



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

Judgment No. 2019-UNAT-922

**Haq and Kane
(Respondents/Applicants)**

v.

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

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge Dimitrios Raikos
Judge John Raymond Murphy

Case No.: 2018-1215

Date: 28 June 2019

Registrar: Weicheng Lin

Counsel for Ms. Haq and Ms. Kane: George G. Irving

Counsel for Secretary-General: John Stompor

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/099, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 5 October 2018, in the case of *Haq and Kane v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 4 December 2018 and Ms. Ameerah Haq and Ms. Angela Kane filed a joint answer on 29 January 2019.

Facts and Procedure

2. Ms. Haq joined the United Nations as a Junior Professional Officer with the United Nations Development Programme (UNDP) in 1976. She served continuously thereafter for UNDP through 2004, when she was appointed Deputy Assistant Administrator and Deputy Director of the UNDP Bureau for Crisis Prevention and Recovery at the D-2 level. Throughout those years, she was a participant of the United Nations Joint Staff Pension Fund (Fund or UNJSPF). Effective 8 June 2004, Ms. Haq was appointed Deputy Special Representative of the Secretary-General for the United Nations Assistance Mission to Afghanistan (UNAMA) at the Assistant Secretary-General (ASG) level, under a fixed-term appointment initially for six months. The letter of appointment (LoA) dated 7 June 2004 included the following paragraph under the title “Information”: “Your particular attention is drawn to Staff Regulation 3.3 relating to the Staff Assessment Plan and to the Regulations and Rules relating to the United Nations Joint Staff Pension Fund and to the Annex to this letter explaining various United Nations allowances, entitlements and conditions of employment.”¹

3. Ms. Haq signed the LoA on 21 July 2004. She was then 54 years old. In 2007, she was appointed Deputy Special Representative of the Secretary-General for the United Nations Mission in Sudan (UNMIS) also at the ASG level. In 2010, she was appointed Special Representative of the Secretary-General for the United Nations Integrated Mission in Timor-Leste (UNMIT) at the Under-Secretary-General (USG) level. From 2012 to 2015, she served as the USG for the United Nations Department of Field Support at Headquarters. For more than 10 years at the ASG or USG level, Ms. Haq remained a participant of the

¹ Staff Regulation 3.3, effective 1 January 2003, showed how the staff assessment was computed and how the staff assessment rates were applied to the salaries and other emoluments of the staff members with, or without, dependents.

UNJSPF, paying a fixed percentage of her pensionable remuneration to the UNJSPF and accruing her contributory service. Ms. Haq retired in January 2015, having contributed to the UNJSPF for more than 38 years.

4. Ms. Kane joined the Organization in 1977 at the P-2 level as Editor/Writer in the Department of Public Information (DPI) in New York. She subsequently served as Political Affairs Officer in the Executive Office of the Secretary-General, later on with UNDP, the United Nations Population Fund (UNFPA) in Jakarta, Indonesia, the Department for Disarmament Affairs, and the Executive Office of the Secretary-General. In 1995, she was promoted to the D-2 level as Director, DPI, and later as Director, Department of Political Affairs (DPA). Throughout those years, she was a participant of the UNJSPF. Effective 15 January 2003, Ms. Kane was appointed as Deputy Special Representative of the Secretary-General for the United Nations Mission in Ethiopia and Eritrea (UNMEE) at the ASG level, under a fixed-term appointment initially for six months. The LoA dated 13 December 2002 included the following paragraph under the title "Information note": "Your particular attention is drawn to Staff Regulation 3.3 relating to the Staff Assessment Plan and to the Regulations and Rules relating to the United Nations Joint Staff Pension Fund."

5. Ms. Kane signed the LoA on 6 January 2003. She was then 54 years old. In 2004, she was appointed as the ASG in the Department of General Assembly and Conference Management and, in 2006, as the ASG in the DPA. In 2008, Ms. Kane was appointed the USG for the Department of Management (DM). In 2012, she served as the USG and High Representative of the Office of Disarmament Affairs until her retirement in August 2015. For more than 12 years at the ASG or USG level, Ms. Kane remained a participant of the UNJSPF, paying a fixed percentage of her pensionable remuneration to the UNJSPF and accruing her contributory service for more than 37 years.

6. The payment of retirement benefits is governed by Part V of the Fund's Regulations titled "Benefits". Of particular relevance to the present case is Article 28 titled "Retirement benefit". Article 28 underwent several amendments by the General Assembly, starting in 1985, when it introduced a cap on the monthly periodic benefit payable to the staff who retired at the ASG and USG levels, as a part of economy measures at the time of serious actuarial imbalance of the Fund. In resolution 40/245 dated 18 December 1985, the General Assembly decided to add a paragraph (d) to Article 28. The amended Article 28(d) capped the monthly periodic benefit payable to the staff who retired at the ASG and USG levels to the greater of either

60 per cent of the participant's pensionable remuneration on the date of separation, or the maximum benefit payable to a participant at the D-2 level (top step for the preceding five years separating on the same date as the participant), with 35 years of contributory service. In 1996, the General Assembly further amended Article 28(d) by removing the reference to "35 years of contributory service".²

7. Another cap was introduced by the General Assembly in 1996 in respect of the lump sum benefit. In resolution 51/217, dated 18 December 1996, the General Assembly decided to amend Article 28(g)(i)(B). According to the amended Article 28(g)(i)(B), if a staff member elects a lump sum option, the amount of the lump sum is capped to the smaller of the actuarial equivalent of one third of the retirement benefit, or the actuarial equivalent of one third of the maximum retirement benefit payable to a participant at the top step of the P-5 level.

8. It should be noted that the first cap (on the monthly periodic benefit without a beneficiary having exercised the lump sum option) applies only to staff who retire at the ASG and USG levels, but the second cap (on the lump sum withdrawal) applies to all staff at the D and above levels.

9. After they submitted their separation documents, by which Ms. Haq elected to receive one third lump sum and Ms. Kane elected to receive a standard periodic benefit, Ms. Haq and Ms. Kane received communications from the UNJSPF notifying them of their respective retirement entitlements.³ Both of them were surprised to find that their retirement benefits would be less than the amount they each thought they would receive.

² General Assembly resolution 51/217 titled "United Nations pension system", Annex 1.

³ Ms. Haq received a letter from the UNJSPF dated 10 March 2015, notifying her that her lump sum withdrawal amounted to USD 628,204.55 and her periodic benefit stood at USD 123,046.80 per annum or USD 10,253.90 per month. In the case of Ms. Kane, the Secretary-General in his appeal states that the UNJSPF notified her on 27 January 2015 of the details regarding her pension benefit, and attaches a UNJSPF benefit estimate, dated 27 January 2015. An estimate can be obtained by a participant from the UNJSPF website. The benefit estimator of 27 January 2015 for Ms. Kane showed that her retirement full pension was subject to Article 28 and that she would receive USD 180,866 per annum if she retired on 31 August 2015. In the Respondent's reply, dated 9 February 2017 before the Dispute Tribunal, however, the Secretary-General stated that the UNJSPF had notified Ms. Kane of her pension benefits on 1 October 2015 citing annex 8 of Ms. Haq's and Ms. Kane's joint application to the Dispute Tribunal. But annex 8 contained only the UNJSPF's letter of 10 March 2015 to Ms. Haq; it did not attach the UNJSPF's communication of 1 October 2015 to Ms. Kane.

10. Ms. Haq and Ms. Kane approached the Fund, but they were told that the Fund's Regulations had been correctly applied and that the Pension Board was not empowered to make any adjustments. Ms. Haq requested a review of that determination by the Standing Committee of the Pension Board, but the Standing Committee upheld the UNJSPF's determination.

11. On 26 May 2016, Ms. Haq and Ms. Kane sent a joint letter to the Secretary-General, in which they asked him to address the negative effects of the General Assembly's amendments to the Fund's Regulations on their pensions "both as a matter of policy and of basic equity". They made specific reference to the regressive features of the Fund's Regulations and the adverse effects for the long-term staff serving at the ASG and USG levels. They queried why the information had not been disclosed to them that while paying significantly higher contributions, their pension benefits were in effect reduced and why other options that were available to prevent this had never been explained to them or offered as alternatives. They concluded by asking the Secretary-General to "provide a representative amount of compensation for [their] losses".

12. On 7 July 2016, the USG/DM replied on behalf of the Secretary-General. He informed Ms. Haq and Ms. Kane that the Secretary-General had reviewed the matter in close coordination with his Executive Office, the Office of Legal Affairs (OLA), the DM offices and the UNJSPF Secretariat. The USG/DM summarized the history of the amendments to Article 28 of the Fund's Regulations and the introduction of the caps by the General Assembly "at its own behest" and explained how the caps were applied to the standard calculations in accordance with the amended Article 28. He noted that every staff member had the responsibility to look into his or her respective situation and seek advice, if necessary. The USG/DM concluded by saying that since their entitlements had been correctly calculated there was no basis for the Organization to pay any compensation as requested.

13. On 3 August 2016, Ms. Haq and Ms. Kane met with the UNJSPF in order to better understand some of the technical issues raised in the USG/DM's response. They queried why the UNJSPF benefit estimator and the Fund's annual statements had failed to reflect the effect of Article 28 caps, and were told that the calculations for the ASG and USG levels had to be inputted manually.

14. Ms. Haq and Ms. Kane contacted the United Nations Office of the Ombudsman and Mediation Services (UNOMS) for an informal resolution. On 8 August 2016, the Management Evaluation Unit (MEU) agreed to extend the 60-day deadline for management evaluation pending the result of the mediation efforts.

15. On 31 October 2016, following an unsuccessful mediation of the case, Ms. Haq and Ms. Kane submitted a joint request to the MEU for management evaluation of the decision embodied in the letter of 7 July 2016 from the USG/DM. They clarified that they were not challenging the Fund's Regulations, but the "decision to disclose some factors governing [their] employment, but not those critical factors affecting [their] future pension benefits". More specifically, they were contesting the "failure of the Organization to carry out its obligations as a good employer" and the "failure to disclose fully all options open to [them] to safeguard [their] legitimate entitlements result[ing] in an unfair administrative arrangement which negatively affect[ed their] conditions of service", and "unfairly disempowered [them] from making career and financial choices in [their] best interest". For that failure of duty of care, they contended, they were entitled to "compensation in the form of repayment of [their] contributions, with interest, at, respectively, the ASG and USG levels".

16. On 10 November 2016, the Officer-in-Charge, MEU, sent a separate but identical response to Ms. Haq and Ms. Kane, in which he informed them that their submission was not receivable, because "neither the fact that [they] had raised this matter with the Secretary-General nor anything in the Under-Secretary-General for Management's response to [them] constituted a discrete contestable administrative decision".

17. On 9 January 2017, Ms. Haq and Ms. Kane filed a joint application with the Dispute Tribunal contesting the "decisions" as follows:

[the] rejection by the Secretary-General [as embodied in the letter of 7 July 2016 from the USG/DM] of the request to address and rectify the failure of the Organization to fulfil its duty of care in connection with the obligation to disclose and offer alternative remedies for the adverse effects upon their pensions of the contractual arrangements for the final years of service at the Assistant Secretary-General and Under-Secretary-General levels.

18. In its Judgment of 5 October 2018 now under appeal, the Dispute Tribunal determined that it had jurisdiction to consider the merits of Ms. Haq's and Ms. Kane's application as they were contesting the letter of 7 July 2016 from the USG/DM and had

timeously requested a management evaluation of the contested decision, because the 7 July letter contained a “new and separate administrative decision, distinct from any of the Applicants’ letters of appointment at the ASG and USG levels and from any other decisions issued by the [United Nations Joint Staff Pension] Board in relation to their pensions”.⁴ The Dispute Tribunal determined that it had jurisdiction to review Ms. Haq’s and Ms. Kane’s application because the issue of the Secretary-General’s authority and discretion to take the contested decision was not argued and/or contested either before the 7 July 2016 letter was issued or during the management evaluation.

19. On the merits, the Dispute Tribunal determined that the Organization had the obligation to fully and accurately inform staff members of their rights and obligations by including in an LoA clear and detailed contractual clauses related to all the fundamental and essential terms of appointment, and by providing together with the LoA a copy of the Staff Regulations and Rules, including the ones related to the UNJSPF and the relevant administrative issuances. In the present case, the Dispute Tribunal found that the Organization had not acted in accordance with this obligation and that Ms. Haq and Ms. Kane had accepted their appointments at the ASG and USG levels unaware of the applicable rules, including the Fund’s Regulations, and the legal consequences therefrom on their pension benefits and entitlements. It therefore concluded that the Secretary-General’s rejection of Ms. Haq’s and Ms. Kane’s request to address and rectify the failure of the Organization to fulfil its duty of care and offer alternative remedies was unlawful.

20. Consequently, the UNDT ordered the rescission of the rejection of their request. In the alternative, the UNDT awarded Ms. Haq and Ms. Kane each three-month net base salary in lieu of the rescission. It also awarded Ms. Haq and Ms. Kane each USD 10,000 as moral damages and the payment of material damages “result[ing] from the breach of the Applicants’ fundamental right to be fully and timely informed of their conditions of service related to their right to pension (contributions and related retirement benefits) at the ASG and USG levels” in an amount to be established by the Secretary-General.⁵

⁴ Impugned Judgment, para. 55.

⁵ *Ibid.*, para. 112(e).

Submissions

The Secretary-General's Appeal

21. The UNDT erred in fact and in law and exceeded its jurisdiction in finding that Ms. Haq's and Ms. Kane's joint application was receivable. Its finding that the USG/DM's letter of 7 July 2016 was a new and separate decision that constituted a reviewable administrative decision was erroneous, because the said letter was a response to Ms. Haq's and Ms. Kane's request for equitable, and not legal, compensation; as such, it produced no direct and legal consequences or impact on their terms of appointment, nor did it address any legal obligation owed to them. Ms. Haq and Ms. Kane cannot create a new contestable decision by expressing disagreement with a previously communicated decision and challenging a subsequent confirmation of the decision.

22. It should be emphasized that the subject matter of Ms. Haq's and Ms. Kane's letter related to decisions that occurred as early as 2003. They did not initiate an administrative review or management evaluation until 1 November 2016, more than 12 years later. Even assuming that Ms. Haq and Ms. Kane were not aware of the Administration's failure to fulfil its duty of care towards them until January 2015 for Ms. Kane and March 2015 for Ms. Haq when the Fund notified them separately of the details regarding their respective pension entitlements, their request for management evaluation filed on 1 November 2016 was still out of time by more than a year.

23. The Dispute Tribunal erred in fact, law, and procedure in finding that staff members had a fundamental right to be fully and timely informed of how conditions of service apply to their individual circumstances and that Ms. Haq and Ms. Kane had not been provided with sufficient guidance about their pension entitlements when they accepted their appointments at the ASG and USG levels. Contrary to this finding, the Staff Regulations do not require the Administration to include detailed contractual clauses related to all terms of appointment in an LoA, because an LoA contains all the terms and conditions of employment expressly or by reference. The UNDT effectively created requirements that are not foreseen in the legal framework and imposed on the Administration the responsibility to explain the implications of the Fund's Regulations to senior staff members such as Ms. Haq and Ms. Kane, and a new duty of care to ensure that each and every staff member was aware of how the legal framework would be applied or could affect his or her individual circumstances. Contrary to

the UNDT findings, staff members, especially those in senior positions with significant responsibilities in relation to the Organization's human resources framework, such as Ms. Haq and Ms. Kane (the latter serving, *inter alia*, as the Representative of the Secretary-General on the Pension Board), are expected to know what policies, rules and regulations apply to them.

24. The UNDT made a fundamental error in procedure by prohibiting the Secretary-General's Counsel from eliciting evidence from Ms. Haq and Ms. Kane about the extent of their knowledge of the Fund's Regulations. That error led the Dispute Tribunal to conclude erroneously that there was no evidence that Ms. Haq and Ms. Kane had been aware of the content of the Fund's Regulations.

25. The UNDT erred in finding that there was a possibility for Ms. Haq and Ms. Kane to be exempted from their participation in the Fund. There is no provision in the Staff Regulations or the Fund's Regulations for any staff member to opt out of the participation in the Fund, with the exception of ungraded officials. Staff Rule 6.1 and Article 21(a) of the Fund's Regulations have not been interpreted to allow staff members on a full-time appointment longer than six months to opt out of participation and it has not been the practice of the Organization to agree to a staff member's opting out of such a participation.

26. The Dispute Tribunal erred in law in its orders of rescission, in-lieu compensation, and material damages. The provision of the full texts of the Staff Regulations and the Fund's Regulations and Rules as well as additional explanations would have made no difference, because Ms. Haq and Ms. Kane would have found themselves in the same position as they are today. Their pension benefits would still be capped at the D-2 level, and it would not have been possible for them to opt out of participation in the Fund.

27. The Dispute Tribunal also erred in law in its award of moral damages, because the award of moral damages was based on Ms. Haq's and Ms. Kane's testimony, without independent evidence, contrary to Article 10(5) of the UNDT Statute, which was amended in 2014, and the Appeals Tribunal's jurisprudence represented by *Kallon*, which had issued before the UNDT heard the present case.⁶

⁶ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742 (full bench). The outcome of the case was pronounced on 31 March 2017, and the Judgment was issued on 22 June 2017.

28. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and dismiss Ms. Haq's and Ms. Kane's case in its entirety. Alternatively, the Secretary-General requests that the Appeals Tribunal vacate the remedies ordered by the Dispute Tribunal.

Ms. Haq's and Ms. Kane's Joint Answer

29. The Secretary-General is challenging the UNDT findings by attempting to reargue the case. The ruling by the Dispute Tribunal that the letter of 7 July 2016 from the USG/DM constituted an appealable administrative decision is in keeping with the Appeals Tribunal's jurisprudence, because it not merely reiterated and reaffirmed the statutory basis for the calculation of the benefits, but also communicated a new decision on the liability of the Secretary-General for his actions or inactions. He did not object to Ms. Haq's and Ms. Kane's request on grounds of receivability; instead, he conducted a new review in coordination with his Executive Office, OLA, DM, and the UNJSPF Secretariat.

30. Ms. Haq and Ms. Kane submitted a timeous request for management evaluation, as the time limit ran from the date they knew all of the relevant facts regarding the accumulated benefits which were determined and communicated after their separations had taken place. It was after those procedures had been exhausted and further information had been provided identifying the prior contractual arrangements that Ms. Haq and Ms. Kane addressed the issue to the Secretary-General for a final decision. Neither the Secretary-General nor the MEU took issue with the timeliness of their appeal.

31. The elementary notion of transparency required the disclosure of the effects that Ms. Haq's and Ms. Kane's new contracts at the ASG and USG levels would have had on their pension entitlements, given they were not provided with the Fund's Regulations and the Article 28 cap was not applied to estimates that staff could obtain on the Fund's website. Disclosure is the part of good faith, fair dealing and duty of care, which is an inherent part of the employment relationship and a fundamental condition of service.

32. There was no error in procedure in the UNDT proceedings. The Secretary-General's Counsel was prevented from trying to widen the scope of the cross-examination into the substance of the case as the scope of the UNDT hearing was limited to the issue of damages.

33. The Secretary-General argues that Staff Rule 6.1 and Article 21(a) of the Fund's Regulations have not been interpreted as allowing staff to opt out of participation in the Fund, but he does not cite any authority. The Dispute Tribunal was correct in holding that not being fully informed had precluded any possibility of finding alternative remedies including declining further service at the ASG and USG levels and exercising their retirement options. All of those alternative scenarios would have ameliorated the adverse effects on Ms. Haq and Ms. Kane.

34. The Dispute Tribunal was correct in ordering monetary compensation as this was the only practical remedy awarded in terms of moral damages and the negative financial consequences as a result of the failure of the Administration in its duty of care towards its staff. The UNDT's award of moral damages was based not only on the testimony of Ms. Haq and Ms. Kane, but also on the direct evidence of harm in terms of unforeseen financial consequences amounting to hundreds of thousands of dollars in deductions from their salaries without a corresponding pension benefit.

Considerations

Receivability

35. We have doubts about whether the application before the UNDT was receivable.

36. Under Article 2(1)(a) of the UNDT Statute, the Dispute Tribunal is "competent to hear and pass judgement on an application ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". In their letter dated 26 May 2016, Ms. Haq and Ms. Kane brought their request for compensation before the Secretary-General "both as a matter of policy and of basic equity". Consequently, the 7 July 2016 response from the USG/DM was probably meant to address this request but not to issue an administrative decision which is a measure with direct legal effect. The "review" undertaken by the Secretary-General was, in this understanding, not a legal review but a policy or equity review of Ms. Haq's and Ms. Kane's request for compensation. Additionally, in their application to the UNDT, Ms. Haq and Ms. Kane did not refer to any "terms of appointment", which could have been understood as providing them with a claim for compensation as a remedy for the alleged breach of duty. Further, the alleged breach of duty happened in 2002 and 2004, respectively, and was

directly linked to Ms. Haq's and Ms. Kane's respective promotions to the ASG level. They never had then, nor have now, the intention to challenge the legality of those administrative decisions. Their aim was to keep the advantages of their promotions (especially the higher remunerations) and at the same time avoid the capping of their pension benefits at the D-2 level as provided in Article 28(d) of the UNJSPF Regulations. Finally, Ms. Haq and Ms. Kane accepted the calculation of their pension benefits by the Fund, and the administrative decisions in this regard were not challenged and thus went into legal force. Their 26 May 2016 request was an attempt to obtain, by way of compensation, pension entitlements which they are not entitled to under the legal provisions of the UNJSPF due to the capping in Article 28(d) of the Fund's Regulations.

37. On the other hand, the USG/DM expressly stated, in his 7 July 2016 letter, that the Secretary-General had "reviewed" the matter before he gave a lengthy explanation as to why the calculation of Ms. Haq's and Ms. Kane's pension benefits by the UNJSPF was in accordance with the Fund's Regulations, and that each and every staff member had the responsibility to look into his or her respective situation, thus implicitly stating that he, the Secretary-General, did not breach any duty of information towards Ms. Haq and Ms. Kane. As he did not refer at all to the legal force of the earlier promotions and the pension decisions, but rendered a series of legal arguments as to why Ms. Haq's and Ms. Kane's request for compensation must fail, the 7 July 2016 letter could also be regarded as a new administrative decision producing a direct legal effect that Ms. Haq's and Ms. Kane's request for compensation was denied.

38. Due to these uncertainties and because the matter is of general interest, the Appeals Tribunal will decide the case on the merits.

Merits

Whether the Secretary-General breached his duty of information towards Ms. Haq and Ms. Kane at the time of their appointments at the ASG level

39. The UNDT erred in law in finding that Ms. Haq and Ms. Kane had a fundamental right to be fully and accurately informed about their pension entitlements at the time of their appointments at the ASG level in 2002 and 2004, respectively, and that the Secretary-General breached this duty of information.

40. According to the UNDT,⁷

the Organization has the obligation to fully and accurately inform the staff member of his or her rights and obligation by including in the letter of appointment clear and detailed contractual clauses related to all his/her fundamental and essential terms of appointment, which include the right to the pension, and by providing together with the letter of appointment a copy of the Staff Regulations and Rules, including the ones relating to the UNJSPF, and the relevant administrative bulletins (ST/AI) and/or circulars (ST/IC).

41. We do not agree. The relevant Staff Regulation 4.1 and Annex II read as follows:⁸

Regulation 4.1

As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

Annex II

Letters of appointment

- (a) The letter of appointment shall state:
 - (i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;
 - (ii) The nature of the appointment;
 - (iii) The date at which the staff member is required to enter upon his or her duties;
 - (iv) The period of appointment, the notice required to terminate it and the period of probation, if any;
 - (v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;
 - (vi) Any special conditions which may be applicable.

⁷ Impugned Judgment, para. 70.

⁸ In effect as of 7 February 2003.

(b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;

...

42. The Dispute Tribunal erred in law in failing to consider that Staff Regulation 4.1 does not oblige the Secretary-General to transmit the UNJSPF Regulations to a staff member with the letter of appointment, upon appointment. The UNJSPF is an autonomous body apart from the Secretariat of the Organization and has its own rules and regulations. Consequently, Annex II(b), upon appointment, obliges the Secretary-General only to provide to the newly appointed staff member a copy of the Staff Regulations and Staff Rules, but not of the Regulations, Rules and Pension Adjustment System of the UNJSPF. As to the requirement under Annex II(a)(vi) that the letter of appointment shall state any special conditions which may be applicable, this refers only to special conditions which could affect the appointment itself, but it does not include possible consequences for the pension status and/or entitlements of the staff member. When accepting an appointment, retirement in most cases is many years away. It would not be practicable and would put too great a burden on the Administration if the Secretary-General was required, upon appointment, to provide each and every new staff member information about the pension matters including the possible consequences of the appointment for his or her pension entitlements.

43. It was sufficient for the Secretary-General to state, under “Information” in the letter of appointment, that Ms. Haq’s and Ms. Kane’s “particular attention is drawn to (...) the Regulations and Rules relating to the United Nations Joint Staff Pension Fund”. By this information, Ms. Haq and Ms. Kane were alerted that their appointments at the ASG level might have an impact on their pension status and entitlements and that it was their responsibility to become familiar with the Fund’s Regulations or to seek further advice with regard to this matter.

Compensation for material and moral harm

44. As there was no breach of duty and consequently no illegality on the part of the Administration, there can be no award of compensation for material or moral harm.

45. Consequently, the Appeals Tribunal does not have to examine whether Ms. Haq and Ms. Kane have established a causal link between the alleged breach of duty and their current pension situation. We note, however, that neither Ms. Haq nor Ms. Kane have stated during the proceedings before the UNDT or the Appeals Tribunal that they would have rejected the offer of appointment at the ASG level in 2002 and 2004 had they known about the capping of their pension benefits under Article 28(d) of the Fund's Regulations. We also point out that Ms. Haq and Ms. Kane have not suffered any financial harm. Had they stayed on at the D-2 level, their pensions would not be higher than those subject to Article 28(d) capping. It is true that their monthly pension contributions were much higher than those of D-2 staff members, but so were their monthly remunerations at the ASG and USG levels. Moreover, their continuous participation in the Pension Fund at the ASG and USG levels boosted their total periods of contributory service to more than 38 years for Ms. Haq and more than 37 years for Ms. Kane.

Judgment

46. The appeal is granted and Judgment No. UNDT/2018/099 is hereby reversed.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Murphy

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar