



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

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Judgment No. 2017-UNAT-783

**Sarrouh  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Deborah Thomas-Felix Judge Dimitrios Raikos
Case No.:	2017-1064
Date:	27 October 2017
Registrar:	Weicheng Lin

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Counsel for Ms. Sarrouh:	George G. Irving
Counsel for Secretary-General:	Wambui Mwangi

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/220, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 22 December 2016, in the case of *Sarrouh v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 20 February 2017, and Ms. Elissar Sarrouh filed her answer on 13 April 2017.

**Facts and Procedure**

2. The Dispute Tribunal made the following factual findings based on the submissions made by the parties in a jointly-signed statement and the evidence on record:<sup>1</sup>

... The Applicant, a former Special Advisor at the D-1 level, step 5, in the Bureau for Development Policy (“BDP”) of the United Nations Development Programme (“UNDP”), contests her “formal notice of separation from service” notified to her on 29 January 2015.

...

... On 16 September 2002, the Applicant joined the Sub-Regional Facility for Arab States in UNDP as an Institutional Reform Specialist at the L-4 level in Beirut, Lebanon.

... On 1 January 2004, she was reassigned to the [Regional Bureau for Arab States (“RBAS”)] at the Headquarters [(“HQ”)] of UNDP on a fixed-term contract at P-4 level, and, on 1 August 2005, she was appointed as a Deputy Resident Representative at the P-5 level in the UNDP Egypt Country Office.

... On 1 January 2007, the Applicant was reassigned as a Policy Advisor to the Democratic Governance Group (“DGG”) of BDP at the same grade. In 2007, she successfully passed the United Nations Resident Coordinator Assessment test and was thereafter qualified for appointment for Resident Coordinator/Resident Representative/Designated Official/Humanitarian Coordinator (“RC/RR/DO/HC”) positions.

... In October 2009, the Applicant was appointed Director of the Brussels Liaison Office of the [United Nations] Development Fund for Women, a P-5 level position.

... On 1 June 2010, the Applicant was appointed as RC/RR for the United Arab Emirates (“the UAE”) at the D-1 level.

... On 27 April 2012, the Applicant was instructed by the then Assistant Administrator and Regional Director for RBAS, Ms. AS (“RBAS Regional Director”), to undertake a mission to New York in order to conduct consultations with relevant parts of [HQ], including with the Management Consultancy

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<sup>1</sup> Impugned Judgment, paras. 1, 26-60 (emphasis in original).

Team to reach a sustainable solution to some alleged management issues in [the] Country Office in the UAE.

... During her stay at the [HQ] in May 2012, it was agreed that the Applicant was to leave the UAE and be moved to UNDP's [HQ], New York, to work as a Special Advisor at [the] D-1 level.

... On 4 June 2012, as results from an email with the subject-matter "Note for the Record[]" sent by Ms. FW (unknown title) to the Applicant and the then Deputy Regional Director of RBAS, ("the Deputy Regional Director"), that during a meeting of the same date, it was agreed that:

- a. The Applicant's contract would be extended for two years effective 1 June 2012;
- b. Terms of Reference would be developed during the following week for a post at the D-1 level in the "BDP Governance Unit",
- c. A letter "re-assigning" the Applicant[] from the "UAE to BDP", effective 1 August 2012 would be issued during the following two weeks;
- d. The BDP assignment would be "for 22 months, being the balance of the two year extension [and] during this assignment [the Applicant] could apply for other HQ posts, without being bound by the usual 'time post limitation'";
- e. The Applicant would leave UAE on 31 July 2012, proceeding on home leave, and report for duty in BDP on 4 September 2012;

... On 8 June 2012, the Applicant confirmed by email that Ms. FW's June 2012 email reflected "what we discussed", making only one revision (not relevant here).

... Later the same date, Ms. FW responded [to] the Applicant, informing her that the "tour of duty" rule would only apply for posts in New York and that, as the post in BDP would cease to be funded on 1 July 2014, she would be able to apply for any post at any location.

... On 12 June 2012, Ms. FW forwarded the Terms of Reference to the Applicant. In these Terms of Reference, the Applicant's alleged post was labelled, "Policy Advisor on Public Service", its level was stated as D-1, and it was located in New York. Under the heading "Duties and Responsibilities", it was indicated that the Applicant would work under "the overall direction of the Democratic Governance Practice ["DGG"] Director and the direct supervision of the Senior Public Administration Advisor/Responsive Institutions Cluster Team Leader". However, nothing was stated about how the alleged post was funded.

... On 18 June 2012, the Applicant forwarded her comments to the Terms of reference to the Practice Director of the DGG /BDP, stating, amongst others, that "many areas still need work".

... By email of 23 June 2012 a UNDP colleague, copying, amongst others, Ms. FW and the then Deputy Regional Director, noted that it had been agreed, during the Applicant's mission to [HQ], that she would be "reassigned" from the UAE to [HQ] with effect from the end of July 2012. The UNDP colleague also noted that she understood that the Applicant [was] "in discussions with BDP regarding [the Applicant's] eventual assignment with BDP" and that the "reassignment" would proceed "[r]egardless of the outcome of these discussions".

... By email of the same date, the Applicant responded that, "There is and was no agreement on reassignment without my prior approval and agreement on the [Terms of Reference] of the assignment proposed by BDP". The Applicant further expressed that she was "quite alarmed" with the statement that the "reassignment" would proceed "[r]egardless of the outcome of these discussions[]" because this constituted "a clear breach of what we discussed".

... In a separate email of the same date to the Deputy Assistant Administrator and Deputy Director of BDP, Ms. MS, the Applicant stated that she could not accept the Terms of Reference as they did not represent the agreement with the RBAS. The Applicant appended to this email exchange as an annex to h[er] application, an undated version of the Terms of Reference; albeit now rather formed as an employment contract—the starting date is stated [as] 4 September 2012 and [the] duration is indicted as "Initial Contract [of] 2 years". The name of [the] alleged post was changed to, "Senior Adviser on Governance and Sustainable Development" and the Applicant was to report to the DGG Director (no mention was made to the Senior Public Administration Advisor/Responsive Institutions Cluster Team Leader). Nothing was stated regarding the source of funding for the alleged post.

... By a letter titled, "Reassignment", dated 28 June 2012 from Benefits and Entitlement Services, UNDP, Copenhagen, to the Applicant, which was jointly-signed by two UNDP Human Resources Associates, the Applicant was informed that she was "reassigned" ... as "Advisor to UNDP New York".

... On 9 April 2013, the Terms of Reference[] were signed by the DGG Practice Director, Ms. F. The alleged post was named, "Special Advisor, Strategic Initiatives, [DGG]" and the Applicant was to report to the DGG Practice Director. The document further indicated:

- a. "Starting Date: January 1st, 2013-December 31, 2014 (staff member hold[s] a two years [sic] contract with expiry date June 30, 2014); and
- b. "Duration of Initial Contract: 2 years".

However, no mention was made as to how this alleged post was to be funded, including from which budget the expense for the Applicant's salary would be charged.

... On 1 October 2013, in an email to the Officer-in-Charge of BDP/DGG, copying also the Director of the Office of Human Resources[...] (“the OHR Director”) and the Deputy Assistant Administrator and Deputy Director of BDP, Ms. MS, the Applicant indicated, amongst others, that she had [been] expecting a “constructive dialogue with BDP management” and that she felt that BDP/DGG had not made any effort to “integrate” her into DGG. She further stated that, “As you know, I do not have a position in DGG. It is a fragile arrangement with RBAS, where I am sitting in DGG with RBAS paying my salary.[”]

... Between April and November 2013, the Applicant applied for a range of different RC, BDP and other UNDP positions, but UNDP (by the Executive Group, “EG”), as the nominating agency, did not nominate the Applicant for any of these positions. The [Dispute] Tribunal determined in Judgment No. (...) UNDT/2016/219 in Case No. UNDT/NY/2014/021 that the EG’s decisions on 5 September and 12 November 2013 not to nominate the Applicant for any of the relevant RC position for which she had appli[ed] in August and November 2013 were unlawful.<sup>[2]</sup>

... On 20 November 2013, the Chief Resource Management Division, Bureau for Crisis Prevention and Recovery, UNDP, emailed a broad range of UNDP staff in different units, including all staff in BDP sharing with them a “link for conducting the functional mapping”.

... On 7 February 2014, upon her request, the Applicant met with the OHR Director to discuss possible short-term and long-terms assignments for her, including in Syria and Jordan. In a contemporaneous, “Note for the Record”, prepared by the Applicant dated 11 February 2014, the Applicant stated that, during this meeting, she was informed that, in case her contract would expire, there would be no separation or termination of her contract but that she would be assigned to the Business Solution Center for a maximum period of one year during which time period she could apply for other posts.

... On 11 February 2014, the Applicant applied and reapplied for a total of five RC positions, but never received any information and/or responses to her applications.

... On 26 February 2014, the Applicant was placed on certified sick leave, which was subsequently extended to the end of May 2014.

... On 21 May 2014, the Management Bureau Director sent an email with the subject line, “Structural Change: Notification to affected staff”, apparently to all UNDP staff at [HQ] in New York, about the “Structural Review” in October 2013. In this email, the Management Bureau Director stated that

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<sup>[2]</sup> This Judgment is vacated on appeal in a parallel case during the same session; see *Sarrouh v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-784.

Given the scope of the restructuring, all staff who are currently employed in Headquarters or regional level unit[s] are in principle affected by this change.

This does not mean that your job necessarily changes. It simply signals that your current position is within the scope of the change exercise and therefore you are in principle affected. The precise implications for your post will be communicated to you in due course. Organograms and Terms of Reference detailing the new configurations and responsibilities of bureau and units within them have now been published and from these you will be able to see changes which may affect your position. Your managers will also be holding meetings to discuss the impact on your unit.

... On 23 May 2014, the Applicant filed an application for suspension of action during management evaluation with the Dispute Tribunal of the decision not to renew her fixed-term appointment beyond 31 May 2014. In its ensuing order, (...) Order No. 127 (NY/2014) dated 29 May 2014, as part of the background, the [Dispute] Tribunal noted as follows [in paras. 12-14]:

[...] The Applicant states that, on 13 May 2014, she inquired with the Office of Human Resources, Bureau of Management, UNDP, about the status of her G-4 visa, which expires at the end of May 2014 and about her United Nations Laissez Passer, which had already expired. She was advised that the Office of Human Resources had received no requests for further contract extension, without which her G-4 visa would not be extended. She was told to contact the Bureau of Management in New York, which she did, but received no reply.

[...] On 22 May 2014, the Applicant requested management evaluation of the decision “not to renew [her] fixed-term appointment which expires on May 31, 2014”. The following day, on 23 May 2014, she filed the ... application with the [Dispute] Tribunal.

[...] On 27 May 2014, the Office of Human Resources, Bureau of Management, UNDP, sent an email to the Applicant, stating that, “upon its current expiration, and as of 1 June 2014, [her] contract will be extended for three months, i.e. until 31 August 2014”. The email was received by the Applicant at 4:51 p.m. on 27 May 2014.

... On 28 May 2014, the Applicant’s contract was extended for three months until 31 August 2014.

... On 29 May 2014, by (...) Order No. 127 (NY/2014), the [Dispute] Tribunal rejected the application for suspension of action (...) because there was no pending administrative decision to separate her on 31 May 2014.

... On 2 June 2014, the Applicant requested to amend her 22 May 2014 request for management evaluation [] and now requested that the decision to leave her status as unassigned, as resulted from the 27 May 2014 contract extension, be also reviewed.

... On 1 July 2014, the Applicant received the response to her request for management evaluation from the Management Bureau Director. In the considerations, it was indicated that:

- a. No administrative decision was taken not to renew her contract beyond 31 May 2014 and no such decision had consequently been communicated to her;
- b. Her contract had been extended until 31 August 2014;
- c. UNDP was in the process of realigning its human resources structure, *inter alia*, at the UNDP [HQ]. New organograms and a related realignment strategy have been developed. Given the scope of the restructuring, all staff members who were assigned to [HQ] were in principle affected by the related changes. A decision had been taken to only renew expiring contracts of most [HQ] staff for a limited period of time, i.e., until the expected completion of the realignment process;
- d. Since the Applicant's post was affected by the realignment exercise, her appointment was not again renewed for two years, but only for a period of three months;
- e. The Applicant's status was not changed on 27 May 2014 to "unassigned";
- f. The Applicant was still assigned as Special Advisor at the D-1 level with BDG/DGG and her assignment was affected by the realignment process.

... By letter dated 10 July 2014, the Applicant responded [to] the Management Bureau Director regarding his 1 July 2014 management evaluation. She stated, amongst others, that:

... The statement, "your post is affected by the realignment exercise" is patently wrong. As you are well aware, I do not have a post, nor have I been redeployed against any [HQ] position ... More importantly, upon announcing the realignment process, I was bluntly told by my supervisor, [name redacted, "Mr. K"], that my assignment with BDP was a two year arrangement with RBAS management after which I [was] expected to go back to RBAS or anywhere else as I [did] not have or [held] any position within the BDP structure.

... I have not been notified by RBAS management, my parent Bureau, that my position as RR/RC [was] affected by the restructuring ... RC/RR position[s] are not affected by the restructuring ... I look forward to hearing from RBAS

Regional Director, and discuss options for my next assignment with RBAS, my parent Bureau.

...

... On 30 August 2014, the Applicant's contract was extended from 1 September to 30 November 2014. Subsequently, together with her contract, the Applicant's certified sick leave was extended until 31 December 2014.

... In his 28 July 2015 reply, the Respondent submits that:

As noted, the Applicant had remained on sick leave all this while. While her position had ended on 1 July 2014, due to her sick leave UNDP did not send her a letter informing her that she was to be separated, and as a result, her post was not formally abolished. However, pursuant to consultations with the Medical Services Division, which advised UNDP that it would be beneficial to the Applicant's recovery to be advised of her exact job status, on 29 January 2015 [Ms. H, name redacted] Officer-in-Charge (OiC), OHR, informed the Applicant that her assignment with [the Bureau for Policy and Programme Support (BPPS)] (formerly BDP) had since ended, and that her post in BPPS would be formally abolished effective 31 January 2015. The Applicant was now also informed that given that she had not been successful in securing either a temporary or regular assignment, and taking into account her ongoing sick leave status, once she was to "no longer be on certified sick leave, [her] notice period in accordance with [United Nations] Staff Rule 9.6 (c) (i), and [United Nations] Staff Rule 9.7 (b), [would] automatically begin". The Applicant was further informed that she could apply for an agreed separation, if she so wished. With the abolition of her post on 31 January 2015, it was only on 1 February 2015 that the Applicant was placed on unassigned status.

... By letter dated 2 March 2015, the Applicant filed a request for management evaluation of the decision notified to her on 29 January 2015 that her position with ... BPPS ... has ended and the position she was encumbering was abolished as of 31 January 2015.

... By letter dated 1 April 2015, the Management Bureau Director responded to the Applicant's 2 March 2015 request for management evaluation, stating, amongst others, that:

- a. The Applicant's claim regarding her not being affected was time barred as she was informed about this in his email of 21 May 2014;
- b. Given her continued sick-leave stat[us], while her assignment with BPPS had long ceased, the Organization decided to formally abolish it effective 31 January 2015; and



c. Accordingly, on 1 February 2015, she was placed on “unassigned” status.

... The Applicant remained on sick leave from February 2014 until 31 July 2015 after which she was separated from service.

3. The UNDT rendered its Judgment on 22 December 2016 finding that the decision that Ms. Sarrouh’s position with BPPS had ended and the position she was encumbering was abolished as of 31 January 2015 was unlawful since Ms. Sarrouh had not been assigned to a post with BPPS at the time she received the contested decision. Even if her post had actually been abolished, the Dispute Tribunal concluded that her rights in accordance with Staff Rule 9.6(e)(ii) were not respected. The UNDT further considered that “it appears that the real reason for the termination was [Ms. Sarrouh’s] extended sick leave”.<sup>3</sup> By way of remedy, the UNDT ordered the Secretary-General to pay compensation in lieu of rescission of the contested decision in the amount of two years and 28 days’ (31 July 2015 to 28 August 2017) net base salary at the D-1 step 5 level in addition to compensation equal to both the staff member’s and the Organization’s pension contributions which would have been paid to the United Nations Joint Staff Pension Fund (UNJSPF) during the same period. The UNDT calculated the relevant period based on its findings that “if the post had not been abolished, [Ms. Sarrouh’s] contract would have been extended for another two years” and in light of the “extension from April 2013 to December 2013, [Ms. Sarrouh’s] contract would therefore likely have been extended from 1 January 2014 to 31 December 2016” and “that her assignment with BDP/DGG was expected to continue in 2017, at least until 28 August 2017, the final year of implementation of the 2014-2017 Strategic Plan ... [and] the time of [Ms. Sarrouh’s] retirement”.<sup>4</sup> In addition to in-lieu compensation, the UNDT awarded moral damages in the amount of USD 3,000.

4. On 20 February 2017, together with his appeal before the Appeals Tribunal, the Secretary-General filed a motion seeking leave to adduce additional evidence. On 1 March 2017, Ms. Sarrouh filed her response to the motion asking that this Tribunal deny the Secretary-General’s request or, in the event the Appeals Tribunal grants the motion, also grant her request for leave to file additional evidence on her part. This Tribunal, by Order No. 280 (2017), dated 26 April 2017, granted both the Secretary-General’s motion and Ms. Sarrouh’s counter-motion. It ordered that the exhibits attached to the motion and the

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<sup>3</sup> Impugned Judgment, para. 122.

<sup>4</sup> *Ibid.*, para. 128.

counter-motion be part of the record before the Appeals Tribunal and that the UNJSPF produce evidence of the retirement benefits that have been or would be paid to Ms. Sarrouh during the period covered by the in-lieu compensation.

### **Submissions**

#### **The Secretary-General's Appeal**

5. The Secretary-General's appeal is limited to the award of in-lieu compensation. He submits that the UNDT erred in law by awarding remedies that would place Ms. Sarrouh in a better position than she would have been in had she not been separated, which runs counter to the Appeals Tribunal's jurisprudence in *Warren*.<sup>5</sup>

6. First, the Secretary-General argues that the UNDT awarded an excessive amount of in-lieu compensation. If the Organization were to execute the UNDT's order, Ms. Sarrouh would receive a total of USD 566,131 regarding the period from 1 August 2015 to 28 August 2017, composed of USD 342,037 as compensation in lieu of rescission, in addition to USD 226,794 as payments already made or to be made by UNDP and the UNJSPF, namely (i) termination indemnity (approximately USD 95,463), (ii) compensation in lieu of notice (approximately USD 82,502), and early retirement benefits (approximately USD 82,502). Had Ms. Sarrouh remained with the Organization until the date of her normal retirement age, that is 28 August 2017, she would have received a D-1 net base salary and applicable entitlements minus health insurance and her pension contribution amounting to approximately USD 324,384. In its calculation of the compensation, the UNDT failed to account for the termination benefit, compensation in lieu of notice and early retirement benefit.

7. The Secretary-General further contends that in addition to having awarded an excessive amount of in-lieu compensation, the UNDT erred in its determination of the underlying period of two years and 28 days. The amount of compensation awarded was the equivalent of Ms. Sarrouh's net base salary had she been retained by UNDP at the D-1 level until her date of normal retirement. The UNDT erroneously based its calculation on the speculative assumption, contrary to the Appeals Tribunal's jurisprudence in *Mwamsaku*,<sup>6</sup> that Ms. Sarrouh would have remained in service for a period of two years and 28 days. The UNDT also erred in fact in its interpretation of

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<sup>5</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

<sup>6</sup> *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246.

the management evaluation response of 1 July 2014 when it found that the latter showed that her contract would have been extended for another two years, had her post not been abolished. The UNDT made a further factual error by assuming—in the absence of any evidentiary submissions before it—that an extension of her appointment from April 2013 to December 2013 would have automatically resulted in a two-year extension from 1 January 2014 to 31 December 2016.

8. Moreover, the UNDT failed to inquire and take into consideration any income that Ms. Sarrouh may have earned during the period in question from her private enterprise “Expert Consulting in Governance” as well as from the professorship she held at McGill University. Accordingly, Ms. Sarrouh was placed in a much better position than she would have been in, had she not been separated.

9. Based on the foregoing, the Secretary-General requests that the award of in-lieu compensation be “substantially reduced, if not eliminated” in order to take the following aspects into account: (i) the payments that Ms. Sarrouh received from UNDP upon separation for the period in question; (ii) the early retirement benefit Ms. Sarrouh received and would continue to receive from UNJSPF for the period from 1 August 2015 to 28 August 2017, corresponding to two years and 28 days; and, (iii) the earnings that Ms. Sarrouh received from her professional activities for her enterprise “Expert Consulting in Governance” and her professorship at McGill University for the period from 1 August 2015 to 28 August 2017.

### **Ms. Sarrouh’s Answer**

10. Ms. Sarrouh submits that the formulation of the Secretary-General’s argument—namely that she would be placed in a better position than if she had not been separated—“betrays its motivation, which is to attempt cost savings at the expense of justice”. The UNDT Judgment carefully considered all the factors involved and applied the established jurisprudence on calculation of compensation and the Appeals Tribunal generally gives deference to the Dispute Tribunal and does not lightly disturb the quantum of damages awarded.

11. Ms. Sarrouh claims that the Secretary-General merely attempts to reargue his case, which was presented in full to the UNDT. In both her written submissions and testimonial evidence, Ms. Sarrouh addressed the issue of economic and moral damages providing full disclosure of her economic and medical circumstances including the facts that she was unable to find employment

and that she was undergoing medical treatment for cancer during her last year of service and after her separation. It is a “blatant misrepresentation” by the Secretary-General to state that the UNDT failed to order her to disclose income or failed to inquire if she had mitigated her loss. In fact, Ms. Sarrouh had testified under oath before the UNDT that her involvement with McGill University was non-remunerative and that she had not generated any income from the consultancy business she was trying to establish. The Secretary-General had deliberately chosen not to cross-examine her or to request evidence at the time of the hearings.

12. Ms. Sarrouh further contends that the compensation awarded should not be reduced. She argues, *inter alia*, that unlawful termination is “one of the most serious consequences of administrative abuse of authority” which has an even greater impact on a “long-serving staff member approaching retirement age ... who is experiencing serious health concerns”.

13. The Secretary-General’s figures in the abstract are misleading. Net base pay is significantly less than the full amount of the net remuneration and entitlements Ms. Sarrouh would have received had she not been separated because she would have benefitted from step increments and cost-of-living adjustments. The Secretary-General also has not provided any argument as to why the amount of the increased pension contributions she would have benefitted from had she been reinstated should be reduced. The “early retirement benefit” that the Secretary-General is claiming as gainful income is in fact reducing her retirement income significantly as a result of having to take a reduced pension two years before reaching her regular retirement age instead of a full pension of USD 41,397.00 *per annum* or USD 54,535.00 *per annum* had she been separated for health reasons and obtained a disability pension. In any case, pension benefits are a separately earned entitlement that is irrelevant to the issue of damages from loss of employment and it was within the UNDT’s discretion to order compensation for consequential losses.

14. Further, the amount of compensation should not be reduced by the termination indemnity and compensation in lieu of notice (which she noted was paid in a significantly lower amount than stated by the Secretary-General) as these are earned entitlements payable to all staff who are prematurely separated. In addition, it is settled case law that compensatory damages should not be reduced by a termination indemnity.

15. If any of these amounts were to be offset to the compensation awarded, she requests to be compensated for legal costs, medical expenses and the reduction in salary she suffered from being placed on half pay prior to her separation.

16. Ms. Sarrouh claims that the UNDT correctly awarded compensation on the basis of her legitimate expectation to continue in service until her mandatory retirement age. There was an unchallenged finding based on documentary evidence that her assignment as Special Advisor would continue until 2017 and that it was not conditional upon the outcome of the realignment. The Secretary-General's reliance on jurisprudence governing the renewal of fixed-term appointments is misplaced as the finding of wrongful termination is predicated on entirely different arguments.

17. Ms. Sarrouh requests that the Appeals Tribunal dismiss the appeal and award costs in the amount of USD 10,000 based on the Secretary-General's "misrepresentation of the trial record" which constitutes a "gross abuse of process".

### **Considerations**

18. The Secretary-General's appeal is limited to the UNDT's award of compensation in lieu of rescission, which he claims is excessive.

19. As the UNDT's Judgment does not mention any submissions by the Secretary-General regarding Ms. Sarrouh's claim for compensation, we have examined the record for details of the case put forward to the UNDT by the Secretary-General as a challenge to such a claim. We have come to the conclusion that the claim went unchallenged.

20. We note that Ms. Sarrouh's application to the UNDT claimed: "[C]ompensation for two years at full pay allowing her to benefit from her full pension" plus moral damages in the amount of two years' net base pay, "\$100,000.00 in compensation for medical expenses and suffering depression and illness as a result of harassment, mistreatment and discrimination", plus "full reimbursement of all legal expenses (...) incurred since 2012 (...) in the amount of \$30,000". The Secretary-General's reply dated 28 July 2015 did not address the issue of compensation.

21. In the hearing before the UNDT, Ms. Sarrouh gave evidence of her loss of income but was not cross-examined on her claim for compensation. We note that the Secretary-General claims in his appeal that the UNDT erred by "failing to enquire and take into account any income that [Ms. Sarrouh] may have earned during the period from the private enterprise, Expert Consulting in Governance, that she founded, as well as income from the professorship that she held at McGill University". This is an entirely baseless submission which we reject.

During the hearing before the UNDT, Ms. Sarrouh gave evidence that she did not have any employment and that her placement at McGill University was a “non-salary” honorary position. She was not cross-examined on this evidence, which was not contested in any way.

22. At the UNDT hearing, the Secretary-General did not produce any evidence disputing Ms. Sarrouh’s claim for compensation. At the conclusion of the evidence, the UNDT invited the parties to address on anything related to Ms. Sarrouh’s separation and “other elements which might have relevance to the case and which are not yet before us”. The UNDT also invited the parties to address on “what you request from the [Dispute T]ribunal”. The Secretary-General chose not to address on the issue of Ms. Sarrouh’s compensation claim.

23. The parties were then given until 20 May 2016 to file their closing submissions, with the direction that “your closing submissions are to be based exclusively on the evidence presented to the [Dispute T]ribunal”. In Ms. Sarrouh’s closing submissions, she addressed on the negative impact on her reputation, career and health, her inability to secure regular employment, her damaged opportunity of finding any alternative employment and the direct impact on her livelihood and pension entitlements. She claimed special leave with full pay from the date of separation (31 July 2015) until retirement (28 August 2017) “thereby ensuring her entitlements and wages for this period are recovered and her pension contributions are reinstated”. In contrast, the Secretary-General’s closing submissions did not contain any submissions on Ms. Sarrouh’s compensation claim.

24. Since the Secretary-General did not contest Ms. Sarrouh’s claim for compensation before the UNDT, he cannot raise that issue on appeal. In *Staedtler*,<sup>7</sup> we held that a party is not permitted to raise new arguments at the appeal stage, nor can that party argue that the UNDT erred on questions of fact or law with respect to allegations which were not raised before the UNDT for its consideration.

25. We find that the UNDT’s award of in-lieu compensation was based on the uncontested evidence before it. As such, its findings were not unreasonable and it did not commit any error in its assessment of the compensation award. We have consistently held that the UNDT is in the best position to decide on the level of compensation given its appreciation of the case,

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<sup>7</sup> *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 24. See also *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292, para. 31.

and that in the absence of any error of law or manifestly unreasonable factual findings, the Appeals Tribunal will not interfere with the discretion vested in the Dispute Tribunal to decide on remedy.<sup>8</sup>

26. By Order No. 280 (2017), the Secretary-General was given leave to file “additional evidence”. However, it is now clear that the Secretary-General did not produce any case to the UNDT contesting Ms. Sarrouh’s claim for compensation. As the Secretary-General cannot present such a case for the first time on appeal, the “additional evidence” is therefore irrelevant.

27. It follows that for the foregoing reasons the appeal must fail.

28. However, we reject Ms. Sarrouh’s claim for costs of USD 10,000 on the ground that the Secretary-General’s appeal falls well short of a manifest abuse of the appeals process.<sup>9</sup>

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<sup>8</sup> *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26.

<sup>9</sup> Article 9(2) of the Statute of the Appeals Tribunal provides: “Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party.”

**Judgment**

29. The appeal is dismissed and Judgment No. UNDT/2016/220 is affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of October 2017 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Thomas-Felix

*(Signed)*

Judge Raikos

Entered in the Register on this 8<sup>th</sup> day of December 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar