UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-532

Dalgaard et al.

(Applicants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Richard Lussick, President Judge Rosalyn Chapman Judge Inés Weinberg de Roca Judge Sophia Adinyira Judge Luis María Simón Judge Mary Faherty Judge Deborah Thomas-Felix
Case No:	2014-684
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Applicants:	Jeffrey Dahl
Counsel for Respondent:	Rupa Mitra

JUDGE RICHARD LUSSICK, PRESIDING.

Facts and Procedure

1. On 17 October 2013, the United Nations Appeals Tribunal (Appeals Tribunal) rendered Judgment No. 2013-UNAT-359 in the case of *Ademagic et al. v. Secretary-General of the United Nations*.[1] The Appeals Tribunal held, inter alia:[2]

> ... Because the Appeals Tribunal has legal authority to do so, and has sufficient factual information, the matter is hereby remanded to the decision maker, namely the [Assistant Secretary-General for Human Resources Management (ASG/OHRM)] (rather than to the [United Nations Dispute Tribunal (UNDT or Dispute Tribunal)]) for the ASG/OHRM to consider, in accordance with the relevant statutory provisions and the principles of substantive due process, whether the staff members' fixed-term contracts should be retroactively converted to permanent appointments. There is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give "every reasonable consideration" to those [International Criminal Tribunal for the former Yugoslavia (ICTY)] staff members demonstrating the proficiencies, competencies and transferrable skills which render them suitable for career positions within the Organization.
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> ... The ASG/OHRM shall use a process that is fair, properly documented and completed in a timely manner. Given the duration of these proceedings, and mindful of the finite mandate of the ICTY and the stress uncertain contract situations imposes on staff, the Appeals Tribunal directs that the conversion process be completed within 90 days of the publication of this Judgment. Each staff member is entitled to receive a written, reasoned, individual and timely decision, setting out the ASG/OHRM's determination on his or her suitability for retroactive conversion from fixed-term to permanent contract. This applies equally to any litigant staff members who were part of the original conversion exercise at issue but have since left the service of the ICTY.
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> ...
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> ... We find that the substantive due process breaches in the ASG/OHRM's decision-making meet the fundamental nature test established in *Asariotis* and, as such, *of themselves* merit an award of moral damages. In assessing the quantum of such damages, the Tribunal takes into consideration the satisfaction being granted to the staff members, namely, that a new "suitability exercise" shall be conducted, with

[1] The Judgment was entered into the Appeals Tribunal's register on 19 December 2013.

[2] *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359 (*Ademagic et al.)*, quoting *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, paras. 72-74 and 82. The Appeals Tribunal noted that *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357 applies, *mutatis mutandis*, to *Ademagic et al.* and, as such, adopted paragraphs 33 to 82 of that Judgment.

> retroactive effect. This remedy – to a considerable extent – corrects the harm sustained by the staff members. Nevertheless, the Appeals Tribunal is persuaded that an award of damages is merited for the breach which occurred and, in all the circumstances, awards compensation in the amount of 3,000 Euros to each of the Respondents/Appellants. The Appeals Tribunal further holds that payment of compensation shall be executed within 60 days from the date of issuance of this Judgment to the parties. That failing, interest shall be applied, calculated as follows: five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment.

2. On 31 March 2014, six individuals of the original Ademagic et al. group, Mr. Klaus Dalgaard, Mr. Michael Hehn, Ms. Janice Looman-Kerns, Mr. Marcus Richardson, Ms. Laurie Sartorio McNabb and Ms. Smilja Zoric (Dalgaard et al.), filed a "Supplemental Motion for an Order Requiring Respondent to Execute the Judgment to Pay 3000 Euros". The Secretary-General filed his comments on 2 April 2014.

3. By Order No. 178 (2014) dated 2 April 2014, the Appeals Tribunal, inter alia, invited the parties to submit additional briefs on their arguments.

4. On 17 April 2014, Dalgaard et al. filed an "Additional and Supplemental Briefing on Supplemental Motion for an Order Requiring Respondent to Execute the Judgment to Pay 3000 Euros" and the Secretary-General filed his comments on 7 May 2014.

Submissions

Dalgaard et al.'s Motion

5. Dalgaard et al. seek an order pursuant to Article 27 of the Rules of Procedure of the Appeals Tribunal requiring execution of the Judgment in relation to the payment of non-pecuniary damages with interest. The Secretary-General did not raise any objections to granting relief to Dalgaard et al. at any time during the proceedings and are therefore foreclosed from doing so now. Dalgaard et al. ask that the Appeals Tribunal order the immediate execution of the Judgment and specifically, that the Secretary-General immediately pay 3,000 Euros plus the required interest to each of the six individuals.

6. Dalgaard et al. submit that the only avenue available to the Secretary-General to avoid the Judgment would have been to file a motion under Article 11(1) of the Appeals Tribunal's Statute, which he failed to do. This avenue is no longer open to him in view of the strict time limits applicable to applications for revision of Judgment. The Appeals Tribunal's determination that the six individuals should receive 3,000 Euros as non-pecuniary compensation is *res judicata*. Furthermore, there would have been no basis for a request for revision because the Secretary-General did not discover any "decisive fact" that he was unaware of at the time the Judgment was rendered. He must have been aware of the separation dates of the six individuals.

7. Dalgaard et al. contend that the *Ademagic et al.* Judgment and the *Schoone* Judgment[3] are consistent with each other. Mr. Schoone was denied relief because he failed to seek management evaluation of OHRM's instruction that he needed to resign from the ICTY in order to take up a positon at another duty station. His break in service disqualified him for consideration for a permanent appointment. Furthermore, Mr. Schoone failed to request moral damages. Conversely, Dalgaard et al. were awarded non-pecuniary damages on the ground that the damages had been requested and that the litigants suffered from the impugned decision because none of them had been properly assessed for conversion.

8. Dalgaard et al. contend that the Secretary-General's deliberate refusal to abide by the Judgment constitutes a continuation of the fundamental breach of Dalgaard et al.'s substantive due process rights and request an additional award of moral damages in the amount of 5,000 Euros per person and additional per diem damages of 100 Euros per person from 17 February 2014 until payment is made.

The Secretary-General's Comments

9. The payment of moral damages to Dalgaard et al. would be inconsistent with *Schoone*. In *Schoone,* the Appeals Tribunal held that an ICTY staff member who contested the denial of a permanent appointment was not entitled to be considered anew when, although deemed eligible and suitable initially, he renders himself ineligible by resigning mid-process. In *D'Aspremont*,[4] the UNDT held that where a staff member is ineligible for consideration for conversion to a permanent appointment, there is no discretion to grant a permanent

[3] *Schoone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-375.
[4] *D'Aspremont v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/083.

appointment. The six individuals fall in either or both of the categories. Accordingly, they did not suffer a fundamental breach of their due process rights and the basis for the award of moral damages does not apply to them.

10. The Secretary-General submits that the principle of *res judicata* does not preclude him from relying on the *Schoone* Judgment. Until the issuance of the *Ademagic et al.* Judgment, his position was that the contested decision was properly taken and there was accordingly no basis to award non-pecuniary damages. Moreover, the decision that the six individuals were ineligible for the payment of the non-pecuniary damages was based primarily on the *Schoone* Judgment. He is therefore not procedurally barred from assessing their eligibility for non-pecuniary damages in light of the *Schoone* Judgment.

11. The Secretary-General contends that he could not have asked for a revision of the Judgment since the *Schoone* Judgment did not constitute a new fact for the purpose of a revision request.

12. The Secretary-General claims that the six individuals are not entitled to additional damages. They have not established how the requested amounts correspond to any actual damages that they have suffered. Furthermore, the Statute of the Appeals Tribunal provides that the Appeals Tribunal shall not award punitive damages.

13. The Secretary-General requests that the Appeals Tribunal dismiss the Motion in its entirety.

Considerations

14. The impugned decision of the ASG/OHRM referred to in *Ademagic et al.* was the decision of 20 September 2011 to accept the endorsement by the Central Review Bodies (CRBs) of OHRM's recommendation on the non-suitability for conversion of ICTY staff. This decision was communicated to each of the Applicants by letters dated 6 October 2011.

15. From information now supplied by the Secretary-General, all six members of Dalgaard et al. had either resigned, retired or transferred from the ICTY prior to the issuance of the impugned decision.

16. The Secretary-General supplied the following information in his comments filed on 7 May 2014:[5]

(a) Klaus Dalgaard resigned effective 31 July 2011;

(b) Michael Hehn resigned effective 31 May 2010;

(c) Janice Looman-Kerns reached retirement age at the age of 62 on 2 August 2009 and was granted an exceptional extension of appointment beyond retirement age. She retired from service on 31 May 2010;

(d) Marcus Richardson resigned effective 31 July 2011;

(e) Laurie Sartorio McNabb transferred away from ICTY effective 21 November 2010; and

(f) Smilja Zoric resigned effective 23 February 2011.

17. The facts set out in *Ademagic et al.* relate the history of events leading up to the impugned decision.[6] It is pertinent that in February 2011, ICTY staff were informed that there had been no joint positive recommendations by OHRM and the ICTY on the granting of permanent appointments and that accordingly, the cases had been transferred "to the appropriate advisory body, in accordance with section 3.4 of ST/SGB/2009/10". On 4 April 2011, OHRM, being of the view that the CRBs did not have all relevant information before them, returned the matter to the CRBs, requesting that they review the full submissions of the ICTY and OHRM and provide a revised recommendation. These facts are important to show that at a stage when the CRBs had not reached any final decision, four of the six Dalgaard et al. members had already left the employ of the ICTY. By the time that the impugned decision had been made and staff members had been notified by letters dated 6 October 2011, none of the Dalgaard et al. members were still employed at the ICTY.

18. Moreover, the Dalgaard et al. members could not have been in any doubt that the award of moral damages flowed from the violation of staff members' rights by the impugned decision, and that it therefore could not have applied to them. The *Ademagic et al.* decision states at page 24: "However, given that this Tribunal has addressed the merits of the impugned decision of the ASG/OHRM, and has determined that that decision violated the staff members' right to have been fairly, individually and properly assessed for conversion, we shall consider whether the breach warrants an award of non-pecuniary damages."

[5] Secretary-General's comments, para. 4.
[6] *Ademagic et al.*, pages 4 to 6.

19. Consequently, none of them could rightfully claim that they were entitled to moral damages as a result of their rights being violated by the impugned decision.

20. Nevertheless, both parties to the *Ademagic et al.* case allowed the Appeals Tribunal to proceed to its decision without apprising it of the true status of the members of Dalgaard et al.

21. Due diligence by the Secretary-General in the presentation of his case would have obviated the instant proceedings. Instead, it took the present Motion for him to disclose information that should have been imparted during the *Ademagic et al.* proceedings.

22. The alternative course taken by the Secretary-General is absolutely unacceptable. It was not open to the Secretary-General to decide that Dalgaard et al. were ineligible to be paid the award of damages when there was an order of the Appeals Tribunal to the contrary.

23. The Appeals Tribunal finds it astonishing that the Secretary-General would take it upon himself to contravene the Appeals Tribunal's order in *Ademagic et al.* in light of previous decisions of the Appeals Tribunal in *Igbinedion*,[7] *Igunda*[8] and *Villamoran*[9] emphasizing the inviolability of a Tribunal order. The Secretary-General's opinion as to the effect of the judgment in *Schoone* on Dalgaard et al.'s entitlement to moral damages is irrelevant. It is his duty to give proper observance to the order of the Appeals Tribunal. By failing to do so, he put himself at risk of contempt proceedings.

24. Accordingly, the Appeals Tribunal finds no merit in the Secretary-General's case.

25. Having said that, the Appeals Tribunal recognizes the anomalous circumstances surrounding the present Motion.

26. The members of Dalgaard et al. cannot be said to have come to court with clean hands. Had they disclosed the true facts as to their separation from the ICTY, their claim to moral damages would have been found to be without merit.

[7] *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 30.
[8] *Igunda v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-255, para. 32.
[9] *Villamoran v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160, para. 48.

27. The Appeals Tribunal holds that it is the self-evident duty of all counsel appearing before the Tribunals to contribute to the fair administration of justice and the promotion of the rule of law. Counsel for Dalgaard et al. failed in this duty by allowing the Appeals Tribunal to proceed on a factual basis which Counsel should have known to be untrue, resulting in an award of moral damages to which Dalgaard et al. were not entitled.

28. In these exceptional circumstances, the Appeals Tribunal considers by Majority, Judge Simón and Judge Faherty dissenting, that justice in this case will be met if the Judgment in favour of Dalgaard et al. were not to be executed.

Judgment

29. The Motion for Execution is refused.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Lussick, Presiding	Judge Chapman	Judge Weinberg de Roca
(Signed)		*(Signed)*
Judge Adinyira		Judge Thomas-Felix

Judge Simón and Judge Faherty append a dissenting opinion.

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Dissent by Judge Simón and Judge Faherty

1. We respectfully dissent from the Majority's decision to reject Dalgaard et al.'s Motion for Execution of Judgment No. 2013-UNAT-359.

2. In Judgment No. 2013-UNAT-359, the Appeals Tribunal awarded "*each of the Ademagic et al. Respondents/Appellants* 3,000 Euros in non-pecuniary damages".[10] The "Ademagic et al. Respondents/Appellants" are listed in an annex to the Judgment and include the six individuals designated here as Dalgaard et al. Each of these six individuals is entitled to an award of 3,000 Euros. This Judgment is *res judicata*.

3. In the present case, the Secretary-General refused payment of compensation to those six ICTY staff members "who resigned, retired or transferred from the ICTY before the date of the contested decisions (20 September 2011)".[11] The Secretary-General did not raise such objection at any point during litigation, neither before the Dispute Tribunal nor before the Appeals Tribunal. If equity is to decide the matter, it seems to us that the failure of the Secretary-General to raise the issue now being relied on leads to the conclusion that he is estopped from pursuing this matter at this juncture.[12]

4. The Appeals Tribunal has consistently held that "a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body's jurisdiction, because it is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures."[13]

5. In *Igbinedion*, the Appeals Tribunal held that "[i]t is unacceptable that a party before the Dispute Tribunal would refuse to obey its binding decision in this manner, regardless of the fact that, in the instant case, the Order was ultimately vacated by the Appeals Tribunal. To rule otherwise would undermine legal certainty and the internal justice system at its core,

[10] Judgment No. 2013-UNAT-359, para. 40 (emphasis added).
[11] Controller's memorandum of 12 February 2014.
[12] See e.g. *Azzouz v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-432, para. 20, citing to *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056, para. 12.
[13] *Igunda v. Secretary-General*, Judgment No. 2012-UNAT-255, para. 32.

and would incite dissatisfied parties to consider UNDT Orders as mere guidance or suggestions, with which compliance is voluntary."[14]

6. The Appeals Tribunal Judgment is clear and unambiguous. Yet, the Secretary-General unilaterally decided to refuse payment to Dalgaard et al., in direct violation of the Appeals Tribunal's Order.

7. Furthermore, where a party disagrees with the outcome of an Appeals Tribunal Judgment, there are several avenues open to it to seek review of judgment. These are listed in Article 11 of the Appeals Tribunal Statute and include requests for revision, interpretation and correction:

> ... As this Tribunal stated in *Shanks* and *Costa*, the authority of a final judgment – *res judicata* – cannot be so readily set aside. There are only limited grounds, as enumerated in Article 11 of the Statute of the Appeals Tribunal, for review of a final judgment.
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> ... In this respect, the applicant's arguments are irrelevant if they do not meet the requirements clearly established in the Statute to ensure the finality of a judgment.[15]

8. In the present case, the Secretary-General has not sought review of the Appeals Tribunal Judgment under Article 11,[16] but simply decided to disobey the Appeals Tribunal's order. The Appeals Tribunal's consistent jurisprudence established over the past five years is that it may not reconsider its own judgments unless a request for review "fulfills the strict and exceptional criteria established by Article 11 of the Statute".[17] The Appeals Tribunal has no

[14] *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 29.
[15] *Johnson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-355, para. 10, quoting *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, paras. 16 to 19, footnote omitted, citing *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-063 and *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-26*bis*.
[16] This Article recognizes in our system what in national and international legal systems are the exceptional circumstances and procedures which could lead to a departure from the principle of *res judicata*.
[17] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-393, para. 14, quoting *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, para. 16.

> ... "inherent power to reconsider" to [render] a revision expressly forbidden by the Statute from a rule based on the concept of *res judicata*, designed to avoid litigation *ad aeternum*, particularly applicable to the highest court of a judicial system.[18]

9. From our point of view, the denial of the requested execution implies a consideration of the Appeals Tribunal Judgment outside the framework of Article 11 of the Appeals Tribunal Statute and does so based on facts that the Secretary-General failed to raise during both trial and appeal proceedings and that have not been raised through an admissible avenue for review. The Secretary-General's review is conducted only in response to a request for execution by the present claimants and involves examining again the facts that justified the compensation for moral damages, which were awarded on the basis that the claimants were part of a group of staff members who were not individually considered for conversion. We are of the view that the factual premise, in respect of each of the six applicants, on which the Secretary-General now relies must have been capable of being ascertained prior to the UNDT hearing and indeed the appeal before this Tribunal.

10. Furthermore, revisiting the underlying factual premise effectively results in a *de novo* consideration of the facts and law without having allowed the applicants the opportunity of defence and response to the Secretary-General's arguments as to why the award made to each of them should not be executed. In our view, this constitutes a departure from the principle of *res judicata* and effectively penalizes the applicants.

11. For the foregoing reasons, we would have granted Dalgaard et al.'s Motion for Execution of Judgment No. 2013-UNAT-359 with regard to the payment of the sole amount of 3,000 Euros in accordance with the said Judgment.

[18] *Johnson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-355, para. 10, quoting *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, paras. 16 to 19, footnote omitted, citing *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-063 and *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-26*bis*.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*
Judge Simón	Judge Faherty

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar