

2014-UNAT-433-Corr.1, Hersh

UNAT Held or UNDT Pronouncements

UNAT considered an appeal by the Secretary-General. UNAT held that UNDT had correctly stated that even if it could be argued that the profile of the Broadcast Technology Officer (BTO P-4) post had changed due to the drafting of new Terms of Reference (TOR) by Ms Hermann, the only viable course of action in the circumstances for the purposes of filling it would have been a regular, competitive selection process and not a comparative review as happened in this case. UNAT held that UNDT was correct in finding that the so-called comparative review between Ms Hersh and Mr Tobgyal for the only post of BTO in the new mission was manifestly fraudulent and amounted to a reckless abuse of power and position on the part of Ms. Hermann. UNAT held that UNDT had not erred in exercising jurisdiction over Ms. Hersh's challenge of the classification of the BTO post in UN Mission in South Sudan (UNMISS), even if Ms. Hersh did not request management evaluation, since UNDT's review of the factual situation by necessity involved a consideration beyond the mere fact of termination of the contract. UNAT held that UNDT did not err regarding the increased award of compensation under Article 10. 5(b) of the UNDT Statute. UNAT held that the alternative award of two years' net base salary was well within UNDT's jurisdiction, having regard to the seriousness of the breaches, which occasioned a referral of the Chief Radio to the Secretary-General for accountability. Regarding the moral damages, UNAT held that the award of the sum of one year and four months' net base salary was excessive and reduced it to six months' net base salary. UNAT upheld in part the appeal and affirmed the UNDT judgment, subject to variation of the award to two years and six months' net base salary, with interest at the US Prime Rate accruing from the date on which the staff member left South Sudan.

Accountability Referral: UNAT affirmed the UNDT referral for possible action to enforce accountability. UNAT held that the referral for accountability was well within the discretion of UNDT under Article 10. 8 of UNDT Statute.

Decision Contested or Judgment/Order Appealed

UNDT Judgment: The Applicant contested the decision to terminate her contract. UNDT ordered rescission of the decision to separate the Applicant from service because it was the result of a series of violations of the pertinent administrative issuances. UNDT ordered that the Applicant be reinstated, or in the alternative, be paid two years' net base salary. Regarding moral damages, UNDT further awarded the Applicant one year's net base salary for substantive irregularity and four months' net base salary for procedural irregularity.

Legal Principle(s)

The Administration has the duty to follow its own Regulations and Rules in matters of staff selection. In reviewing such decisions, it is the role of UNDT or UNAT to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration. The Secretary-General has broad discretion in matters of staff selection. The Tribunal can intervene where the Administration failed in its duty to act fairly, justly, and transparently in dealing with its staff members and to follow its own Regulations and Rules.

Outcome

Appeal granted in part

Applicants/Appellants

Hersh

Entity
UNMIS
Case Number(s)
2013-495
Tribunal
UNAT
Registry
New York
Date of Judgement
27 Jun 2014
President Judge
Judge Faherty
Language of Judgment
English
Issuance Type
Judgment
Categories/Subcategories
Classification (post)
Compensation
Non-pecuniary (moral) damages
Pecuniary (material) damages
Disciplinary matters / misconduct
Abuse of authority
Separation from service
Termination of appointment (see also, Termination of appointment)
Staff selection (non-selection/non-promotion)
Termination (of appointment)
Referral for accountability
Applicable Law
Administrative Instructions

- ST/AI/1998/9

Other UN issuances (guidelines, policies etc.)
Staff Regulations

- Regulation 1.2(c)
- Regulation 4.1

UN Charter

- Article 101

UNDT Statute

- Article 10.5(b)

UNRWA DT Statute

- Article 10.8

Related Judgments and Orders

2011-UNAT-153
2012-UNAT-263
2012-UNAT-236
2012-UNAT-226
2013-UNAT-340
2010-UNAT-071