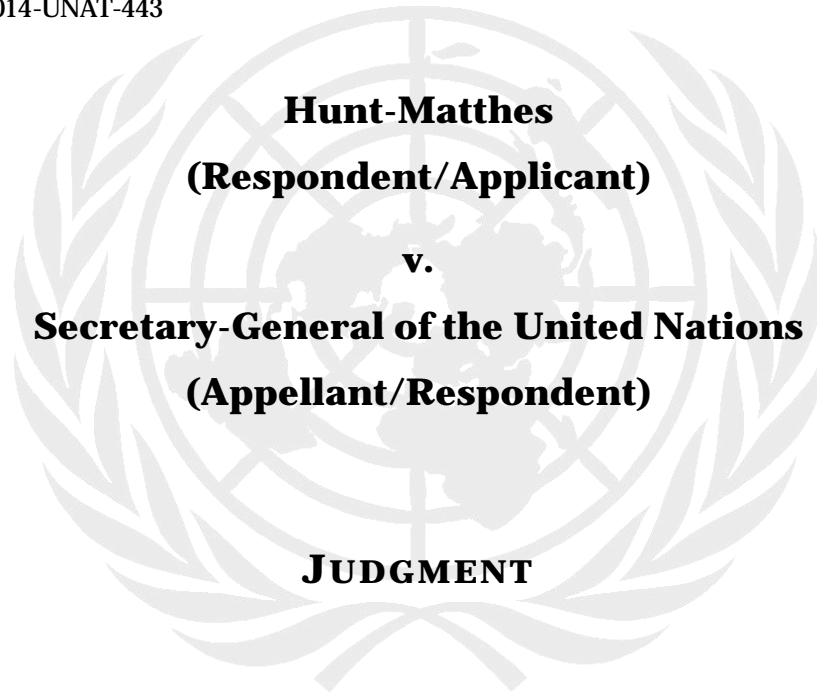




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-443



**Hunt-Matthes  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Luis María Simón Judge Rosalyn Chapman
Case No.:	2013-510
Date:	27 June 2014
Registrar:	Weicheng Lin

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Counsel for Ms. Hunt-Matthes: Miles Hastie/OSLA

Counsel for Secretary-General: Paul Oertly

**JUDGE RICHARD LUSSICK, 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/2013/084, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 28 May 2013. The Secretary-General appealed on 26 July 2013, and Ms. Caroline Hunt-Matthes answered on 27 September 2013.

**Facts and Procedure**

2. Ms. Hunt-Matthes is a former staff member of the United Nations High Commissioner for Refugees (UNHCR). She re-joined UNHCR in September 2003 as a Senior Investigation Officer at the P-4 level, with the Inspector-General's Office (IGO) under a one-year fixed-term appointment.

3. According to Ms. Hunt-Matthes, during her field investigation in October 2003 in Sri Lanka into an allegation of rape of a refugee by a UNHCR staff member, she encountered "obstruction and interference by the Country Representative" of UNHCR in Sri Lanka. She reported the obstruction to her immediate supervisor and subsequently all the way to UNHCR's Deputy High Commissioner. She was initially supported by her immediate supervisor. However, later in 2003 and in the beginning of 2004, the relationship between Ms. Hunt-Matthes and her immediate supervisor became strained, with the latter accusing the former of breaches of confidentiality and warning the former against discussing her Sri Lanka investigation with persons outside the IGO.

4. Ms. Hunt-Matthes was seriously injured in a car accident in July 2004 in Indonesia. She was medically evacuated to Geneva, and placed on sick leave from August 2004 to September 2004 and on 50 per cent sick leave thereafter through March 2006.

5. While she was on sick leave, in August 2004, Ms. Hunt-Matthes' immediate supervisor asked her again to complete and submit her Career Management System (CMS) objectives in connection with the preparation of her Performance Appraisal Report (PAR). Ms. Hunt-Matthes apologized and offered to finalize her CMS objectives after she returned to work.

6. On 25 August 2004, Ms. Hunt-Matthes' immediate supervisor confirmed to UNHCR's human resources office the decision not to extend Ms. Hunt-Matthes' fixed-term appointment beyond its expiry date on the grounds of unsatisfactory performance. The next day, he finalized Ms. Hunt-Matthes' PAR, without a final discussion with her, rating her performance as "unsatisfactory". However, Ms. Hunt-Matthes was not separated in September 2004. Her appointment was extended as an administrative measure through 30 May 2006.

7. Ms. Hunt-Matthes initiated a PAR rebuttal procedure. A rebuttal panel was constituted. A member of that panel subsequently complained about being approached by the head of the Performance Management Unit (PMU) and being asked to meet with UNHCR's Legal Affairs Section. The rebuttal panel determined that Ms. Hunt-Matthes' case fell within the mandate of the Office of Internal Oversight Services (OIOS) and recommended that the matter be referred to OIOS for action.

8. In October 2004, Ms. Hunt-Matthes was offered a position with the Evaluation and Policy Analysis Unit (EPAU) within UNHCR as a Senior Evaluation Officer at the P-4 level. Her performance there between October 2004 and 1 September 2005 was rated "fully effective". Her PAR for 2003 and 2004 with unsatisfactory performance was allegedly withdrawn from her official status file. Ms. Hunt-Matthes stated to the Dispute Tribunal that as the withdrawal was conditioned upon her dropping her case she did not accept that proposal.

9. In September 2005, the PAR rebuttal panel forwarded Ms. Hunt-Matthes' complaint of misconduct and her PAR rebuttal to the OIOS Vienna Office, but OIOS did not pursue this referral "due to insufficient resources". Neither was her PAR rebuttal completed.

10. Ms. Hunt-Matthes was medically cleared to return to work in March 2006. At the end of May 2006, she was separated from service with the EPAU, which had been replaced by a new unit called Policy Development and Evaluation Service.

11. Ms. Hunt-Matthes appealed. Both her suspension of action request and her substantive case were rejected by the former Joint Appeals Board. In March 2007, she applied to the former Administrative Tribunal, which did not review her case before its

abolition at the end of 2009. Her application in respect of the decision not to renew her fixed-term appointment, among other things, was transferred to the Dispute Tribunal.

12. By Order No. 001 (NBI/2013) dated 2 January 2013, the UNDT ordered the parties to file their respective witness lists, with a summary of anticipated testimony and approximate time each witness was expected to take and their contact details, by 31 January 2013. Ms. Hunt-Matthes filed a summary of evidence to be given by her and her witnesses including Mr. Anthon Verwey, former Chief of the EPAU, whereas the Secretary-General's representative informed the Dispute Tribunal on 31 January 2013 that the Respondent did not intend to call witnesses. The UNDT issued another order on 5 February 2013, ordering Ms. Hunt-Matthes to provide a more detailed summary of the evidence to be elicited by her witnesses.

13. During the first day of the substantive hearing on 26 February 2013, Mr. Verwey testified for Ms. Hunt-Matthes. Among other things, he stated his belief that the negative PAR that Ms. Hunt-Matthes had received was "an act of retaliation". He also thought that the allegations that Ms. Hunt-Matthes had breached confidentiality by discussing cases with him "were part of a plan to somehow destabilise Ms. Hunt-Matthes". In her summary of the evidence to be given, Ms. Hunt-Matthes did not make any reference to the allegations of breach of confidentiality. The UNDT noted that during the hearing the representative of the Secretary-General did not challenge any of Ms. Hunt-Matthes' evidence relating to her allegations of retaliation or question Mr. Verwey about the allegations of breach of confidentiality.

14. In the evening on 26 February 2013, the representative of the Secretary-General filed a motion with the UNDT requesting leave to call Ms. Hunt-Matthes' former supervisor as a witness. The Dispute Tribunal rejected the motion in Order No. 081 (NBI/2013), on the grounds that well before the hearing the Respondent had adequate notice of the allegations of retaliation and harassment by her supervisor and had a full opportunity to call any witnesses to rebut those allegations if he had chosen to do so and that the motion was filed too late. In the view of the UNDT, to grant the motion would mean that both Ms. Hunt-Matthes and Mr. Verwey would have to be recalled and cross-examined, which would be impossible to achieve due to the well-known time constraints.

15. In Judgment No. UNDT/2013/084, the Dispute Tribunal held that the decision not to renew Ms. Hunt-Matthes' appointment was unlawful, and there had been a failure to comply with the performance management process. It further held that the preparation of the performance appraisal was retaliatory. The Dispute Tribunal awarded Ms. Hunt-Matthes one year's salary and benefits, USD 50,000 for moral damages and costs of GBP 6,074.50 for manifest abuse of proceedings by Counsel for the Secretary-General. The Dispute Tribunal also referred three UNHCR offices (Executive Office, Department of Human Resources Management and Legal Affairs Unit) to the Secretary-General for accountability.

### **The Secretary-General's Appeal**

16. The Secretary-General maintains that the Dispute Tribunal erred in law in refusing to consider the detailed reply statement of Ms. Hunt-Matthes' immediate supervisor and a supplementary statement of UNHCR's Deputy Inspector-General, which provide evidence of UNHCR's view of Ms. Hunt-Matthes' performance and the performance appraisal process. The Secretary-General recalls that the UNDT rejected his request to call Ms. Hunt-Matthes' immediate supervisor as a witness, on the grounds that it had been made too late, which would have fully cured the concern expressed by the UNDT. By so doing, the Dispute Tribunal committed a procedural error such as to affect the decision of the case by denying him an opportunity to present the evidence of the supervisor both in writing and in person.

17. The Secretary-General submits that the UNDT erred in concluding that the non-renewal decision was retaliatory said to be based on Mr. Verwey's testimony. The Secretary-General maintains that, given its general and speculative nature, Mr. Verwey's testimony provided an insufficient basis for the UNDT's conclusion of retaliation, as his evidence as to a conversation taking place in March 2004 at the latest was too attenuated to corroborate a characterization of the non-renewal of her appointment in late August 2004 as retaliation. Moreover, Mr. Verwey's observation of past events does not support a conclusion that the UNHCR Administration had engaged in retaliation in Ms. Hunt-Matthes' case.

18. On the merits, the Secretary-General submits that the UNDT erred in law and exceeded its competence by examining matters that had been rendered moot and had not been subject to a request for administrative review. He notes that Ms. Hunt-Matthes' service was extended numerous times for almost two years beyond the expiry of her initial

appointment, at the same P-4 level, with UNHCR. In his view, the contested decision not to renew her fixed-term appointment was rendered moot by subsequent developments and had thus no legal impact on her. The Secretary-General also notes that, in her request for administrative review, Ms. Hunt-Matthes only requested review of UNHCR's non-renewal decision as well as actions and omissions that were detrimental to her future in the Organization. The alleged omissions by OIOS were not part of her request for administrative review. However, the Dispute Tribunal factored the alleged omissions by OIOS as part of its calculation on costs. In this connection, the Secretary-General notes that the alleged omissions by OIOS substantially postdate, and have no connection with, the contested decision.

19. The Secretary-General also submits that the Dispute Tribunal erred in concluding that the non-renewal decision was unlawful solely because of procedural breaches in the performance appraisal, without weighing their gravity and overall impact.

20. The Secretary-General further submits that there is no legal basis for the Dispute Tribunal to award compensation in lieu of rescission in the amount of one year's salary and benefits as if she would have received a four-year appointment in September 2003, when no such commitment had ever been made by UNHCR. The Secretary-General states that UNDT's award of USD 50,000 for moral damages is necessarily flawed resulting from its erroneous findings of the unlawfulness of the non-renewal and the existence of retaliation.

21. The Secretary-General submits that the UNDT erred in referring UNHCR entities to him for accountability. The UNDT further erred in awarding costs against him.

### **Ms. Hunt-Matthes' Answer**

22. Ms. Hunt-Matthes submits that the Secretary-General is appealing the UNDT Judgment in order to evade compensation for admitted PAR flaws, upon which the decision not to renew her appointment was based, and moreover, in order to needlessly continue a nine-year ordeal.

23. Ms. Hunt-Matthes also submits that the Secretary-General has not alleged or demonstrated manifest unreasonableness of the UNDT Judgment. In her opinion, deference should be accorded to the UNDT's findings of fact and its determination of the quantum of damages.

24. Ms. Hunt-Matthes further submits that it is not disputed that she made reports of misconduct and that she faced adverse administrative actions of non-renewal following the report.

### **Considerations**

25. One of the Secretary-General's grounds of appeal is that the UNDT committed an error in procedure such as to affect the decision of the case by denying him an opportunity to present the evidence of Ms. Hunt-Matthes' supervisor both in writing and in person. Since this ground questions the fairness of the trial in the lower tribunal, it is appropriate to consider it first.

26. The Secretary-General alleges that the UNDT's refusal to even consider, let alone give any probative value to, the witness statements of Ms. Hunt-Matthes' supervisor constituted a significant error of law. The Secretary-General claims that "the UNDT indicated during the oral hearings that, absent the supervisor testifying *viva voce*, it would have difficulty placing reliance on his written statement. Yet when the [Secretary-General] requested leave during the hearings to call the supervisor as a witness, ... the UNDT rejected [his] request on the grounds that it had been made too late."<sup>1</sup>

27. On the first day of the hearing, 26 February 2013, Ms. Hunt-Matthes called Mr. Verwey as a witness, who gave evidence which was not contained in the summary of his evidence that had been provided to the Secretary-General. At 7:25 pm that same day, the Secretary-General filed an application for leave to call Ms. Hunt-Matthes' former supervisor as his witness.

28. The grounds for the Secretary-General's application were that Mr. Verwey gave evidence earlier that day of matters that had not been referred to in the summary of his evidence provided to the Secretary-General. These matters included allegations against Ms. Hunt-Matthes' former supervisor and the former Deputy Inspector-General. Specifically, that they constructed allegations of breach of confidentiality against Ms. Hunt-Matthes in order to falsely justify a poor performance assessment of her. The Secretary-General was taken by surprise by this evidence. Ms. Hunt-Matthes had been ordered to provide a summary of the anticipated testimony of her witnesses by 31 January 2013, which she failed to do. On 5 February 2013, Ms. Hunt-Matthes was ordered to provide a more detailed summary of the evidence to be elicited by her witnesses by 25 February 2013. In the summary of the evidence to be given, received by the

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<sup>1</sup> Appeal, para. 25.

Secretary-General on the eve of the trial, Ms. Hunt-Matthes failed to make any reference to the testimony of alleged falsification of allegations of breach of confidentiality.

29. The next day, 27 February 2013, the UNDT issued an oral ruling rejecting the Secretary-General's motion to call a witness. This was followed on 15 April 2013 by Order No. 081 (NBI/2013) giving reasons for that decision.

*In arriving at its decision, the UNDT considered the following facts:*

30. It was clear to the Secretary-General from the beginning that retaliation was a prominent aspect of the case. Ms. Hunt-Matthes had alleged in her application to the UNDT that the IGO managers demonstrated ill will towards her and that "the organizational culture of UNHCR is conducive to incidents of harassment and retaliation, behaviour patterns many of its senior staff fail to recognize or acknowledge". On 12 October 2012, she submitted a chronology of events which claimed she had been the victim of retaliation. On 22 February 2013, one of the documents filed in an agreed bundle was a statement by Mr. Verwey that Ms. Hunt-Matthes was "a clear victim of systematic abuse of power intended to lead to her separation from UNHCR".

31. The Secretary-General had indicated to the UNDT on at least two occasions prior to the 26 February 2013 hearing that he did not intend to call any witnesses.

32. On 31 January 2013, Ms. Hunt-Matthes filed a summary of evidence to be given by her and her three witnesses. At a status conference on 5 February 2013, Ms. Hunt-Matthes was ordered to file a more detailed summary of the evidence to be elicited by her and her witnesses.

33. Mr. Verwey's summary, which was subsequently filed, indicated that he would "describe briefly the origins of the IGO and its general *modus operandi*. He will show how it was not independent and had a propensity to be used as a management tool rather than a true oversight body."

34. At the hearing on 26 February 2013, by agreement of the parties, the case was allowed two days hearing time as it was to be immediately followed by another case involving Ms. Hunt-Matthes.



35. Counsel for the Secretary-General did not challenge any of Ms. Hunt-Matthes' evidence relating to her allegations of retaliation and the reasons for the negative PAR she was given by her supervisor, which was used as the reason for not renewing her contract with the IGO.

36. When Mr. Verwey gave evidence, he "*generally* followed the synopsis that had been submitted to the [Dispute] Tribunal". (Emphasis added.) He elaborated on the synopsis by referring to

his role in the launch of IGO and the establishment of its database of cases; his knowledge of and experience with [Ms. Hunt-Matthes'] former supervisor, his concerns about the way the IGO had conducted some of its investigations. He told the [Dispute] Tribunal that he believed that the negative P[A]R that [Ms. Hunt-Matthes] received was an act of retaliation. He also referred to the allegations that [Ms. Hunt-Matthes] had breached confidence by discussing her cases with him, among others. He said that the supervisor was a man under pressure at that time.

Mr. Verwey also agreed, when asked by the UNDT, that the alleged breaches of confidence were part of a plan to destabilise Ms. Hunt-Matthes. He said that to construe what Ms. Hunt-Matthes had said to him as a breach of confidence was "an under the belt attack".

37. Counsel for the Secretary-General did not cross-examine Mr. Verwey about these allegations. He confined his questions to Mr. Verwey's role in finding an amicable solution to Ms. Hunt-Matthes' problem in IGO and his offer for Ms. Hunt-Matthes to work at the EPAU.

*The UNDT's reasons for its decision*

38. The Dispute Tribunal was cognizant of Article 19 of its Rules of Procedure, which provides that the Tribunal may issue any order or give any direction for the fair and expeditious disposal of a case and to do justice to the parties. The UNDT correctly identified the question for decision as being whether it was in the interests of justice to allow the Secretary-General's motion to call his witness.

39. The UNDT took the following lenient view of the shortcomings in Mr. Verwey's written summary of evidence:

It is correct that in his summary of evidence to be given, Mr. Verwey did not refer to specific allegations of retaliatory behaviour including the question of [Ms. Hunt-Matthes'] use of confidential information. However, the [Dispute] Tribunal finds that the issue of alleged retaliation against [Ms. Hunt-Matthes] by her supervisors was a prominent aspect

of the case from the beginning. It was referred to in the Application, in the Respondent's reply, the Applicant's chronology and in the agreed bundle of documents. All of these were submitted well before the hearing and the [Secretary-General's] counsel had access to all the documents.

40. The UNDT also took into account that although both Ms. Hunt-Matthes and Mr. Verwey gave evidence about retaliation, neither of them was cross-examined or challenged on the point by the Secretary-General.

41. The UNDT was also mindful that granting the Secretary-General's application at this stage would result in both Ms. Hunt-Matthes and Mr. Verwey having to be recalled and cross-examined, which would not be possible to achieve "in light of the pre-determined and strict timetable agreed by the Tribunal and the parties".

42. In refusing the Secretary-General's motion, the UNDT concluded that

well before the oral hearing of this case the [Secretary-General] had adequate notice of [Ms. Hunt-Matthes'] allegations of retaliation and harassment by her supervisor and a full opportunity to call any witnesses to rebut those allegations if [he] had so chosen. ... Additionally, this late application was not only made out of time but also at a stage of the hearing which, in view of the well-known time restraints, cannot be accommodated. ... The interests of justice would not be met by granting the application.

### *Conclusions*

43. It is not disputed that the evidence Mr. Verwey gave regarding the alleged falsification of allegations of breach of confidentiality by Ms. Hunt-Matthes' former supervisor and the former Deputy Inspector-General was not disclosed in Mr. Verwey's summary of evidence.

44. The Dispute Tribunal erred in not attaching any importance to this omission. Instead, the UNDT reasoned that "the issue of alleged retaliation against [Ms. Hunt-Matthes] by her supervisors was a prominent aspect of the case from the beginning". Such reasoning ignored the obligation that rested upon Ms. Hunt-Matthes to provide a detailed and accurate summary of the evidence Mr. Verwey would give. The summary that was provided was vastly different from the oral evidence given by Mr. Verwey.

45. The preliminary question which the UNDT had to decide was whether the summary of evidence provided to the Secretary-General was a fair and accurate disclosure of the evidence Mr. Verwey had given in his oral testimony. The answer to that was clearly no. That retaliation was already known as an issue could not have alerted the Secretary-General that Mr. Verwey was going to give oral evidence that Ms. Hunt-Matthes' former supervisor and the former Deputy Inspector-General had falsified allegations of breach of confidentiality against her. Nor did it mean that the Secretary-General was not taken by surprise by Mr. Verwey's previously undisclosed evidence. The Secretary-General's representative was entitled to expect that Mr. Verwey's sworn testimony would accord with the previously provided summary of his evidence. He had no way of knowing that Mr. Verwey was going to give evidence that was not contained in the summary.

46. The UNDT pointed out that on previous occasions the Secretary-General had advised that he did not intend to call any witnesses. This consideration was no longer relevant in view of what had occurred at the trial.

47. As noted by the UNDT, at the hearing the Secretary-General did not challenge either Ms. Hunt-Matthes or Mr. Verwey on their evidence about retaliation. The Secretary-General should have done so, and should also have objected to Mr. Verwey's evidence as soon as it became clear that he was departing from the summary which had been previously provided. However, any errors counsel may have committed cannot cause his client to be deprived of a fair trial.

48. The Secretary-General was not at fault in what had occurred. Rather, the fault rested with Ms. Hunt-Matthes. She had called a witness, who gave evidence which had not previously been disclosed to the Secretary-General and which was not only potentially damaging to the Secretary-General's case, but also damaging to the reputation of the former supervisor and the former Deputy Inspector-General. It was the duty of the UNDT to ensure that the Secretary-General was not prejudiced by Ms. Hunt-Matthes' failure to comply with its previous direction to provide a detailed summary of the evidence Mr. Verwey was going to give. Given that the UNDT allowed Mr. Verwey's testimony into evidence, the interests of justice demanded that the Secretary-General be given the opportunity to answer Mr. Verwey's previously undisclosed accusations by calling a witness in rebuttal. Moreover, Ms. Hunt-Matthes would not have been prejudiced by such a measure. In fact, Ms. Hunt-Matthes did not object to the Secretary-General's motion to call a witness.

49. As stated above, Article 19 of the UNDT Rules of Procedure gives UNDT the discretion to issue any order or give any direction appropriate for the fair and expeditious disposal of the case and to do justice to the parties. In our view, the UNDT improperly exercised its discretion by giving the timetable of the case priority over the fair trial rights of the Secretary-General. While expeditious disposal of a case is important, it can never supersede the parties' right to a fair hearing. The unfairness to the Secretary-General was compounded by the fact that the UNDT refused to consider the written statement of the former supervisor, resulting in the Secretary-General being left with no way to answer an important part of the case against him.

50. We find that, in the circumstances, the UNDT's refusal of the Secretary-General's motion to call a witness was a clear violation of due process, which must result in the Judgment under appeal being annulled and the case being remanded for a hearing *de novo* before a different judge.

51. This conclusion renders it unnecessary to examine the other grounds of the appeal.

### **Judgment**

52. The appeal is allowed in part and the Judgment of the UNDT is set aside. The case is remanded to the UNDT for a hearing *de novo* before a different judge.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Chapman

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

*(Signed)*

Weicheng Lin, Registrar