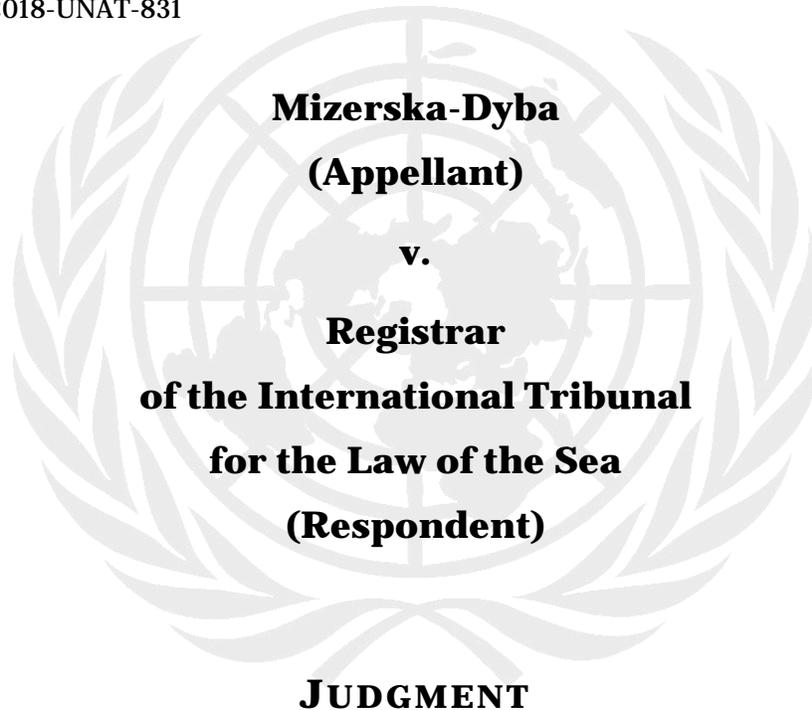




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-831



**Mizerska-Dyba  
(Appellant)  
v.  
Registrar  
of the International Tribunal  
for the Law of the Sea  
(Respondent)**

**JUDGMENT**

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Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2017-1120
Date:	22 March 2018
Registrar:	Weicheng Lin

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Counsel for Appellant:	Ludovica Moro
Counsel for Respondent:	Philippe Gautier

**JUDGE DEBORAH THOMAS-FELIX, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against an “implied decision” by the Registrar of the International Tribunal for the Law of the Sea (ITLOS Registrar and ITLOS, respectively) following the recommendation of the ITLOS Joint Appeals Board (JAB) in its report of 7 July 2017. Ms. Elzbieta Mizerska-Dyba filed her appeal on 21 October 2017 and the ITLOS Registrar filed his answer on 21 December 2017.

**Facts and Procedure**

2. Ms. Mizerska-Dyba joined ITLOS on 1 March 2007, as a Librarian at the P-4 grade, step I on a two-year fixed-term appointment. She signed three subsequent letters of appointment: effective 1 March 2009, for a two-year term, step III; effective 1 March 2011, for a five-year term, step V; and for a further five-year term, effective 1 March 2016, step X.

3. On 30 December 2015, Ms. Mizerska-Dyba submitted a memorandum to the Head of Personnel, Building and Security (H/PBS), requesting a revision of her step level in order “to reflect [her] professional experience that [she] had brought in upon the initial appointment”. She also requested “retroactive monetary compensation to which [she was] entitled under the applicable rules”.

4. By memorandum dated 23 February 2016, Ms. Mizerska-Dyba was informed that her request for revision could not be considered as it was submitted more than eight years after her initial appointment, and therefore beyond the one-year time limit provided for in ITLOS Staff Rule 3.17 on retroactivity of payments.

