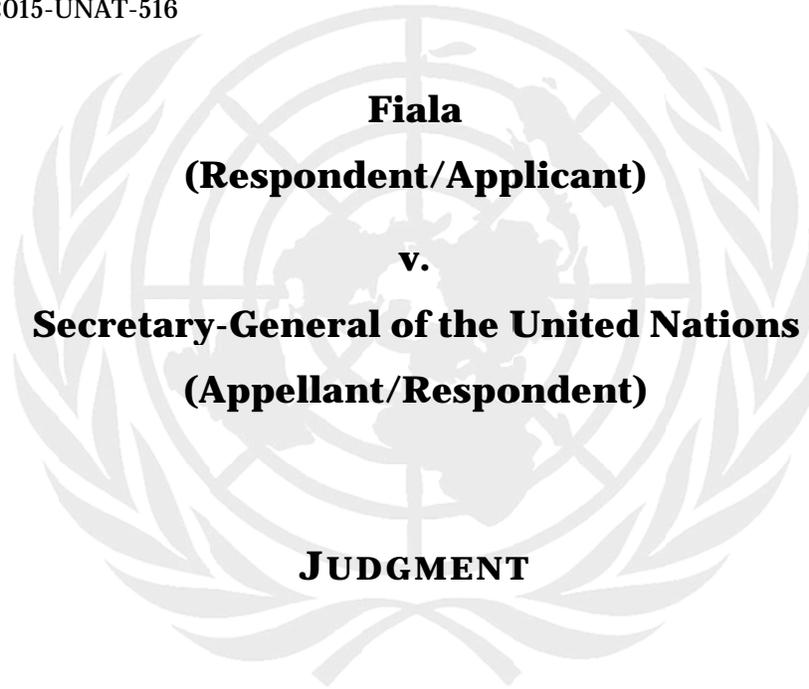




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-516



**Fiala
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Richard Lussick
Judge Sophia Adinyira

Case Nos: 2014-590, 2014-595 & 2014-596

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Ms. Fiala: George Irving

Counsel for Secretary-General: Zarqaa Chohan

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:¹

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

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

Democratic Republic of the Congo (MONUC)].

... By an email dated 28 April 2006, Mr. Bentz informed the Offices of the Director of Administration (DOA) and Personnel in MONUC that the Applicant was the selected candidate and recommended recruitment at the FS-5 level and simultaneously requested that Personnel speed up the process in order to avoid a [break in service].

... Upon receipt of the Letter of Appointment from PMSS, the Applicant noticed that she was offered a lateral move (FS-4) and immediately called Mr. Alexander Sokol, then Team Leader, Recruitment and Placement Section/PMSS and Mr. Bentz in MONUC to inform them of the apparent error.

... Mr. Sokol informed the Applicant that she featured on a list of staff members to be re-assigned and had been processed as a lateral move as a result of the downsizing of UNAMSIL. The Applicant informed him that she had successfully gone through a competitive selection process for an FS-5 level post. Mr. Sokol offered to re-visit her case, but needed time.

... Mr. Bentz advised that the most expedient way to deal with the matter was for the Applicant "to sign the Letter of Appointment with her present grade and level, and take up the matter once she was in MONUC".

... A facsimile of 9 May 2006 from Ms. Hazel Scott, DOA/MONUC, to Mr. Chaste Abimana, then Officer-in-Charge (OiC), PMSS, stated that the Applicant was interviewed and recommended for appointment against an FS-4 position of Administrative Assistant. The fax highlighted that as UNAMSIL could not maintain her status beyond expiration of her accumulated leave, she should be given the Offer of Appointment with MONUC at the earliest convenience in order to avoid a [break in service].

... On 17 May 2006, the Applicant signed a contract offer for a fixed-term appointment as Administrative Assistant at the FS-4, step 10 level. The Applicant joined MONUC on 1 June 2006.

... On 7 September 2006, Mr. Bentz wrote to Mr. Paulin Djomo, then Chief Civilian Personnel Officer (CCPO), MONUC, requesting advice on the steps to be followed in order to rectify the Applicant's recruitment level from FS-4 to FS-5.

... On 26 September 2006, Ms. Drissa Soro sent an e-mail on behalf of the Head of the International Staff Recruitment Unit of MONUC to Mr. Bentz stating that the Applicant was on a shortlist of technically cleared candidates to be evaluated for the post of Administrative Assistant at the FS-5 level in relation to VA 408823. The shortlist of technically cleared candidates was attached to the email.

... On 27 September 2006, Mr. Bentz received an email from Mr. Hayamoon Mubtakir, Human Resources Officer, International Staff Recruitment Unit, MONUC, indicating that he should complete a comparative evaluation sheet to

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 indicating that upon a review of her personnel records, he wished to confirm that the selection fax received from MONUC was for a post at the FS-4 level and that she was properly recruited at the FS-4 level.

... During the following 10 months, the Applicant attempted informally to rectify her recruitment level from FS-4 to FS-5. By memorandum dated 15 April 2007, the Applicant officially requested revision/correction of her entry level. This was within a year of her recruitment to MONUC on 1 June 2006.

... The Applicant received a response from FPD/DFS on 28 September 2007 stating that she had been properly recruited at the FS-4 level.

... Consequently, the Applicant requested access to her personnel file in MONUC and discovered that there were no documents in her file evincing her FS-5 recruitment process. Her file contained a copy of a fax to PMSS, which had been drafted and authorized by the CCPO and signed by the DOA on 9 May 2006, re-confirming Mr Bentz' selection process but quoting an FS-4 instead of FS-5 recruitment level.

... In a facsimile dated 22 February 2009, Mr. Hany Abdel-Aziz, Director of Mission Support (DMS), MONUC, requested that Mr. Paul Johnson, Chief of Operations FPD/DFS revisit the case based on new evidence that was adduced by the Applicant from archived files of individuals involved in her recruitment process that suggested there was an administrative error in her recruitment.

... An unsigned facsimile dated 27 February 2009 from FPD/DFS to the DMS/MONUC states that after careful review of the relevant recruitment material, FPD could not grant the Applicant's request as she had been properly recruited at the FS-4 level.

... Based on a 4 September 2009 memorandum from the Management Evaluation Unit (MEU) to FPD/DFS, it appears that this 27 February 2009 facsimile was never received by MONUC.

... According to the Applicant, while MONUC was pursuing her case with FPD/DFS in 2009, she authorized the former Panel of Counsel to raise the matter with the Chief of Operations of FPD/DFS, which resulted in four months of silence.

... By an e-mail dated 29 June 2009, a representative from the Panel of Counsel informed her that FPD/DFS had confirmed that it was not in a position to revise her recruitment level as she had, in fact, been interviewed and selected for an FS-4 position in 2006.

... The decision not to revise the Applicant's grade was taken by FPD/DFS on 29 June 2009 and the Applicant was notified the same day by the Panel of Counsel.

The decision was orally communicated by Paulin Djomo, Officer in Charge, Africa II Section, Field Personnel Operational Services, FPD/DFS.

Procedural history

... A request for management evaluation was filed by the Applicant on 29 August 2009. She received a response from MEU on 30 November 2009. [...]

... By an application dated 26 February 2010, the Applicant requested extension of the time limit within which to file her application due to illness. By Order No. 45 (NBI/2010), dated 18 March 2010, she was instructed to submit, by 23 March 2010, a medical certificate or report in support of her request for an extension of the time limit. The Applicant complied with Order No. 45 on 18 March 2010. Pursuant to art. 8.3 of the UNDT Statute, by Order No. 48 on 19 March 2010, the Tribunal granted the Applicant an extension to 1 April 2010 to file her application.

... An Application was subsequently filed on 1 April 2010 and served on the Respondent on 6 April 2010.

... The Respondent filed his Reply on 6 May 2010, requesting that the Application be dismissed as not being receivable.

... By Order No.73 (NBI/2010) dated 7 May 2010, the parties were invited to inform the Tribunal if they were prepared to consider a mediated settlement. As the Respondent did not consider that mediation was a viable option for resolution of this matter, a case management hearing was held on 27 May 2010 pursuant to Order No. 73. The Applicant, her representative, and the Respondent's representative were present at the hearing via audio link.

... At the case management hearing, and in a subsequent filing dated 24 June 2010, the Respondent maintained his position that the Application was not receivable.

... After consideration of the documentary and oral evidence, in Order No. 136, the Tribunal concluded that the Application is receivable and requested the Parties to make submissions on the further management of the case.

[The UNDT found that Ms. Fiala had submitted a timely request for management evaluation in August 2009 of the decision to recruit her at the FS-4 level in June 2006. The UNDT found the application receivable on the ground that the June 2009 DFS communication was a “new administrative decision in its own right[”]. In deciding that the June 2009 DFS communication was “a new administrative decision”, the UNDT found that there was a request to “review” the 2006 decision and that this communication was based upon “new evidence” and “wholly different” facts from those facts used to make the determination upon which the 2006 decision was made.]

... On 7 September 2010, the Applicant filed her response to Order No. 136, informing the Tribunal that she wished to present statements from three witnesses:

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 position and that the decision to appoint her at the FS-4 level was "erroneous". The UNDT ordered the rescission of the decision to appoint Ms. Fiala at the FS-4 level and her re-appointment at the FS-5 level as well as payment of the difference between the salary and entitlements of FS-4 and FS-5 from 1 June 2006 to the date of the Judgment. In the event that rescission of the decision was not possible, the UNDT ordered payment to Ms. Fiala of the loss of earnings at the FS-5 level from 1 June 2006 to the date of the Judgment. In addition, the UNDT ordered USD 10,000 as moral damages for the impact on Ms. Fiala's career and health and for the distress she suffered.

5. On 6 March 2014, Ms. Fiala submitted to the UNDT an application for interpretation of said Judgment. By Order No. 180 (2014), the Appeals Tribunal granted Ms. Fiala's motion for an extension of time to appeal and ordered that the appeal, if any, must be filed within 60 calendar days of the Interpretation of Judgment No. UNDT/2014/007 (Appeals Tribunal Case No. 2014-590). On 19 June 2014, the UNDT issued Judgment UNDT/2014/067 on Interpretation. Ms. Fiala has not appealed Judgment No. UNDT/2014/007.

Submissions

Case No. 2014-595

The Secretary-General's Appeal Against Order No. 136 (NBI/2010)

6. The only decision challenged by Ms. Fiala is the decision to appoint her at the FS-4 level to MONUC. This decision was communicated to her in May 2006. Subsequently, Ms. Fiala made several informal and formal efforts to challenge this decision and she was consistently advised that her letter of appointment reflected the correct level. A request by a staff member to reconsider an administrative decision does not create a new decision and does not restart the

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)

9. The Secretary-General's appeal is time-barred. His appeal was due 60 days from the issuance of the UNDT Order on Receivability.

10. The UNDT correctly determined that the decision rejecting the correction of Ms. Fiala's entry level on the basis of new information was a new decision based on a formal request for reconsideration sent by the Mission on 22 February 2009. The contested decision was not simply Ms. Fiala's selection and appointment to MONUC in 2006, but rather the refusal to recognize the legitimate competitive selection process conducted by the Programme Manager and to finalize the last stages of the "movement to higher level" process to adjust her level accordingly, which she had been promised.

11. The Secretary-General misrepresents the facts when he submits that the only new evidence was that the MONUC/DMS fax communication of 22 February 2009 stated that Ms. Fiala was recruited at the FS-4 level. Rather, the fax acknowledges "new evidence which was made available to Ms. Fiala only recently from the archives of individuals involved" and "[f]rom this additional information it appears that there may have been an administrative error in her recruitment as all these documents indicate that she was technically cleared, interviewed and selected ... for the post ... at the FS-5 level". Ms. Fiala's case is therefore

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 Secretary-General or the Office of the Deputy Special Representative, it was reasonable and consistent with established practice that the position was classified at the FS-4 level. It is consistent jurisprudence that it is not for the UNDT to rule on the appropriateness or otherwise of decisions taken by the Administration in relation to deployment of budgetary posts.

18. The UNDT erroneously concluded that Ms. Fiala had been “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. Her letter of appointment dated 12 May 2006 and the offer she subsequently signed on 17 May 2006 specifically stated that her appointment was at the FS-4 level. Moreover, subsequent exchanges between the Administration and Ms. Fiala confirmed and further clarified her appointment at that level.

19. The UNDT erred in awarding moral damages when Ms. Fiala failed to meet the test for an award of moral harm as set out by the Appeals Tribunal in *Asariotis*.² In the present case, there was no breach of any fundamental procedural right. Furthermore, Ms. Fiala has presented no evidence of moral damages “which can be directly linked or reasonably attributed” to a breach of her rights.

20. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Fiala’s Answer to the Secretary-General’s Appeal Against Judgment No. UNDT/2014/007

21. Ms. Fiala asks that the Appeals Tribunal admit Annexes 12, 14, 17 and 20 to her answer into evidence “in order to respond to the misinformation in the [Secretary-General]’s submission”.

22. The UNDT properly concluded that Ms. Fiala was “interviewed and selected” for a post at the FS-5 level. Ms. Fiala did not apply for a lateral transfer; rather, she applied for an FS-5 Administrative Assistant post and was cleared for that level and occupational group. In response to the Secretary-General’s arguments that her appointment was not the result of a

² *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

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, questionable legal assistance provided to her by the Organization", "an obstinate refusal of Headquarters to rectify what even the Mission recognized as an injustice" and the "fabricated documentation placed on her file which was used to mislead, harass and thwart her efforts to rectify the wrong done to her".

27. Ms. Fiala asks that the Appeals Tribunal reject the appeal in its entirety and “recognize the need to enforce accountability”.

Considerations

28. For reasons of judicial economy, the Appeals Tribunal consolidated the two appeals filed by the Secretary-General and Case No. 2014-590.

Case No. 2014-590

29. On 6 March 2014, Ms. Fiala submitted to the UNDT an application for interpretation of Judgment No. UNDT/2014/007.

30. On 7 March 2014, Ms. Fiala filed a motion with the Appeals Tribunal seeking a 60-day extension of the time limit to file an appeal against the UNDT Judgment. The reason for the extension was that she was not in a position to file her appeal until such time as the requested interpretation was provided. By Order No. 180 (2014), the Appeals Tribunal gave Ms. Fiala 60 days from the interpretation of the UNDT Judgment in which to file her appeal. Interpretation of the UNDT Judgment was rendered on 19 June 2014. Ms. Fiala, however, did not file an appeal within 60 days of that date. Accordingly, the Appeals Tribunal instructs the Registrar to close Case No. 2014-590.

The Secretary-General's appeal against Order No. 136 (NBI/2010)

Ms. Fiala's application to submit new evidence

31. Ms. Fiala requests the Appeals Tribunal to admit into evidence additional information contained in Annexes 10, 15, 18 and 19 to her answer to the Secretary-General's appeal on the issue of receivability. Having perused the documents, we are of the view that the particular documents sought to be admitted into evidence are not necessary to assist the Tribunal in reaching an efficient and expeditious resolution of the appeal. Accordingly, the request is denied.

Is the Secretary-General's appeal on receivability time-barred?

32. By way of preliminary argument, Ms. Fiala contends that the Secretary-General's appeal of UNDT Order No. 136 (NBI/2010) is out of time as he failed to lodge an appeal

within 60 days in accordance with Article 7 of the Appeals Tribunal's Rules of Procedure or at the very least within one year from the date of the Judgment, as required by Article 7(4) of the Appeals Tribunal Statute. There is no merit in Ms. Fiala's argument. Save in exceptional cases, the established jurisprudence of the Appeals Tribunal is that where the Dispute Tribunal renders separate judgments on receivability (concluding that the application is receivable) and on the merits, an appeal should be filed only after the final judgment has been rendered. This is what we have stated in *Wasserstrom*:

... As established in *Bertucci*, an interlocutory appeal is receivable where the UNDT clearly exceeded its jurisdiction or competence. This will not be the case in every decision by the UNDT concerning its jurisdiction or competence. The general rule that only appeals against final judgments are receivable does not apply where the UNDT dismisses a case on the grounds that it is not receivable under Article 8 of the UNDT statute, as the case cannot proceed any further and there is in effect a final judgment.

... The receivability of an interlocutory appeal from a decision of the UNDT allowing a case to proceed on the basis that it falls within its competence under the UNDT Statute is a different matter. If the UNDT errs in law in making this decision and the issue is properly raised later in an appeal against the final judgment on the merits, there is no need to allow an appeal against the interlocutory decision.³

33. In the present case, the Secretary-General properly awaited the final judgment on the merits before raising the issue of the receivability of Ms. Fiala's application to the Dispute Tribunal. That being said, we note that he filed two appeals on 31 March 2014. This is not a proper mode of appeal. As we have said in *Hunt-Matthes*: "Our jurisprudence is clear: '[O]nly one appeal is to be filed after the final judgment has been delivered.' This jurisprudence developed in the context of dual appeals in the same case from separate judgments rendered by the UNDT on the merits and on the relief."⁴

34. Our observation in this regard however does not take from the fact that the Secretary-General appealed the UNDT Order on Receivability in conjunction with his appeal of the Judgment on the Merits and before the Appeals Tribunal rendered its Judgment

³ *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, paras. 18 and 19.

⁴ *Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444, para. 21, citing to *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-280; and *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121 (full bench).

in *Hunt-Matthes*. Accordingly, the appeal of Order No. 136 (NBI/2010) has been filed within the 60-day time-limit provided by the Appeals Tribunal's Statute and Rules of Procedure and is properly before us. As we are not satisfied that the actions of the Secretary-General in filing two appeals amounted to an abuse of process, we decline Ms. Fiala's application for an award of costs of USD 5,000 against the Secretary-General.

Did the Dispute Tribunal err in accepting Ms. Fiala's application?

35. The basic premise of the Secretary-General's argument is that the UNDT erred in accepting an application that was filed more than three years after the contested decision had been communicated to Ms. Fiala. The Secretary-General references the decision in question as that which Ms. Fiala was apprised of in May 2006, namely that she was being appointed to the FS-4 level in MONUC.

36. In her request for management evaluation filed on 29 August 2009, Ms. Fiala identified the contested decision as the "decision taken by [FPD/DFS] on 29 June 2009 [...] that I was properly recruited at the FS-4 level on 1 June 2006 upon joining MONUC". The Secretary-General argues that the 29 June 2009 communication to Ms. Fiala was only one of many confirmations of the same decision that had been provided to her over the years. The Dispute Tribunal came to a different view stating:⁵

[T]he tribunal considers that FPD/DFS' decision, which was communicated to the Applicant by the Panel of Counsel on 29 June 2009, is not merely a confirmation of the 2006 decision as the Respondent avers. It is a new administrative decision in its own right due to the fact that FPD/DFS had been requested by MONUC to review its 2006 decision in light of new evidence that had been discovered by the Applicant. In other words, the 2009 decision was based on facts that were wholly different from the facts used to make the determination in the 2006 decision. Thus, the decision that was communicated on 29 June 2009 is an appealable administrative decision under article 2(1)(a) of the UNDT Statute.

37. In so finding, the Dispute Tribunal had regard to the facsimile dated 22 February 2009 from the DMS, MONUC to the Chief of Operations, FPD/DSF. The contents of the facsimile bear quoting:

1. We refer to the recruitment of Ms. Maja-Verena Fiala ... who joined MONUC [on] 1 June 2006. Ms. Fiala had earlier submitted a case for FPD consideration that

⁵ Order No. 136 (NBI/2010), para. 14.

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 111.2(a) then in force, Sethia was obliged to make his request to the Secretary-General for administrative review within two months. However, he made his request approximately seven years later, in March 2008.

... In his appeal, Sethia argues that the Dispute Tribunal erred in fact as the administrative decision was made on 7 February 2008 and his request for review of this decision was made within the time limit under former Staff Rule 111.2(a). We do not accept this argument. As found by the Dispute Tribunal, the decision confirming Sethia's entry level was communicated to him in writing in February 2001. Sethia did not pursue the procedure available under the former Staff Rules to seek redress, but rather made repeated demands over a period of seven years to the management of [the International Criminal Tribunal for Rwanda] for a correction of his entry level.

... 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.⁶

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

⁶ *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;

- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

45. The Appeals Tribunal cannot try a case *de novo*; it defers to the Dispute Tribunal on factual matters, especially when oral testimony is taken, as was the case here. The UNDT heard from Ms. Fiala, Mr. Bentz and Mr. Djomo. Furthermore, as is clear from its Judgment, the Dispute Tribunal had recourse to a host of documentation which touched upon both the recruitment process Ms. Fiala underwent in 2006 and events subsequent to her move to MONUC in June 2006. In particular, it had regard to Mr. Bentz' testimony that he recommended that Ms. Fiala's post be at the FS-5 level. The Secretary-General takes issue with the Dispute Tribunal's use of the word "recommended", noting that the contemporaneous documents refer to Mr. Bentz merely suggesting that Ms. Fiala be upgraded to the FS-5 level. Whether or not Mr. Bentz recommended or suggested Ms. Fiala for a FS-5 post, the UNDT found that the evidence established that she was interviewed and selected by Mr. Bentz for an FS-5 level post. The Dispute Tribunal came to this conclusion notwithstanding Mr. Bentz' acknowledgement "in his evidence [...] that he did not receive a group of candidates cleared for consideration for appointment at the FS-5 level and that he did not conduct a competitive promotion exercise for an FS-5 position".⁷ In arriving at its conclusion, the UNDT took cognisance not just of the oral testimony of Mr. Bentz but also of a list of recommended candidates to be evaluated for the FS-5 post of Administrative Assistant in MONUC which was sent to Mr. Bentz on 26 September 2006. Ms. Fiala's name was on the shortlist, rated number one in order of preference. The UNDT found this document of probative value in aid of Ms. Fiala's contentions, notwithstanding the fact that Mr. Bentz quite properly refused to sign it as he had not interviewed the candidates named on the document other than Ms. Fiala. An e-mail of 27 September 2006 from MONUC to Mr. Bentz also referred to Ms. Fiala having been interviewed and recommended for the FS-5 level and this too was noted by the UNDT. Indeed, these communications were summed up by the Dispute Tribunal as seeming "that the Mission was finally trying to give effect to Mr. Bentz' recommendation that the Applicant be recruited at the FS-5 level.

⁷ Judgment No. UNDT/2014/007, para. 51.

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

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 weighing exercise with regard to all of the evidence before it, as it must do as the trier of fact. The weighing exercise in the present case favoured a finding that Ms. Fiala was in fact interviewed and selected for an FS-5 position by Mr. Bentz and to a finding that the chain of events which followed Ms. Fiala’s recruitment made it incumbent on the Administration to implement Mr. Bentz’ selection decision. The weight to be attributed to evidence is a matter for the Dispute Tribunal. The remit of the Appeals Tribunal in such matters is limited to a review as to whether the UNDT erred on a question of fact such as to result in a manifestly unreasonable decision. The arguments advanced by the Secretary-General in this appeal do not persuade us that the conclusions of the Dispute Tribunal were manifestly unreasonable in all the circumstances of this case. The findings of the Dispute Tribunal were open to it on the evidence. The fact that the Secretary-General disagrees with the Dispute Tribunal’s findings cannot suffice to warrant interference by the Appeals Tribunal. Accordingly, the appeal on the merits is dismissed.

48. Furthermore, we find no merit in the Secretary-General’s challenge to the moral damages awarded by the Dispute Tribunal. We have consistently said that the Dispute Tribunal is best placed to assess damages.

49. The range of moral damages identified by the Dispute Tribunal for Ms. Fiala, having regard to the evidence before it, cannot be said to be unwarranted and the Secretary-General has not advanced any persuasive argument to suggest otherwise.

⁸ *Ibid.*, para. 74.

Judgment

50. The appeals are dismissed. Order No. 136 (NBI/2010) and Judgment No. UNDT/2014/007 are affirmed. The Registrar is instructed to close Case No. 2014-590.

Original and Authoritative Version: English

Dated this 26th 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 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar