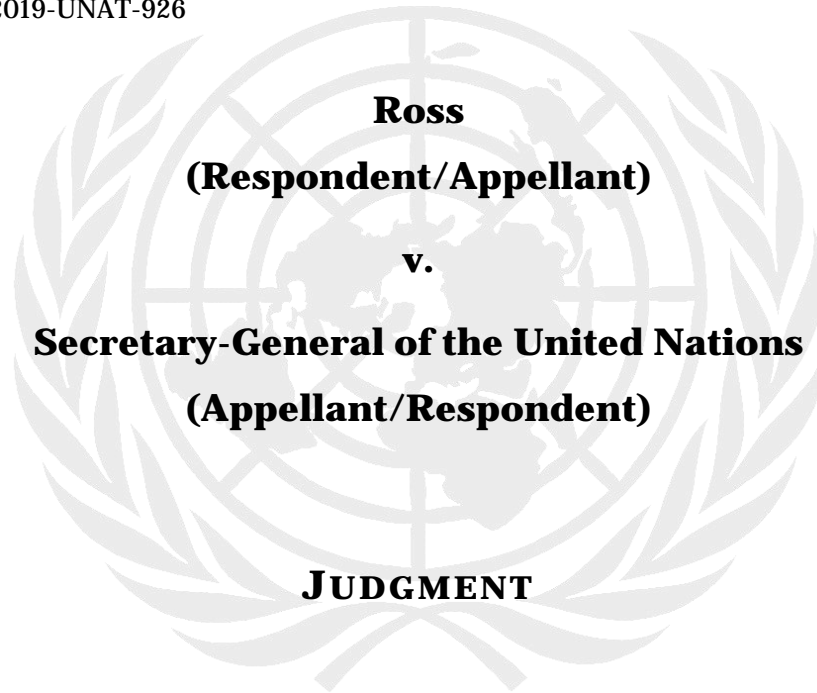




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-926



**Ross
(Respondent/Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Dimitrios Raikos Judge Deborah Thomas-Felix
Case Nos.:	2018-1220 & 2019-1221
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Ross:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against Judgment No. UNDT/2018/108, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 2 November 2018, in the case of *Ross v. Secretary-General of the United Nations*.

2. The Secretary-General filed one of the appeals on 18 December 2018, and Mr. Felix Ross filed his answer on 8 February 2019. The filings were registered as Case No. 2018-1220. Mr. Ross filed the second appeal on 7 January 2019 and the Secretary-General filed his answer on 8 March 2019. The filings were registered as Case No. 2019-1221. As the two appeals challenged the same UNDT Judgment, the Appeals Tribunal consolidated them for all purposes, by way of Order No. 341 (2019), dated 21 February 2019.

3. On 8 February 2019, Mr. Ross filed a motion for the referral of both appeals to a full panel of judges pursuant to Article 10(2) of the Appeals Tribunal's Statute on grounds that the standard of proof for moral harm is not clear in the current jurisprudence and that the UNDT erroneously calculated his award of compensation when it did not consider that his actual damages were significantly higher than in any case previously before the Appeals Tribunal. On 18 February 2019, the Secretary-General filed a response to the motion arguing that Mr. Ross lacked standing to request an *en banc* panel as a referral for a full bench rests with the President of the Appeals Tribunal or any two judges sitting on a particular case, pursuant to Article 10(2) of the Appeals Tribunal's Statute, and that there were no exceptional issues warranting consideration by a full bench.

Facts and Procedure

4. Mr. Ross is a former Senior Protection Officer with the United Nations High Commissioner for Refugees (UNHCR). In his application before the UNDT, Mr. Ross contested the decision to appoint an external candidate to the position of P-4 Senior Legal Officer, Administration of Justice in Nairobi.

5. The UNHCR Revised Policy and Procedures on Assignments (PPA) governed the recruitment in issue. Paragraph 68(a) of the PPA required managers to provide the Division of Human Resources Management (DHRM) with the written operational context and the position's profile requirements for the purposes of conducting a matching exercise. This was done on 30 April 2015. UNHCR normally advertises vacancy announcements in bulk through a bi-annual compendia of job openings issued in March and September of each year. If additional positions become vacant, UNHCR issues a compendium which is added to the bi-annual compendia and invites staff members to express their interest. DHRM may advertise positions simultaneously internally and externally. Pursuant to paragraphs 12 and 14 of the PPA, positions that are classified as "Expert" are open to external applicants who possess specialized skills not readily available internally.

6. On 3 May 2015, UNHCR advertised the post in issue, in its 2015 Spring Compendium. Mr. Ross applied for the position on 16 May 2015. The Job Description for the post indicated under the heading titled "Essential Minimum Qualifications and Professional Experience Required" and "Desirable Qualifications & Competencies" the academic and professional competencies required for the post, which as relevant were: i) an advanced university degree (master's degree or equivalent) in law with emphasis in the area of international law; ii) a first-level university degree, in combination with the required work experience plus an additional two years of work experience may be accepted in lieu of the advanced university degree; iii) a minimum of 10 years (12 years for bachelor degree holders) of previous relevant work experience including a minimum of seven years of progressively responsible professional experience; iv) advanced court advocacy skills and substantive litigation experience obtained as an attorney in a law firm and/or a legal officer in an international organization; v) experience in dealing with issues related to the internal justice system of the United Nations, knowledge of the jurisprudence of the UNDT and the Appeals Tribunal as well as organizational regulatory frameworks and policies; vi) in-depth knowledge and experience of international law, including, international administrative law as practiced in international organizations (in particular in the United Nations); and vii) fluency in English and French (both oral and written).

7. Upon expiration of the deadline stipulated in the vacancy notice, DHRM carried out a comprehensive matching exercise on the basis of established criteria. In accordance with the PPA the eligibility of the internal candidates and their short-listing was carried out by DHRM on 2 September 2015. Three eligible internal candidates, including Mr. Ross specifically, were

short-listed. The minutes of the DHRM matching meeting of 2 September 2015 record that Mr. Ross met the requirements for the position.

8. External applicants were short-listed by the Talent Outreach and Acquisition Section (TOAS), DHRM, which short-listed four external applicants.

9. DHRM then presented the short-list to the manager of the vacant position (Hiring Manager) for her views on their suitability. In terms of the PPA, DHRM is not bound by the Hiring Manager's views but must nevertheless take them into account when conducting the matching exercise.

10. The Hiring Manager concluded that Mr. Ross did not meet the minimum requirements for the job opening. While Mr. Ross had worked under the supervision of the Hiring Manager on human resources and administration of justice matters, he had limited exposure to the new internal justice system and had not worked in this field for several years. His experience was not *recent* experience. The Hiring Manager found the other internal candidate was also not suitable for the position on account of his portfolio not focusing on administration of justice matters and he therefore did not possess the requisite experience. It would seem that the third internal candidate was also considered unsuitable, though this is not clear from the record.

11. Given that none of the internal candidates were deemed suitable by the Hiring Manager, only external candidates were invited for the interview. In terms of paragraph 71 of the PPA, where the appointment of an external candidate is being considered, the external and internal applicants selected by the Hiring Manager are interviewed by a panel comprised of at least three members, including the Hiring Manager or his/her designated representative, a designated representative of DHRM and an expert in the same functional area. In the present case, the Interview Panel was comprised of Frits Bontekoe, Principal Legal Adviser of the Legal Affairs Section (LAS), Elizabeth Brown, Senior Legal Officer, LAS, Sandra Muller, Senior Legal Officer, LAS, and Angelita Cecere, Head, Vacancy Management Unit, DHRM. The Interview Panel evaluated four external candidates and recommended one of them.

12. The selected candidate was a Canadian lawyer, who had at the time been serving as the joint Officer-in-Charge of the United Nations Office of Staff Legal Assistance (OSLA). Prior to joining OSLA, he was employed by the Federal Department of Justice in Canada as Crown Counsel from 2004-2011, where he litigated before federal courts and administrative

tribunals, specializing in immigration and refugee law issues. He has a law degree, a diploma in Police Sciences, two master's degrees: one in administrative law and another in public international law. He is fully bi-lingual and able to work both in English and French and is also a mother tongue Russian speaker. He is admitted to the Canadian and Quebec Bar Associations.

13. Mr. Ross holds a master's degree in international law and has passed the German Bar exam. He has three years' experience as an Associate Legal Officer with the International Organization for Migration (October 2005 to October 2008), one year experience as an Associate Protection Officer with UNHCR (September 2004 to September 2005), two years as a Legal Officer in UNHCR's Legal Affairs Section (November 2008 to November 2010), 23 months' experience as a Senior Protection Officer in UNHCR (November 2010 to July 2012 and July 2015 to October 2015) and six months' temporary assignment as a Legal Officer in UNHCR, Nairobi (January 2013 to July 2013). He claimed experience in: providing legal advice on human resources matters especially management review requests; disciplinary cases and appeals to the UNDT; representing UNHCR at the United Nations working group tasked with the reform of the Staff Regulations and Rules; coordinating the implementation of the United Nations justice reform in UNHCR; advising the Director/DHRM on Human Resources policies; familiarity with issues of privileges and immunities, international commercial law and UNHCR's field operations; and fluency in French having studied in France and having worked in French for many years and having passed the United Nations language proficiency exam in French. Unlike the selected candidate, Mr. Ross did not have advanced court advocacy skills and substantive litigation experience obtained as a member of a national bar.

14. DHRM submitted its recommendation to the Joint Review Board (JRB) to ascertain whether DHRM had followed proper procedures in making its recommendation for appointment to the High Commissioner. The minutes of the JRB's meeting of 28 October 2015 reflected that there was some debate about whether Mr. Ross should have been excluded for not having recent experience with the new United Nations internal justice system. It was noted that three external candidates had been interviewed despite not having French language skills. While a majority of members of the JRB endorsed the recommendation of the external candidate, two members considered that there had been a procedural flaw in not interviewing Mr. Ross.

15. On 6 November 2015, UNHCR announced the decision of the High Commissioner to appoint the selected candidate to the position. On 10 November 2015, Mr. Ross requested management evaluation of the contested decision to the UNHCR Deputy High Commissioner (DHC) and on 11 November 2015, he filed an application for suspension of action of the decision.

16. On 13 November 2015, the DHC responded to Mr. Ross' management evaluation request confirming the original decision and explaining to him that he had not been selected for an interview because he had not been found to meet the essential minimum qualifications and professional experience required for the position. The letter stated:

According to your fact sheet and as confirmed in your request for management evaluation, you worked on administration of justice matters for only three years with [International Office of Migration (IOM)] and for two years with UNHCR's Legal Affairs Service. This falls short of the required minimum relevant work experience. I also find that your fact sheet does not demonstrate the required "advanced court advocacy skills and substantive litigation experience" stipulated as minimum requirements.

17. Mr. Ross has not contested the DHC's specific conclusions on his non-eligibility in respect of these requirements. The DHC further informed Mr. Ross that his application for the advertised position received full and fair consideration and that the Hiring Manager was not required, under paragraph 71 of the PPA, to invite him for an interview.

18. On 17 November 2015, the UNDT issued Order No. 369 (NBI/2015) and dismissed Mr. Ross' suspension of action application on the grounds that the contested decision was no longer the subject of an ongoing management evaluation.

19. On 1 February 2016, Mr. Ross filed an application before the UNDT.

20. On 31 March 2016 Mr. Ross' fixed-term appointment expired and he was separated from service. The decision not to renew his fixed-term appointment is the subject of a separate proceeding before the UNDT and is not part of the present appeal.

21. On 2 November 2018, the UNDT issued its Judgment and found that although the recruitment process, which sought external candidates for a position that entailed litigating before the UNDT, was rational and mirrored the prevalent practice of candidate searches for legal officers of other international tribunals, Mr. Ross did not receive the fullest consideration due to him as an internal candidate. The UNDT found that the criterion of

“relevant experience” had not been applied consistently to all candidates and the criterion of “recent experience with the new [United Nations] internal justice system”,¹ which had been applied in the selection process, was actually not a criterion listed in the vacancy announcement. Therefore, the UNDT held that when Mr. Ross was excluded from being interviewed he was deprived of the “fullest regard” owed to an internal candidate. The UNDT, however, rejected Mr. Ross’ allegations of an ill motive in the assessment of his candidature and held that he had not provided evidence in support thereof.

22. The UNDT failed to make any finding regarding the DHC’s conclusion in his letter of 13 November 2015 that Mr. Ross did not meet the minimum requirements of the post.

23. The UNDT held that a procedural irregularity in a selection process would only result in a rescission of the decision not to promote a staff member when he or she would have had a significant chance of promotion. The UNDT was unable to determine if Mr. Ross would have been selected had he been interviewed and therefore was unable to order a rescission of the decision. Rather, the UNDT compensated Mr. Ross for loss of opportunity, noting he had a one-in-five chance of selection given that four other candidates had been interviewed. The UNDT awarded him USD 5,000 for material damages connected to the loss of opportunity

24. The UNDT also awarded Mr. Ross USD 4,000 as compensation for moral damages. The UNDT held that the evidentiary standard set forth in *Kallon*² did not afford Mr. Ross “sufficient notice” and “the effect of the majority holding on evidentiary requirements [wa]s not obvious”.³ Noting that the main source of evidence for moral damages was the concerned individual, and that Mr. Ross “had no reason to secure ‘independent corroboration’ at the time when he filed his application”, the UNDT considered that “it would be, therefore, permissible to rely on the affidavit filed by [Mr. Ross], which [wa]s ‘evidence’ in the sense of [Article 5(b)] of the UNDT Statute.”⁴ The UNDT also relied on its “own experience and knowledge of the human psyche as to the occurrence of a moral damage such as would normally be suffered under the circumstances”.⁵

¹ Impugned Judgment, para. 70.

² *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

³ Impugned Judgment, para. 79.

⁴ *Id.*

⁵ *Id.*

25. The UNDT dismissed various other claims of procedural unfairness made by Mr. Ross. In particular, it found that UNHCR did not violate his right under paragraph 119 of the PPA to receive relevant information when it withheld documentation and whited out the part of the JRB's minutes where it was noted that there was a procedural flaw in not interviewing Mr. Ross, and which revealed that three of the four short-listed candidates had not fulfilled the minimum qualifications of the post.⁶

Submissions

The Secretary-General's Appeal

26. The Secretary-General requests the Appeals Tribunal to vacate the UNDT's award of compensation for moral damages in the amount of USD 4,000. The Secretary-General argues that the UNDT erred in law as Article 10(5)(b) of the UNDT Statute requires evidence of harm before awarding compensation. The majority sitting *en banc* in *Kallon* held that "evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise) affirming that moral harm has indeed occurred".⁷ This principle in *Kallon* has been confirmed by the Appeals Tribunal in several subsequent appeals.⁸

27. In the instant case, the UNDT based its award for moral damages solely on Mr. Ross' affidavit without support of any independent evidence. The UNDT justified its deviation from the requisite standard of proof because the "jurisprudential developments do not afford sufficient notice to the addressees" and that "the effect of the majority holding in *Kallon* on evidentiary requirements is not obvious".⁹ According to the Secretary-General, Mr. Ross had ample notice of the requirements of Article 10(5)(b) as interpreted by *Kallon*, because the judgment in that

⁶ A staff member's right to be provided with the relevant documentation from the selection process stems from paragraph 119 of the PPA, which states that staff members who have reasons to believe that they have not been given full and fair consideration for a particular position, have the right to be provided, upon request, with information on the process which led to that particular decision. The information provided shall include the relevant documentation submitted by DHRM to the JRB or to the High Commissioner, as applicable, as well as any JRB Minutes.

⁷ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 69.

⁸ *Langué v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, para. 20; *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 69; *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 64; *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764, para. 37.

⁹ Impugned Judgment, para. 79.

case was issued on 22 June 2017 nearly one year before Mr. Ross filed his last submission on 14 June 2018.

Mr. Ross' Answer

28. Mr. Ross requests the Secretary-General's appeal be dismissed in its entirety. Mr. Ross maintains that the interpretation of *Kallon* in relation to the evidentiary standard for moral damages is unclear. In *Kallon*, the panel members disagreed about the requisite standard. The judgment upheld the UNDT's award of moral damages which was granted by the UNDT on the basis of the testimony of the applicant alone. Subsequent judgments of the Appeals Tribunal have denied moral damages on the basis of only the applicant's testimony. These judgments are based on the alleged "majority of the bench", however, four of the seven judges in *Kallon* held in that case that the applicant's testimony alone did suffice. Even the dissenting opinion in *Kallon* did not rule out that an applicant's testimony alone could suffice as the dissent stated, "while there may be some exceptions, generally speaking, the testimony of an applicant alone is not satisfactory proof to support an award of damages".¹⁰ Thus, the judges including those judges that dissented, all had agreed that it is possible for the testimony of an applicant alone to suffice.

29. Mr. Ross in effect requests the Appeals Tribunal to re-visit its judgment in *Kallon* and to overturn it. Regarding the amendment to Article 10(5)(b) of the UNDT Statute per the General Assembly resolution, it is true that the mere claim of an applicant does not suffice without evidence, however, the change only requires there to be evidence and does not require specific evidence. Such an interpretation goes well beyond the will of the General Assembly. While it is true that in some systems an applicant's own statement is not considered evidence because he or she is not considered a witness, there are many countries where the evidence of an applicant will suffice. The United Nations system has established practice that an applicant may testify to give evidence. An applicant's allegations in submissions differ from an applicant's sworn testimony given live or via an affidavit, which has a higher level of reliability and has consequences for the witness if determined to be untruthful. Holding an applicant's evidence as sufficient evidence for moral damages does not contradict the General Assembly's legislative intent that evidence be proffered to justify compensation for harm. It is not for the Tribunals to add an additional requirement of a specific type of evidence beyond what is set forth in the UNDT and Appeals Tribunal's Statutes. To do so would be to go beyond the powers conferred upon the

¹⁰ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742 (dissent), para. 12.

Tribunals by the General Assembly. Without any wording in the Statutes that indicate a specific type of evidence is required, there is no basis for applicants to discern that their own sworn testimony would not suffice as “evidence” referred to in the Statute.

30. Lastly, Mr. Ross argues that the *Kallon* judgment did not put him and other applicants on notice of the evidentiary standard for moral damages. The *Kallon* judgment is unclear and based on the judgment, it is not a conclusion readily reached that additional evidence is required beyond mere “evidence” required by the Statute. To the contrary, since the Appeals Tribunal upheld the award of compensation based solely on the applicant’s testimony, it is reasonable for one to conclude the opposite is true—that an applicant’s testimony, as sole evidence of moral harm, is sufficient. Based on the foregoing, his affidavit submitted before the UNDT is reliable evidence of his harm and the UNDT did not err in relying upon it to award him damages.

Mr. Ross’ Appeal

31. Mr. Ross argues that the UNDT erred in law in not ordering rescission of the decision despite finding the selection process was flawed as it confused the judicial standard required for rescission. The jurisprudence does not require a “causal” link between a procedural violation and a non-selection but only a “direct” link. Mr. Ross cites *Chhikara*¹¹ in support. The UNDT’s reference to the *Dualeh*¹² case is misplaced as in that case there was no causal link between the procedural violation and the non-promotion as Mr. Dualeh would not have been promoted even if the violation had not occurred.

32. Mr. Ross claims that his situation differs as he had a significant chance of being selected. In this regard, the UNDT erred in setting his chances at one in five (with four others being interviewed) as the UNDT failed to consider that three of the four persons interviewed did not fulfill the essential minimum qualifications required (particularly the language skills) and should not have been interviewed. In reality, Mr. Ross had a chance of one out of two to be selected for the post had he been given full and fair consideration. The UNDT failed to consider this when setting his damages, as the flawed selection process resulted in not only his non-selection but also his non-renewal, leading him to have larger damages, namely, loss of income as of April 2016.

¹¹ *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723, para. 48.

¹² *Dualeh v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-175, para. 17.

33. Mr. Ross requests not only the decision be rescinded, but that in order to have an effective remedy the Appeals Tribunal also reinstate him (presumably to his prior post although he does not specify in his appeal) since “his fixed-term appointment was not extended as a consequence of the non-selection”. The UNHCR’s rotation system requires the non-extension of a staff member after a set period of time, if the staff member has not secured a different post.

34. The *Chhikara*¹³ case supports the proposition that contract extensions resulting from a positive selection process should be considered in calculating compensation. In *Chhikara*, the applicant would have received a three-year contract had he been selected. Likewise, Mr. Ross would have received a three-year contract, resulting in a loss of USD 300,000 in income and pension contributions. He has attempted to mitigate his damages by applying to positions and by opening his own law firm. He claims compensation in the amount of at least half of his loss of income for three years (USD 150,000).

35. Mr. Ross submits further that the UNDT erred in law and fact in setting the amount of moral damages at USD 4,000 and in finding that there was no ulterior motive as he had been excluded from the selection process by mistake. The hiring manager was a seasoned Senior Legal Officer with over ten years’ experience working on human resources matters. Her actions were deliberate and the UNDT should have considered this in setting an amount of damages for his moral harm.

36. The UNDT also erred in fact and in law in not considering that the whiting out of the JRB minutes were part of the management evaluation process and decided it did not have power to review such malicious acts under its Statute. The right to receive information in terms of paragraph 119 of the PPA does not form part of the management review process but is an individual due process right.

37. There is only one reasonable conclusion for why the sections of the JRB minutes were redacted. The intention was to conceal information adverse to UNHCR. These intentional actions caused moral harm for which he requests the Appeals Tribunal to increase the amount of compensation for moral damages.

¹³ *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723, para. 55.

38. Mr. Ross also requests the Appeals Tribunal to refer the matter to the Secretary-General for accountability with regard to the whiting out of the documents and for conflicts of interest involving Ms. Brown and Mr. Bontekoe. The conflicts of interest occurred during the management evaluation process, namely, that both individuals were part of the hiring panel yet advised the DHC during the management evaluation process and in response to his request for a suspension of action.

39. Mr. Ross requests the Appeals Tribunal to vacate the impugned Judgment but for the finding that he was not afforded full and fair consideration and the order of USD 4,000 in moral damages. He requests that the decision not to select him be rescinded with alternative compensation in lieu of rescission be set at this Tribunal's discretion. He also requests to be reinstated and additional compensation for loss of career opportunities to be set at this Tribunal's discretion.

The Secretary-General's Answer

40. Mr. Ross has failed to demonstrate that the UNDT erred in not ordering rescission. The UNDT has discretion in granting remedies. The UNDT did not err when it did not conclude that Mr. Ross had significant chances to be selected and thus did not warrant rescission. The Appeals Tribunal in *Bofill*¹⁴ has held that the direct effect of an irregularity will only result in rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. In *Chhikara*, the staff member's interview was not correctly recorded and this Tribunal held that there was a direct link between the flawed record and the selection decision. In the instant matter, however, Mr. Ross was not short-listed for interview. Putting him in the place he would have been in had the error not occurred means he would have been short-listed for interview along with four other individuals. Thus, he would have been one of five in a pool and there is no way to know how he would have performed in that interview. The UNDT therefore correctly indicated it was difficult to foresee his chances of being selected. He, therefore, had no right to rescission and the UNDT exercised its discretion in granting remedies. In addition, Mr. Ross has failed to show that the UNDT erred in not reinstating him. He merely reiterates the same arguments that he made before the UNDT.

¹⁴ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174.

41. Mr. Ross has failed to demonstrate that the UNDT erred in calculating compensation. The UNDT was correct in finding that as one of five candidates he would have had a theoretical one in five chance of selection for which an award of USD 5,000 for loss of opportunity was appropriate. Mr. Ross in his appeal evaluates the eligibility of the other candidates, however, this is mere reiteration of his arguments already considered by the UNDT and does not establish any error. Furthermore, in accordance with the jurisprudence, the Appeals Tribunal will not lightly interfere with the UNDT's computation of damages given it is in the best position to assess the probabilities of appointment or promotion. The Appeals Tribunal solely ensures that the UNDT was guided by two elements: the nature of the irregularity and the chance the staff member would have had to be promoted had the correct procedure been followed.

42. Mr. Ross has failed to meet his burden of ill-motive and has not established that the UNDT erred in its finding that the recruitment was not marred by ulterior motives. Likewise, Mr. Ross has failed to show that the UNDT erred in not remedying the alleged due process violations in context of the management evaluation process, namely the redacting of the JRB minutes and his allegations of conflict of interest. He merely reiterates the arguments he made before the UNDT without establishing any errors.

Considerations

Mr. Ross' request for consideration by a full bench

43. Mr. Ross asserts that because the *Kallon* case is unclear as to what is the standard of evidence for moral damages, his appeal should be heard by a full bench of the Appeals Tribunal. Article 10 of the Appeals Tribunal's Statute provides that cases before the Appeals Tribunal shall normally be reviewed by a panel of three judges and shall be decided by a majority vote. Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgment is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A decision to refer a matter for consideration by a full bench is therefore a matter for the panel or the President of the Appeals Tribunal. Mr. Ross has no standing to seek consideration by a full bench. In any event, for reasons that will become apparent, this case does not raise any significant question of law in relation to the evidentiary standard for proof of moral damages.

The merits

44. Mr. Ross in his appeal seeks rescission of the contested decision and an increase in the amounts of compensation for moral injury and loss of opportunity. The Secretary-General does not dispute the finding of the UNDT that Mr. Ross was not given full and fair consideration or that he was entitled to compensation for loss of opportunity. He challenges only the award of moral damages and opposes the appeal of Mr. Ross for an increased amount of compensation for the loss of opportunity.

45. The non-selection of an unsuccessful candidate for appointment or promotion in most instances will follow from a final administrative decision selecting a successful candidate. In such circumstances, the non-selection is an implied administrative decision of the decision to select the successful candidate. The administrative decision may be reviewed on the grounds of unreasonableness, illegality, and procedural unfairness.

46. The UNDT held that the contested decision was unlawful for two reasons. Mr. Ross was not given full and fair consideration firstly because he was denied an interview and secondly due to the introduction of an inappropriate criterion of “recent” experience with the internal justice system. The UNDT categorized these as procedural irregularities. Having determined that Mr. Ross did not receive full consideration, the UNDT was required to exercise its remedial discretion in terms of Article 10(5) of the UNDT Statute. Three options are available to the UNDT in such instances: i) rescission of the contested decision; ii) specific performance; or iii) compensation for harm.

47. The UNDT held that rescission was not appropriate in this case because a procedural irregularity would only result in the rescission of a decision not to promote a staff member, if the aggrieved party had had a significant chance for promotion. In this regard, it referred to the decision of this Tribunal in *Bofill* which held:¹⁵

[t]he direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

¹⁵ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174, para. 28. See also *Dualeh v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-175, para 17.

48. The UNDT's categorization of the irregularities as procedural is not entirely correct. The application of the impermissible criterion of *recent* experience with the internal justice system was an irrelevant consideration and thus the consideration of it amounted to an illegality or substantive irregularity going beyond a mere procedural defect. Be that as it may, the principle in *Bofill* is, in any event, not restricted to procedural irregularities. It holds more broadly that any irregularity (procedural or substantive) in promotion cases will only give rise to an entitlement to rescission or compensation if the staff member has a significant or foreseeable chance for promotion. The irregularity must be of such a nature that, had it not occurred, the staff member would have had a foreseeable and significant chance for promotion.

49. But even where there is a foreseeable and significant chance of promotion, rescission may not always be the appropriate remedy. Although the non-selection may be tainted by illegality, the other legal and factual consequences of the contested administrative decision to select the successful candidate cannot be overlooked. Legal validity is never absolute and can only be described in relative terms, from which it follows that an administrative act may be invalid for one purpose (non-selection) and valid for another (selection). Thus, in certain circumstances, the discretionary remedy of rescission might justifiably not be granted in promotion cases where there may be disproportionate consequences for the selected candidate. In any event, when rescission is granted, the UNDT is obliged in terms of Article 10(5)(a) of the UNDT Statute to set an amount of in-lieu compensation that the Secretary-General may elect to pay as an alternative to the rescission. In this way, a contested administrative decision, though unlawful, is sensibly allowed to subsist for pragmatic reasons where otherwise the consequences of invalidity might be onerous or disproportionate to other affected persons.

50. The UNDT accordingly did not err in declining to rescind the contested decision. It exercised its discretion judicially.

51. This Tribunal has consistently held that a staff member who has unlawfully lost an opportunity for promotion by reason of an irregular non-selection is entitled to compensation and that setting the amount of compensation will turn on the facts of each case.¹⁶ The UNDT

¹⁶ *Niedermeyer v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-603, paras. 39-40; *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109; and *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117.

held that Mr. Ross did not have a significant chance of promotion but, had he been interviewed, only a one in five chance. It nonetheless awarded him compensation of USD 5,000 for his lost opportunity.

52. Mr. Ross' claim for additional compensation on the ground that he had a one in two chance, because some of the interviewed external candidates did not meet all the selection criteria, is unsustainable. He, too, did not meet the essential minimum requirements.

53. During the management evaluation process, the DHC pointed out that Mr. Ross' application for the post revealed that he did not meet the important selection criterion of "advanced court advocacy skills and substantive litigation experience". The relevant criterion in the job description reads: "Advanced court advocacy skills and substantive litigation experience obtained as an Attorney in a law firm and/or a legal officer in an international organization." This criterion requires the candidate to have acquired advanced court advocacy skills or substantive litigation experience either as an attorney in a law firm or as a legal officer in an international organization. The evident sense and purpose of the requirement is that advocacy skills and litigation experience are necessary to fulfil the demands of the post; and that such skills and experience should have been acquired either as a legal practitioner in private practice or as a legal officer in an international organization.

54. Mr. Ross' application and fact sheet indicate that he did not have advanced court advocacy skills and substantive litigation experience either as an attorney in practice or as a legal officer. He has experience only in providing legal advice on human resources matters and little or no experience in court work. The requisite skills and experience are essential minimum qualification requirements. Mr. Ross accordingly did not qualify to be short-listed or interviewed and thus, had no foreseeable chance of being promoted to the position.

55. Hence, in keeping with the decision of this Tribunal in *Bofill*, Mr. Ross is not entitled to any increase in the amount of compensation awarded by the UNDT. However, the Secretary-General has not appealed against the award of compensation for loss of opportunity with the result that there is no legal basis to set it aside.

56. Turning to the question of moral damages and assuming that some harm arose from the interview panel relying on an irrelevant consideration, it is common cause that the UNDT based its award of USD 4,000 solely on the evidence of Mr. Ross.

57. The evident confusion of the UNDT notwithstanding, the principle in *Kallon* is abundantly clear and has been reiterated repeatedly in subsequent judgments. The principle laid down in *Kallon* by a majority of the Judges (Judges Thomas-Felix, Chapman, Lussick and Knierim) is simply this: the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is generally not sufficient to support an award of damages. The principle has been upheld and applied subsequently in *Zachariah*, *Auda*, *Timothy*, and *Langué*.¹⁷

58. Mr. Ross' criticisms of the principle in *Kallon* merely reiterates the view of the minority (Judges Murphy, Raikos and Halfeld) in *Kallon* which held that (as in defamation or libel cases) the facts may presumptively speak for themselves or the sole evidence of the applicant may be sufficient to infer logically as a matter of evidence that harm to personality has been proved. In so far as Mr. Ross and the UNDT are confused by the outcome in *Kallon*, a different majority of the Judges (Judges Murphy, Raikos, Halfeld and Knierim) applied the evidentiary standard and concluded on the facts of the case that there was sufficient corroborating evidence, in addition to the evidence of the applicant, establishing the alleged non-pecuniary harm.

59. In the view of the UNDT, Mr. Ross "had no reason to secure 'independent corroboration'" at the time he filed his application in February 2016, which was before the judgment in *Kallon* was handed down in June 2017. There is no justification for the suggested temporal limitation upon the principle in *Kallon*. The *Kallon* Judgment interprets and enunciates the law introduced by the amendment to Article 10(5) of the UNDT Statute in December 2014, requiring compensation for harm to be "supported by evidence". The law enunciated in *Kallon* applied from that date and the Judgment merely stated the law (*ius dicere non dare*). It did not amend it. Nor was there any duty on the Secretary-General to give Mr. Ross notice of the jurisprudential developments. It is inconceivable that one party to a *lis* might be expected to educate the other about jurisprudential developments. In any event, considering that pleadings only closed in June 2018, Mr. Ross, a lawyer claiming to be expert in the internal justice system, had ample opportunity to acquaint himself with the law as stated in *Kallon* in June 2017.

¹⁷ *Langué v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, para. 20; *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 69; *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 64; *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764, para. 37.

60. Absent any corroborating evidence in addition to that set out in his affidavit, Mr. Ross is not entitled to any moral damages. Accordingly, the appeal of the Secretary-General must be upheld and the UNDT's award of moral damages be set aside.

Judgment

61. Mr. Ross's appeal under Case No. 2019-1221 is dismissed.

62. The Secretary-General's appeal under Case No. 2018-1220 is upheld and the award of USD 4,000 for moral damages in paragraph 84(a) of Judgment No. UNDT/2018/108 is set aside.

Original and Authoritative Version: English

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

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Thomas-Felix

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

(Signed)

Weicheng Lin, Registrar