5. On 26 February 2016, Ms. Mizerska-Dyba signed her letter of appointment for a further five-year appointment starting 1 March 2016 and annotated it as follows: “I have signed this Letter of Appointment without prejudice to my rights in connection with the steps I am now in the process of taking to have the administrative decision set out in the Interoffice Memorandum, PER/2016/EB/007, dated 23 February 2016, by the Head of Personnel to be reviewed by the Registrar and without prejudice to the outcome thereof.”

6. By memorandum dated 18 March 2016, Ms. Mizerska-Dyba submitted to the ITLOS Registrar a request for review of the H/PBS's decision to reject her request for revision of her step level. By memorandum dated 15 April 2016, the ITLOS Registrar informed her that her request could not be considered.

7. On 12 May 2016, Ms. Mizerska-Dyba lodged a complaint before the Conciliation Committee. On 5 October 2016, Ms. Mizerska-Dyba received the report of the Conciliation Committee which concluded that the process before it had failed.

8. On 2 December 2016, Ms. Mizerska-Dyba filed an appeal with the ITLOS JAB and the Registrar filed his reply on 30 December 2016.

9. On 20 December 2016, the Secretary of the JAB informed the parties of the composition of the JAB, following the replacement of one of its members due to her previous involvement in matters relating to Ms. Mizerska-Dyba's case.

10. On 3 February 2017, Ms. Mizerska-Dyba filed with the Chairperson of the JAB an application for the recusal of the JAB member designated by the Registrar. On 10 February 2017, the Secretary of the JAB informed the parties that Ms. Mizerska-Dyba's application was rejected.

11. The JAB issued its report on 7 July 2017 dismissing Ms. Mizerska-Dyba's application. The JAB found that ITLOS Staff Rule 3.17 excluded as time-barred all of Ms. Mizerska-Dyba's claims for monetary compensation relating to periods dating back to more than one year before her memorandum of 30 December 2015 to the H/PBS. The JAB further found that the alleged error in the determination of Ms. Mizerska-Dyba's step-in-grade, if demonstrated at all, would not have been repeated at the time of each contract renewal, but would remain an error committed in 2007. The JAB also emphasized that the application of the time limit of ITLOS Staff Rule 3.17 was much more favourable to Ms. Mizerska-Dyba than the 30-day time limit that would have otherwise applied under the legal framework on dispute resolution. Finally, the JAB found that whether or not Ms. Mizerska-Dyba had been aware in 2007 of what she today perceives to be an error in the determination of her step-in-grade was irrelevant, as staff members are deemed to be aware of the provisions of the ITLOS Staff Regulations and Rules.

12. The Registrar did not take a decision on the recommendation of the JAB. Ms. Mizerska-Dyba received the JAB Report on 11 July 2017. Pursuant to Article 2(5) of the Agreement between ITLOS and the United Nations extending the competence of the Appeals Tribunal to ITLOS, in the absence of a decision taken by the Registrar within 14 days after receipt of the report, an appeal before the Appeals Tribunal is receivable, if filed within 90 days following the 14-day period after receipt. Ms. Mizerska-Dyba filed her appeal timely, on 21 October 2017.

### **Submissions**

#### **Ms. Mizerska-Dyba's Appeal**

*The JAB erred in dismissing Ms. Mizerska-Dyba's appeal against the administrative error affecting her current contract of employment as time-barred under ITLOS Staff Rule 3.17*

13. The JAB failed to consider Ms. Mizerska-Dyba's request for correction of the administrative error affecting her *current* contract of employment, which commenced on 1 March 2016, and which, if framed within the time limits set out in ITLOS Staff Rule 3.17, is not time-barred. The fact that the Administration erroneously computed her work experience when assessing her entry step should not prevent her from requesting the correction of the error with respect to her current and future employment contracts. Ms. Mizerska-Dyba is not claiming retroactive payment as of her initial appointment, even if the mistake in assessing her steps was first committed at the entry level.

14. The JAB erred in finding that the renewal of a contract does not constitute the stipulation of a new contract. The four contracts of employment she signed during her tenure at ITLOS are part of the employment relationship with ITLOS but are different contracts of employment based on different terms, such as different durations, different salaries and even different legal frameworks. When, on 1 March 2016, Ms. Mizerska-Dyba signed a new contract for a five-year duration, it had different terms than her previous contract. It was not an automatic renewal and required the agreement and signatures of the parties involved. Moreover, fixed-term appointments carry no expectancy of renewal. Ms. Mizerska-Dyba was, therefore, on time when she requested correction and retroactive payment related to her current contract.

15. The error in the determination of her step-in-grade should be corrected with respect to her current contract which should read “step XV” instead of “step X”, “step XV” being the last available step within the P-4 grade pursuant to the salary scale in place on 1 March 2016. The subsequent amendment to the United Nations Salary Scale, effective 1 January 2017, which lowered the maximum step within the P-4 grade to “step XIII” should not apply to her in light of the Pay Protection measures.

16. Ms. Mizerska-Dyba raised her complaint as soon as she identified the error occurred. When she joined ITLOS in 2007, she was not familiar with the United Nations system. She did not receive any information on step assessment and while she received a copy of the ITLOS Regulations and Rules in place at the time, they did not (and as of today do not) refer to the assessment of the step-in-grade upon recruitment. After serving at ITLOS for a period of time sufficient to notice discrepancies in the recruitment policies and the arbitrary determination of steps, she raised the issue in order to seek correction of the error affecting her contractual position.

*The JAB failed to take into consideration the following issues on the merits*

17. The Administration discriminated against Ms. Mizerska-Dyba by exercising its discretion and arbitrarily assigning steps. The “United Nations Guidelines for Determination of Level and Step on Recruitment to the Professional Category and Above” (United Nations Guidelines) provide specific and objective criteria for the determination of steps in order to avoid the exercise of administrative discretion. In the absence of any normative or administrative instruction promulgated by ITLOS on step assessment criteria upon recruitment, Ms. Mizerska-Dyba based her request on the relevant United Nations Guidelines. In that regard, the JAB erred in finding that the ITLOS Administration has no duty to inform staff of the existence of such guidelines.

18. The United Nations Guidelines should apply to ITLOS. ITLOS Staff Rule 12.3(bis) provides that amendments of the United Nations Staff Rules shall be incorporated into the ITLOS Staff Rules and that “in applying the Staff Rules of [ITLOS], the Registrar will be guided by [United Nations] instructions, directives and practice”. ITLOS Staff Rule 2.1 on classification of posts provides that the classification of posts within ITLOS be consistent with that of the United Nations. As ITLOS is part of the United Nations common system, it should be bound by the United Nations Guidelines in matters of recruitment and classification of posts. In addition, the Agreement between ITLOS and the United Nations Joint Staff Pension Fund stipulates

that the United Nations financial and Staff Regulations and Rules apply to ITLOS staff *mutatis mutandis*.

19. While ITLOS claims that the ITLOS Registry has its own rules, practices and staff selection system in recruitment matters, which are codified in Administrative Instruction ITLOS/AI/06/11 (Procedure for the selection of candidates for vacant posts), ITLOS/AI/06/11 does not make any reference to step assignment. Moreover, in the absence of any codified information, the assertions by ITLOS that the United Nations Guidelines were never applied by the ITLOS Registry and ITLOS developed the established practice of hiring staff recruited outside the United Nations at “step I” are unsubstantiated.

20. The ITLOS Administration breaches its duty of fairness and good faith when it automatically assigns “step I” to staff with relevant work experience exceeding the minimum required. It perpetuates situations where staff members working side-by-side and performing similar work receive different remuneration and entitlements. Equality of compensation is a fundamental right of a staff member and Ms. Mizerska-Dyba’s rights to equal treatment and fairness of compensation have been violated which she perceives as a form of discrimination affecting her daily office routine and work environment.

21. Ms. Mizerska-Dyba requested a review of her personnel file in order to identify a record of evaluation of her education and professional experience, but could find none. She requests that the Appeals Tribunal order ITLOS to disclose internal documents, if any, documenting the standards applied for the evaluation of the relevant professional experience and education of candidates externally recruited and any documented evidence that the ITLOS Administration has been consistent in the application of such standards.

22. Ms. Mizerska-Dyba asks that the Appeals Tribunal rescind the Registrar’s (implied) decision dismissing her request for correction of an administrative error affecting her current step-in-grade and to consider the merits of the request; order ITLOS to correct her step-in-grade and assign her step XV; grant her retroactive compensation in the amount of the losses suffered due to the wrong step assessment, quantifiable in the salary difference between step X and step XV (following the application of the Pay Protection measures), cumulated from March 2016 until now; and grant her moral damages and award legal costs.

**The Registrar's Answer**

23. The JAB did not err in concluding that ITLOS Staff Rule 3.17 applied to a request for review of entry level and therefore excluded all claims relating to the determination of Ms. Mizerska-Dyba's step-in-grade. When a staff member joins ITLOS, his or her salary is determined in accordance with the relevant grade and, within the grade, the relevant step. This matter is governed by ITLOS Staff Rule 3.17 which applies to a situation of underpayment due to an alleged error or mistake by the Administration arising at the date of entry on duty of a staff member. ITLOS Staff Rule 3.17 establishes a time limit of one year for the staff member to request correction of a possible error. Ms. Mizerska-Dyba's step was determined upon recruitment, so if an error had occurred, it would have occurred in 2007 and not in 2016. Since the time limit in ITLOS Staff Rule 3.17 applies to requests for review of entry level, Ms. Mizerska-Dyba should have requested the correction of the alleged error within one year from her initial appointment.

24. The JAB correctly held that the error in the determination of the step-in-grade, allegedly committed in 2007, is not repeated each time Ms. Mizerska-Dyba's contract is renewed. There is no "automatic renewal of an error" each time a contract is renewed. A renewal of a contract consists in the extension, that is, the continuation, of a staff member's contract for a specific period of time. The duration of the extension is fixed in accordance with ITLOS's policy on duration of contracts (two-year fixed-term contract upon initial appointment, followed by a two-year contract upon first renewal and a five-year contract upon subsequent renewals) and there is no new determination of entitlements or salaries, including step increments, at each renewal of a contract. Finally, Ms. Mizerska-Dyba's contention that her four contracts were based on different legal frameworks misrepresents the JAB's reasoning which merely referred to an earlier version of the ITLOS Staff Regulations.

25. Ms. Mizerska-Dyba has not made a request for correction of her current contract, effective 1 March 2016, since her request of 30 December 2015 which triggered the review process predates the 2016 renewal of her contract.

26. Turning to the actual assessment of Ms. Mizerska-Dyba's entry level, the Registrar notes that the appeal before the JAB was time-barred and therefore, the JAB did not address the merits of Ms. Mizerska-Dyba's claim. Other than some brief comments, there is no need to address the merits now. As to Ms. Mizerska-Dyba's contention that she did not know at the time of her

recruitment what the ITLOS policy on determination of steps was and that she was therefore not in a position to contest the step assigned to her, the Registrar agrees with the JAB which found that the fact that Ms. Mizerska-Dyba was a new staff member in 2007 did not alter her obligation to comply with the time limits established in the ITLOS Staff Regulations.

27. The JAB correctly concluded that the 2004 United Nations Guidelines would have been available in 2007 regardless of their applicability and that, contrary to Ms. Mizerska-Dyba's contention, the ITLOS Administration had no duty to inform the staff members of such guidelines. In any event, the 2004 United Nations Guidelines for determination of level and step are not applicable to the ITLOS Registry and therefore have no relevance in this case. As provided in ITLOS Staff Rule 12.3(bis)(b), United Nations instructions or guidelines do not automatically apply to the ITLOS Registry. Under that provision, the Registrar is to be "guided" by the United Nations instructions, directives and practice to the extent that they are implementing ITLOS Staff Rules similar to those contained in the United Nations Staff Rules. The United Nations Guidelines, however, were adopted pursuant to the adoption of a new staff selection system (Administrative Instruction ST/AI/2010/3) which does not apply to ITLOS. The ITLOS Registry has its own staff selection system which, in 2006, was codified in ITLOS/AI/06/11.

28. In relation to Ms. Mizerska-Dyba's request for production of documents, the Registrar remains at the disposal of the Appeals Tribunal, should it deem the production of documents necessary under its Statute and Rules of Procedure.

29. The Registrar requests that the Appeals Tribunal reject the appeal in its entirety.

### **Considerations**

30. The Appellant submits that the JAB failed to consider her request for correction of the administrative error affecting her *current* contract of employment, which commenced on 1 March 2016, and which, if framed within the time limits set out in ITLOS Staff Rule 3.17, is not time-barred.

31. Having carefully considered the facts of this case, we find it important to repeat the relevant time line in this appeal.

- a) On 30 December 2015, the Appellant submitted a memorandum to the H/PBS whereby she requested a revision of her step level.
- b) By memorandum dated 23 February 2016, the Appellant was informed by the H/PBS that her request for revision could not be considered as it was submitted more than eight years after her initial appointment.
- c) On 26 February 2016, the Appellant signed her letter of appointment for a further five-year appointment starting 1 March 2016 and appended the following proviso: "I have signed this Letter of Appointment without prejudice to my rights in connection with the steps I am now in the process of taking to have the administrative decision set out in the Interoffice Memorandum, PER/2016/EB/007, dated 23 February 2016, by the Head of Personnel to be reviewed by the Registrar and without prejudice to the outcome thereof."
- d) On 18 March 2016, the Appellant submitted a memorandum requesting that the ITLOS Registrar review the H/PBS's decision to reject her request for revision of her step level. By memorandum dated 15 April 2016, the ITLOS Registrar informed her that her request could not be considered.

32. Having carefully reviewed the record of this case and the parties' submissions, we find that the Appellant has not made a request for correction of her current contract, effective 1 March 2016, since her request of 30 December 2015 which triggered the review process predates the 2016 renewal of her contract. Indeed, the statement which she appended to her letter of appointment of 2016 speaks expressly to the decision of 23 February 2016 with no mention of the current contract. As a result, this Tribunal cannot step outside its statutory remit and examine the merits of the Appellant's claim for payments under her current contract when she has made no request to the H/PBS for a review.

*Did the JAB err in finding the Appellant's claims of 30 December 2015 not receivable?*

33. On 30 December 2015 when the Appellant submitted a request to the H/PBS for the revision of her step level in order "to reflect [her] professional experience that [she] had brought in upon the initial appointment" and also for "retroactive monetary compensation to which [she was] entitled under the applicable rules"; more than a year had elapsed from the date on which she received her first salary or "initial payment" under ITLOS Staff Rule 3.17.

34. ITLOS Staff Rule 3.17 which provides for the retroactivity of payments to staff members excludes all claims for monetary compensation relating to periods dating back to more than one year of the date on which the staff member would have been entitled to the initial payment. This rule states as follows:

A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made [a] written claim:

- (i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;
- (ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

35. As a result, the Appellant cannot succeed on a claim for “retroactive monetary compensation” where that claim was made several years after the “initial payment”.

36. For the foregoing reasons, we find that the Appellant’s claims are not receivable. The implied decision by the ITLOS Registrar is upheld.

**Judgment**

37. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 22<sup>nd</sup> day of March 2018 in Amman, Jordan.

*(Signed)*

Judge Thomas-Felix,  
Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Halfeld

Entered in the Register on this 23<sup>rd</sup> day of May 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar