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Before

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JUDGE SOPHIA ADINYIRA , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it three appeals of Judgment No. UNDT/2015/031, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 1 April 2015, in the matter of *Aly et al. v. Secretary-General of the United Nations*.<sup>1</sup> Four individuals of the *Aly et al.* group Mr. Amjad Ejaz, Mr. Jose Elizabeth, Mr. Matthew Cherian and Mr. Stephen Cone appealed on 8 May 2015, and the Secretary-General filed his answer on 14 July 2015.

2. For reasons of judicial economy, the Appeals Tribunal has consolidated the three appeals, noting that each of the appeals arises from Judgment No. UNDT/2015/031

... On 9 September 2004, the Director for the Division of Organizational Development, OHRM (“D/DOD/OHRM”) informed the Applicants of OHRM’s conclusion that the procedures set out in ST/AI/1998/9 [...] had been fully observed in considering the classification of their posts. Citing sec. 5 of ST/AI/1998/9, the D/DOD/OHRM stated that if the Applicants wished to proceed under that provision, it would be necessary to show for each post that the classification standards were incorrectly applied resulting in classification of the posts at the wrong level[.]

... The Applicants’ cases were never submitted to the [New York General Service Classification Appeals Committee (“NYGSCAC”)] for review[.]

... On 22 June 2007, the Applicants filed a statement of appeal to the former Joint Appeals Board (“JAB”) against the implied decision not to submit their appeals to the NYGSCAC for review[.]

... [... In paragraphs 36 and 37 of] JABReport No. 2001 [the Panel held that] (emphasis in original):

... [It] *unanimously concluded* that [the] Appellants’ due process rights had been violated by the Administration’s failure to review their cases in a timely manner [and] *unanimously agreed* to recommend for the moral injury suffered, Appellants be granted three months net-base salary at the rate in effect as at end August 2008, i.e. the date of this report.

... [It] *unanimously agreed* to recommend that [the] Appellants submit their cases to the [NYGSCAC] as expeditiously as possible and



... [On] 27 May 2011, [...] the Office of the Deputy Secretary-General advised the ASG/OHRM (and others) that the Secretary-General had “approved” the requests of the ASG/OHRM in regard to the proposed members of the NYGSCAC.

... On 7 June 2011, the ASG/OHRM issued [Information Circular] ST/IC/2011/17

NYGSCAC report and its findings. By way of remedy, Aly *et al.* sought pecuniary and non-pecuniary damages, as well as legal costs for abuse of proceedings. They did not expressly request either rescission of the contested decision or remand of their case to the NYGSCAC for reconsideration.

5. On 1 April 2015, the Dispute Tribunal re

g) the foregoing deficiencies were not identified or addressed by the ASG/OHRM in her final review, nor did she produce a final, reasoned decision!<sup>1</sup>

6. The Dispute Tribunal thus rescinded the ASG/OHRM's decision of 8 June 2011, together with the NYGSCAC recommendations and remanded Aly *et al.*'s application for a full and fair consideration of their grounds of appeal to the NYGSCAC, which was to make its recommendations to the ASG/OHRM for her final decision, and ordered that the entire process be completed within 90 days of the publication of the UNDT Judgment.<sup>12</sup>

7. The UNDT rejected Aly *et al.*'s request for moral damages and compensation for excessive delays, finding that their claim for compensation for the period from 2000 until 2009 was *res judicata*, having been adjudicated in the first UNDT Judgment, and that there was no delay given that the NYGSCAC issued its recommendation concerning Aly *et al.*'s appeal within 180 days from 21 December 2010, as ordered in the first UNDT Judgment. It also rejected Aly *et al.*'s request for costs, on the basis that the order of rescission of the contested decision together with the remanding of the case for reconsideration was reasonable and sufficient compensation for the delays in the procedure.

#### Submissions

##### The Appellants' Appeals

8. The Appellants submit that the UNDT was correct to rescind the contested decision, but erred in law and procedure when it remanded the cases of the four Appellants to the NYGSCAC for reconsideration since the NYGSCAC cannot review their cases. In particular, Mr. Ejaz and Mr. Elizabeth, both of whom have since retired and separated from the Organization,<sup>13</sup>

the UNDT was aware, and their estates cannot participate in a new reclassification procedure before the NYGSCAC, as the UNDT ordered.

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Accordingly, the Appeals Tribunal should sanction the Secretary-General's abuse of



are already being considered under the remanded process. Accordingly, the interests of justice and judicial economy would be served by the present appeal being dismissed.

18. In the alternative, should the Appeals Tribunal decide to vacate the UNDT Judgment and examine the merits of the matter, recalling that a Tribunal's role is limited to a "judicial review of the exercise of discretion by the competent decision maker", it should uphold the ASG/OHRM's decision of 8 June 2011 not to reclassify the posts, and reject the Appellants' request for the emoluments they would have received had they been reclassified retroactively from October 2000. The NYGSCAC considered at length the merits of the classification appeals in May and June 2011, and the review procedure was comprehensive and correct in substance, regardless of any procedural shortcoming. The record shows that the NYGSCAC carefully considered all of the materials before it and individually reviewed each Appellant's job description on a case-by-case basis, and on its own merits, analysing each based on the applicable classification standards. The Appellants have not identified any specific error made by the NYGSCAC in considering the merits of their requests for reclassification.

19. The Appellants' contention that there was a high likelihood that the posts they occupied would be reclassified on the basis of "studies, reports and recommendations" is pure conjecture. There was no certainty that any Appellant would have been promoted even if his respective post had been reclassified. As each Appellant would have had to apply and compete against other qualified candidates for the reclassified post, and no material submissions regarding the merits of each Appellant's candidature were made, any compensation awarded on this basis would be speculative and thus contrary to the Appeals Tribunal's jurisprudence. Further, the Appellants did not mitigate their alleged loss, as they chose not to apply for the four reclassified posts announced in the Publishing Section in 2006, or to other posts.

20. In relation to damages, the UNDT correctly rejected the request for additional compensation for moral damages for the period from 2000 until 2009, on the basis that this was *res judicata*. Its finding should be upheld as the Appellants have already been paid compensation for losses until the date of the first UNDT Judgment issued in October 2010, which the Appellants did not appeal. As the process undertaken since then has been the result of compliance with the UNDT's lawful directions, it does not constitute delay.

show that they had suffered any moral injury

administrative issuances has not been observed, the Dispute Tribunal may, with the

27. Further, Mr. Cherian and Mr. Cone passed away in 2012, a fact of which the UNDT was aware, and their estates cannot participate in a new reclassification procedure before

32. Other than the above factual differences, the instant matter is, *prima facie*, similar to the related case disposed of by the Appeals Tribunal at this same 2016 Spring Session in *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622. The *Aly et al.* Judgment applies, *mutatis mutandis*, to the instant cases and, as such, paragraphs 30 to 51 thereof are adopted hereunder in their entirety:<sup>22</sup>

... Generally, the Appeals Tribunal defers to the broad discretion of the Dispute Tribunal in the management of its cases.<sup>[23]</sup> And the Appeals Tribunal has criticised the Dispute Tribunal for awarding damages when the Applicant has not requested it.<sup>[24]</sup> Similarly, the Appeals Tribunal defers to the discretion of the Dispute Tribunal to remand a case. While the Appeals Tribunal may reverse an award of damages in cases where a party has not made such a request, by parity of reasoning, it may likewise reverse the awards of damages of the Dispute Tribunal pursuant to its powers under Article 2(3) of our Statute.

... The Appeals Tribunal has ruled that when a reclassification decision is found illegal and a remand is no longer available then compensation is owed by the Respondent:<sup>[25]</sup>

Generally, when the Administration's decision is unlawful because the Administration, in making the decision, failed to properly exercise its discretion and to consider all requisite factors or criteria, the appropriate remedy would be to remand the matter to the Administration to consider anew all factors or criteria; it is not for the Tribunals to exercise the discretion accorded to the Administration. However, in the present case, remand is not available because Mr. Eggesfield has retired from service with the Organization.

... In *Fuentes*, the Appeals Tribunal affirmed the Dispute Tribunal's order that the Secretary-General pay 24,500 Swiss Francs as compensation for the illegal decision not to reclassify her post.<sup>[26]</sup> The Dispute Tribunal noted that Ms. Fuentes had received no response to her appeal of the non-classification decision; that the Administration had failed to respect the procedures under ST/AI/1998/9; and that the decision not to reclassify her post was therefore illegal. The Dispute Tribunal held that since Ms. Fuentes had, in the meantime, been promoted, a remand could no longer offer a remedy to her position. The Appeals Tribunal approved the Dispute Tribunal's assessment of compensation:

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<sup>22</sup> *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622, paras. 30-51.

<sup>[23]</sup> *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.

<sup>[24]</sup> *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009, para. 46.

<sup>[25]</sup> *Eggesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 27.

<sup>[26]</sup> *Fuentes v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-105, para. 32.



... [I]f the administration had, without unreasonable delay, made a decision on the applicant's request, she would have had a good chance of being appointed to a G-5 level post by January 2004 and so of being paid at that level. The damages suffered by the applicant must be calculated as follows: the difference in salary received between the G-4 and G-5 levels during the period from 1 February 2004 to 1 December 2009, on which date she was actually promoted to the G-5 level, an amount of 49,000



... The classification system is promulgated under the Staff Regulations and Rules and it is part of the conditions of employment for all staff members as the rules are incorporated by reference into all United Nations employment contracts.

... In reliance on Staff Regulation 2.1, the former United Nations Administrative Tribunal (Administrative Tribunal) consistently held that the classification of posts of staff members is part of their conditions of service,<sup>[30]</sup> and classification of a post is to be done according to its job description and failure to regularise the discrepancy between the level of classification and an employee's functions is a breach or a violation of a staff member's rights. The Administrative Tribunal Judgment No. 1113, *Janssen* (2003)09. n and

same job classifications to the Appellants' posts as applied to posts with the same job descriptions deprived the Appellants of their rightful opportunity to be considered for the reclassified posts.

... It is correct that there is no automatic right to promotion to an upgraded post, but in this case, the Appellants performed the functions of the positions and the Organization has had the benefit of their performances at a lesser salary than that of their counterparts working under the same job descriptions.

... From the foregoing, we affirm the resôssion by the Dispute Tribunal of the decision of the ASG/OHRM based on the recommendations of the NYGSCAC to maintain the classification of their posts.

... We, however, reverse the UNDT order to remand the case back to the NYGSCAC for reconsideration, and award the Appellants compensation for the violation of their rights.

#### Compensation

... Pursuant to Article 9 of our Statute, as amended by General Assembly resolution 69/203, the Appeals Tribunal may award compensation in appropriate cases for harm supported by evidence, which shall not normally exceed the equivalent of two years' net base salary of the appellant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm supported by evidence, and shall provide reasons for that decision.

... The cap on compensation which shall normally not exceed the equivalent of two years' net base salary of the appellant does not apply where the violation of a staff member's rights is as egregious as in this case.<sup>32]</sup> The facts and circumstances of this case are truly exceptional. This appeal raises fundamental issues of human rights concerning equal pay for equal work and prohibition of discrimination, which reflects negatively on the operations of the Administration in the reclassification process.

... Article 9(3) of our Statute prohibits exemplary or punitive damages. We will therefore not go too far beyond the cap ceiling.

33. Accordingly, we award compensation equivalent to three years' net base salary to each of the Appellants to be calculated by his salary in effect at the date of separation.

#### Judgment

34. The appeals are allowed, and Judgment No. UNDT/2015/031 is affirmed, in part, and reversed, in part. More specifically, the order of remand is reversed, and the

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[<sup>32]</sup> Hersh v. Secretary-General of the United Nations, Judgment No. 2014-UNAT-433; Mmata v. Secretary-General of the United Nations, Judgment No. 2010-UNAT-092.

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Original and Authoritative Version: English

Dated this 24<sup>th</sup> day of March 2016 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Faherty

Entered in the Register on this 13<sup>th</sup> day of May 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar