UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/035
Judgment No.: UNDT/2015/053
Date: 19 June 2015
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DAHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a staff member of the International Criminal Tribunal for Rwanda (ICTR). She filed the current Application on 28 June 2013 challenging the Administration's refusal to grant her the home leave she was entitled to take in 2012.

Facts

2. The Applicant began her career with the United Nations as a French Court Reporter for the International Criminal Tribunal for Rwanda (ICTR) in 2000. She presently holds a Field Service (FS) position at Level 5 step 10.

3. In January 2012 she was diagnosed with a serious ailment and underwent surgery following which she had to undergo intensive treatment in France.

4. On 2 July 2012, while under treatment in France, the Applicant received an email[1] from BT, an ICTR Human Resource Assistant, asking her to sign her employment contract[2] effective 1 July 2012 for the period ending 30 September instead of 31 December 2012.

5. The Applicant inquired about the reason behind the change of her renewal period[3] but she received no explanation. She subsequently found out that her appointment had only been renewed for three months because she had been placed on sick leave.

6. In an email[4] sent by Ms. Sarah Kilemi, the Chief of the ICTR Division of Administrative Support Services (Chief/DASS), to one EN on 21 June 2012 it is stated that should the Applicant return to work before 1 July 2012, the duration of her renewal would be reviewed accordingly.

[1] Exhibit E of Application.
[2] Exhibit F of Application.
[3] Exhibit L of Application paragraphs 63-66.
[4] Exhibit G of Application.

7. On 14 September 2012, Ms. Carmen De Los Rios, the Chief of the ICTR Human Resources & Planning Section (Chief/HRPS) wrote an email[5] to Ms. Kilemi and the Chief of the ICTR Health Services Unit saying that the Applicant had been one of the higher ranked staff members following the staff retention exercise and acknowledging that because of her high rank, her contract was to be extended until December 2012.

8. In August 2012, having accumulated 60 days of annual leave, the Applicant inquired about taking her home leave upon the expiration of her sick leave. She was told that since her appointment was expiring September 2012, she was not eligible for home leave as she would not have the required three month working period upon return from home leave.

9. On 30 August 2012, the Applicant wrote to Mr. Pascal Besnier, the Assistant Registrar of ICTR,[6] informing him that her contract had been ended prematurely and that she was consequently unable to take her home leave. The Applicant informed Mr. Besnier of her numerous failed attempts to resolve this issue with the ICTR Administration. On 3 September 2012[7] she was instructed to wait for a response from Ms. De Los Rios. She never received the aforementioned response.

10. On 27 September 2012[8], the Applicant submitted a "Lump-Sum Option for Travel Request Form" requesting to take her home leave from 2 November 2012 to 18 November 2012. The Applicant's request was never addressed by the Administration.

11. The Applicant completed her treatment in September 2012 and resumed work in October 2012.

[5] Exhibit H of Application.
[6] Exhibit I of Application.
[7] Exhibit I of Application.
[8] Exhibit J of Application.

12. On 8 October 2012, the Applicant inquired again about taking her home leave in an email[9] she sent to Ms. De Los Rios. On the same day Ms. De Los Rios acknowledged receipt of the Applicant's email and indicated that she would get back to her shortly after evaluating her request[10].

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13. On 11 December 2012[11], the Applicant wrote a letter to Mr. Besnier, Ms. De Los Rios, and Ms. Kilemi complaining about ICTR's manner of handling her requests. In this letter she requested assistance with processing her home leave request.

14. On 20 and 21 December 2012, the Applicant was diagnosed with another ailment. Her doctors recommended that she be placed on sick leave[12].

15. In January 2013, the Applicant was placed on sick leave. The Chief of the ICTR Health Services Unit requested that the Applicant submit a more detailed medical report in support of her medical condition.

16. In February 2013, the Applicant was again diagnosed with a severe ailment as evidenced by the reports[13] of her private doctor, and Dr. MA, Chief of the ICTR Career Development and Counseling Unit.

17. Given her health condition, the Applicant was on sick leave for the following periods: from 1 January 2012 to 7 February 2012; from 23 February 2012 to 8 October 2012; from 12 December 2012 to 15 May 2013; and 15 May 2013 until the date the present Application was filed.

18. On 28 February 2013, the Applicant wrote to the Administration once again inquiring about whether she could take her home leave. She was told that she could

[9] Exhibit K of Application.
[10] Exhibit K of Application.
[11] Exhibit L of Application.
[12] Exhibit M of Application.
[13] Exhibits N and O of Application.

not be approved for home leave as she was currently on sick leave[14]. The Applicant was instead medically evacuated to Israel.

19. On 22 April 2013, the Applicant requested management evaluation of the ICTR Administration's refusal to grant her home leave in 2012[15].

20. On 7 June 2013, the Applicant received the decision from the Management Evaluation Unit (MEU). MEU determined that the Applicant's request was time-barred and therefore not receivable and that there were no exceptional circumstances that would justify an extension of the time limit[16].

Hearing

21. In *Bertucci* 2010-UNAT-062, the United Nations Appeals Tribunal (UNAT) recognized the Dispute Tribunal's broad discretion with respect to case management. UNAT stated in relevant part that:

> As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. The Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases.

22. In *Carrabregu* 2014-UNAT-485, UNAT decided that an oral hearing was not necessary because the issues for decision were clearly defined in the parties' written submissions. This Tribunal holds the same view in this case.

23. Accordingly, the Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, has determined that an oral hearing is not required in determining this case and will rely on the Parties' pleadings, written submissions and the documentary evidence in the record.

[15]Exhibit R of Application.
[16] Exhibit S of Application.

Issues

24. The issues for determination are:

a. Whether the Application is receivable; and

b. If it is receivable, whether ICTR's decision to deny the Applicant's request to take home leave in November 2012 unconditionally was lawful?

Is the Application receivable?

Respondent's submissions

25. In August 2012, the ICTR Administration advised the Applicant that since her appointment was not expected to continue beyond three months, under staff rule 5.2 (l)(i)(a), she was not entitled to take home leave. Nevertheless the Administration offered to grant her home leave on the condition that she undertook to reimburse the Organization in the event that she did not serve beyond three months. By making this offer, the Administration granted the Applicant an opportunity to proceed on home leave beyond her entitlement under the Rules.

26. The Applicant had already been informed that she could not get an unconditional grant of home leave at the time of her official request dated 27 September 2012. The Applicant indicated that she could not agree to the Administration's offer to grant her conditional home leave and, instead, insisted on being granted home leave unconditionally as stated in her email dated 8 October 2012[17].

27. On 24 October 2012, the Applicant met with the ICTR Administration to discuss a variety of issues, including her request for home leave. At this meeting, and at no time before 2 November 2012, did the ICTR Administration reconsider its

[17] Exhibit K of Application, paragraph 9.

decision taken that the Applicant would only be granted conditional home leave for the 2-18 November period requested. The minutes of the meeting indicate that, at that time, the ICTR Administration was to confirm whether the Applicant could exercise home leave to an alternate place of home leave on an exceptional basis[18].

28. Accordingly, the initial decision not to grant the Applicant her home leave was communicated to her in August 2012. Subsequently, an offer was made to authorize her home leave travel should she undertake to repay the lump-sum should she not serve for the requisite time. On 8 October 2012, she rejected this offer. As such, the initial decision of August 2012 stood as the final decision not to grant her home leave. Subsequent discussions concerning the issue in late October 2012 did not take the matter any further.

29. The Respondent submits in the alternative that an implied administrative decision was taken on 2 November 2012 not to grant the Applicant's request for unconditional home leave.

30. The case law shows that decisions need not be in writing and may be implied in certain circumstances. The effects of the implied decision of November 2012 in law is that since the Applicant's request for review was filed on 25 April 2013, five months after 2 November 2012, it was untimely and not receivable.

31. The Applicant's subsequent request for home leave, dated 28 February 2013, for different leave dates in 2013 (22 March until 5 April) did not extend the deadline for requesting management evaluation of the implied decision not to grant the Applicant unconditional home leave in 2012.

32. The new request was not the subject of the Applicant's original request for management evaluation dated 22 April 2013. Accordingly, the time started to run from the date of the implied administrative decision, 2 November 2012, and not in

[18] Annex R5 of Respondent's Reply.

March 2013 after the Applicant had submitted a new request for home leave with new leave dates.

Applicant's submissions

33. MEU's determination that the Applicant's request for management evaluation was time-barred and therefore not receivable is patently unreasonable.

34. The Administration's failure to respond to the Applicant's numerous requests with regards to her home leave is considered an administrative decision in itself, as it produces legal consequences for the Applicant. The Administration's lack of response is subject to review by this Tribunal.

35. The conclusion of the management evaluation that the Applicant's right to request a review of her case expired on 1 March 2013 as the decision on her home leave was taken in December 2012 has no basis. Although the Applicant's contractual status rendered her eligible to take home leave in 2012, the Applicant was also entitled to delay taking her home leave past 31 December 2012 as provided in staff rule 5.2(g) that stipulates:

> If a staff member delays taking his or her home leave beyond the Calendar year in which it falls due, such delayed leave may be taken without altering the time of his or her next and succeeding home leave entitlements, provided that normally not less than twelve months of qualifying service elapse between the date of the staff member's return from the delayed home leave and the date of his or her next home leave departure.

36. On 28 February 2013, the Applicant wrote to the Administration to inquire again about the status of her home leave. The Administration responded that the Applicant could not take home leave while she was on sick leave. This reply from the Administration confirms that the Administration itself considered that the Applicant was still entitled to her home leave and that her right to request it had not expired on 31 December 2012. Therefore, the Administration cannot allege that the Applicant's

right to request the review of the administrative decision refusing her home leave expired on 1 March 2013.

37. On the issue of exceptional circumstances the Applicant submits that the decision of MEU in deciding that her sick leave from 12 December 2012 to 15 May 2013 does not justify an extension of time to file a management evaluation request is "an unreasonably stringent interpretation" of what exceptional circumstances are.

38. In February 2013, the Applicant was diagnosed with a severe ailment and has since been on sick leave. The fact that the Applicant continued to send emails during this period does not imply that she was fit to initiate legal proceedings. The Applicant's capacity to write emails during this period is irrelevant.

39. MEU's conclusion that her ailment does not justify an extension of time is insensitive, abusive and manifestly unreasonable. If the interpretation of the term "exceptional circumstances" proposed by MEU is retained staff members who are still alive and who can breathe would never get an extension of time.

Considerations

40. The initial request for home leave was made in August 2012. As the Applicant's contract had not been extended for a six month working period, she was told that she was not entitled to home leave paid by the Organization. In fact her contract was extended from 1 July to September 2012 and not until December 2012 in spite of the letter from Ms. De Los Rios that her contract was to be extended to December 2012, in which case she would have been entitled to home leave.

41. When the Applicant resumed work after her sick leave in October 2012, she again inquired about her home leave. In answer to that request Ms. De Los Rios wrote to her that she would get back to her "shortly after evaluating [her] request"[19]. That last correspondence clearly does not raise the conclusion or inference that a final

[19] Exhibit K of Application.

decision, express or implied, had been taken in respect of the home leave. Nor can that correspondence be backdated to August 2012 to support the view that a final decision not to approve the home leave had been taken in August 2012. The process of making a decision on the home leave was still an ongoing one as at October 2012.

42. Further in February 2013, the Applicant again requested home leave and was informed that her application could not be approved as she was on sick leave. The answer from the Administration was not one linked to the duration of the Applicant's contract but was subject to her sick leave. It can reasonably be inferred from that last reply that no final decision, either express or implied, had been taken in respect of the home leave as of that date or that the decision was left pending on account of the sick leave.

43. Whatever the case may be the Applicant cannot be faulted if she considered the decision of February 2013 as a refusal and proceeded to file a request for management evaluation in April 2013.

Decision

44. The Tribunal finds the Application receivable.

Was ICTR's decision to deny the Applicant's request to take home leave in November 2012, without conditions, lawful?

Applicant's submissions

45. The Applicant submits that her contract was erroneously renewed for a period of three months starting 1 July 2012 instead of six months to end on 31 December 2012.

46. No explanation was given for the shortening of the extension period save for the fact that the Applicant came to know that this was done because she was on sick

leave. This was confirmed by the email sent on 21 June 2012[20] by Ms. Kilemi where she stated that "[t]he staff member is on sick leave and therefore have the extension done for 3 months and if she comes back before then the duration will be reviewed accordingly".

47. On 14 September 2012, Ms. De Los Rios wrote an email to Ms. Kilemi and the Chief of the ICTR Health Services Unit saying that the Applicant had been one of the higher ranked staff members following the staff retention exercise and acknowledging that because of her high rank, her contract was to be extended until December 2012[21].

48. It is clear from these emails that in July 2012, the Applicant should have been renewed for a period of six months that is until December 2012 but the Administration chose to split the renewal period of six months into two renewal periods of three months each because the Applicant was on sick leave.

49. In August 2012, having accumulated 60 days of home leave, the Applicant inquired about taking her home leave upon the expiration of her sick leave. She was told that since her appointment was expiring September 2012, she was not eligible for home leave as she would not have the required three month working period upon return from leave.

50. The Administration verbally acknowledged that the unjustified change in the date of expiration of her appointment was an administrative mistake.

51. On 30 August 2012, the Applicant wrote[22] to Mr. Besnier informing him that her contract had been ended prematurely and that she was consequently unable to take her home leave. The Applicant informed Mr. Besnier of her numerous failed attempts to resolve this issue with the ICTR Administration.

[20] Exhibit G of Application.
[21] Exhibit H of Application.
[22] Exhibit I of Application.

52. The Applicant was instructed[23] to wait for a response from Ms. Carmen de Los Rios. She never received this reply.

53. Thereafter the Applicant underwent several medical treatments from 12 December until 15 May 2013 and from 15 May 2013 until the date of this Application.

54. On 28 February 2013, the Applicant wrote to the Administration once again inquiring about whether she could take her home leave. She was told that she could not be approved for home leave as she was currently on sick leave[24].

Respondent's submissions

55. The ICTR Administration's decision to deny the Applicant's request to take home leave in 2012 unconditionally is lawful. The duration of the renewal of her appointment on 1 July 2012 did not prevent the Applicant from exercising her right to home leave in November 2012.

56. When the Applicant submitted her request for home leave, her appointment was expected to expire on 31 December 2012, less than three months after the date of her return from home leave. Therefore, ICTR Administration's initial decision to deny the Applicant's request was taken in accordance with staff rule 5.2(l)(i)(a).

57. Nonetheless, ICTR Administration agreed to exceptionally approve her request for home leave, but on the condition that she may have to reimburse the Organization in the event that she is not extended until 18 February 2013.

58. The Applicant was not entitled to home leave under staff rule 5.2(l)(i)(a). At the time of her request, her appointment was expected to expire on 31 December 2012. All the Court Reporters' appointments were expected to expire on 31 December 2012. ICTR Administration had no expectation to renew the appointments

[23] Exhibit I of Application.
[24] Exhibit P of Application.

of all Court Reporters, including the Applicant's appointment, as all trials had been completed. It was not until the last day of December 2012 that the decision was made to renew the Applicant's appointment for one month until 31 January 2013.

59. The reasons the Applicant was not granted home leave before 31 September 2012 are twofold: (1) she was on sick leave; and (2) she did not request home leave.

Considerations

60. The requirements for home leave are set out in staff rule 5.2 which provides in relevant part:

> (l) Under terms and conditions established by the Secretary-General, eligible staff members serving at designated duty stations having very difficult conditions of life and work shall be granted home leave once in every 12 months. Staff members shall be eligible for home leave provided that the following conditions are fulfilled:
>
> (i) The staff member's service is expected by the Secretary-General to continue:
>
> a. At least three months beyond the date of his or her return from any proposed home leave; […].
>
> b. In the case of the first home leave, at least three months beyond the date on which the staff member will have completed twelve months of qualifying service;

61. ST/AI/2005/3 (Sick leave) stipulates that:

> 3.9 When a staff member on a fixed-term appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he or she shall be granted an extension of the appointment, after consultation with the Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay and half pay under staff rules 106.2 or 206.3.

62. The Applicant's home leave was not approved in August 2012 because she would not have been expected to serve at least three months after her home leave.

The relevant issue to be decided first is whether there was an understanding that her contract should have been extended for three instead of six months.

63. It is clear from the email sent on 21 June 2012[25] by Ms. Kilemi, where it is stated "[t]he staff member is on sick leave and therefore have the extension done for three months and if she comes back before then the duration will be reviewed accordingly", that the shortened duration of the extension was motivated by the fact that the Applicant was on sick leave. In addition the averment of the Applicant that she came to know that the three month extension was a mistake of the Administration has not been canvassed or rebutted by the Respondent.

64. The non-approval of the home leave of the Applicant was based on two factors: the shortening of her extension and the fact that she was on sick leave. The Respondent did not put forward any cogent reason why the contract of the Applicant was extended for only three months. In the absence of any reason for the extension of three months the Tribunal can only conclude that this was a mistake as averred by the Applicant, a mistake that deprived her of her home leave.

65. There is nothing in staff rule 5.2 which indicates that the extension or the duration of the extension of a contract of employment is to be decided along with the sick leave entitlements of a staff member. Extension and sick leave cannot be merged to motivate a decision on whether to extend a contract or not. Sick leave entitlements are governed by staff rule 6.2.

66. The entitlement to home leave is premised on 12 months service at a designated duty station with the sole condition that the service of the staff member is expected to continue at least three months after the staff member returns to the duty station.

[25] Exhibit G of Application.

67. In *Sanwidi* 2010-UNAT-084, UNAT held that:

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.

68. When Ms. Kilemi wrote that because the Applicant was on sick leave she would be extended for only three months and that the decision would be reviewed if she resumed work, she wrongly applied staff rule 5.2. That was a procedurally incorrect approach that rendered the decision perverse.

Decision

69. The Tribunal concludes that the Respondent exercised his discretion wrongly and unlawfully deprived the Applicant of her home leave when she made the request in November 2012.

Remedies

70. Compensation is governed by articles 10.5(a) and (b) of the UNDT Statute, which stipulate:

> As part of its judgement, the Dispute Tribunal may order one or both of the following:
>
> > (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
> >
> > (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The

> Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

71. Article 10.5(b) was amended by the General Assembly General Assembly in December 2014[26]. The new article reads:

> Compensation, **for harm, supported by evidence** which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

72. Under art. 10.5(a) the Tribunal may order rescission or specific performance except "where the contested administrative decision concerns appointment, promotion or termination". In the latter situation the Tribunal must also set an alternative amount of compensation that should not exceed two years' net base salary unless there are exceptional circumstances.

73. The term "moral damages" is nowhere to be found in the Statute or the Rules of Procedure of the UNDT. However the principle of awarding compensation by way of moral damages is well entrenched in the internal justice system. In a number of cases, moral damages have been awarded by the UNDT and this principle has been approved by UNAT. Should the word "compensation" used in articles 10.5(a) and (b) be understood to include moral damages or are moral damages a separate and distinct remedy that can be awarded in addition to compensation?

74. In *Kasyanov* UNDT/2010/026 Adams J. observed:

> In my view, the word "compensation" should be given the meaning it has in ordinary parlance without introducing notions of damages developed in various domestic jurisdictions. It comprehends the duty to recompense a staff member as nearly as money can do so for the breach of the contract and the direct and foreseeable consequences of

[26] General Assembly resolution 69/203.

> that breach, whether economic or not. Further refinement is neither necessary nor useful.

75. It is clear from the reasoning of the learned Judge that compensation should be interpreted to include both pecuniary and non-pecuniary loss.

76. However in the case of *Gakumba* 2013-UNAT-387, UNAT seems to be making a distinction between an award of compensation under articles 9.1(a) and (b) of the Statute of the Appeals Tribunal, articles that are mirrored verbatim in articles 10.5(a) and (b) of the UNDT Statute. UNAT determined that the circumstances of the Gakumba case supported the UNDT "finding of humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member, which led the UNDT to award the reasonable amount of seven months' net base salary as compensation".

77. UNAT then analysed the nature of the compensation permissible under articles 9.1(a) and (b).

> This compensation [for humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

78. What UNAT is saying is that compensation under art. 9.1(a) is awarded for a prejudice suffered as a result of an action taken by the administration on the contract of employment and should not be assimilated to moral damages. Compensation by way of moral damages under art. 9.1(b), which is known in the civil law system as "dommage moral" and in the common law system as "non-pecuniary loss" or non-

economic loss", is awarded at the discretion of the court. Moral damages are not punitive in nature but are meant to compensate a litigant for physical suffering, mental anguish, loss of reputation, humiliation, and other causes. Moral damages are not solely a question about money but a warning in the field of employment law to employers on how to treat people.

79. In *Eissa* 2014-UNAT-469, UNAT repeated what it had determined in *Gakumba* on the nature of the two heads of compensation that are provided in articles 10.5(a) and (b) of the UNDT Statute by holding:

> An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS Spokesperson. It is not the same remedy and does not serve the same purpose.

80. UNAT also held in *Eissa* that "[m]oral damages arise from a breach of a fundamental nature, whether the breach stems from substantive or procedural irregularities. Either type of irregularity may support an award of moral damages.

81. In *Hersh* 2014-UNAT-433-Corr.1, UNAT held that "[a]n award of moral damages for a breach of a staff member's rights, especially when the breach is of a fundamental nature as found by the UNDT, does not require evidence of harm or a finding of harm".

82. The amendment to art. 10.5(b) requires evidence of "harm" before compensation is granted. One issue that arises with the amendment is whether the amendment should be made to operate retroactively. Would it be applicable to cases filed before the amendment came into force and thus compel an applicant to adduce evidence even where there is breach of fundamental rights? The question assumes all

its importance as UNAT has come out strongly against the retroactive application of rules or regulations even when they would have benefitted an applicant[27].

83. The Applicant filed her case on 28 June 2013. The Tribunal considers that it would be unfair to apply the amendment retroactively to the case of the Applicant as indeed to all cases filed before December 2014. However the issue of whether the amendment should be made to operate retroactively is of no major consequence. The Tribunal takes the view that even without that amendment the established jurisprudence of UNAT indicates that evidence of prejudice is required before an award of moral damages is made[28].

84. What UNAT seems to be saying in *Hersh* is that the breach of the fundamental rights of an individual must be established first. Then if the breach is so patent the evidence of the harm is contained in that patent breach. This is supported by the views expressed in *Asiarotis* 2013-UNAT-309 where UNAT held "[w]here the breach is of a fundamental nature, **the breach may of itself** give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee" (emphasis added). But there must be evidence from which this conclusion may be derived. *Hersh* cannot be interpreted to mean that no evidence is required for an award of moral damages when there is a breach of a fundamental right.

85. In *Assiarotis,* UNAT set out the principles that should guide the UNDT in the award of moral damages:

> To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What

[27] See *Robineau* 2014-UNAT-396 and *Hunt-Matthes* 2014-UNAT-483.
[28] See for example *Wu* 2010-UNAT-042; *Marsh* 2012-UNAT-205; *Kozlov and Romadanov* 2012-UNAT-228; *Wu* 2012-UNAT-042; *Kasyanov* 2012-UNAT-076; and *Diallo* 2014-UNAT-430; *Andreyev* 2015-UNAT-501.

can be stated, by way of general principle, is that damages for a moral injury may arise:

> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.

86. In *Leclercq* 2014-UNAT-429, UNAT held that:

> ST/AI/2005/3 ("Sick Leave") establishes that an appointment shall be extended for the period of certified illness up to the maximum entitlement to sick leave. The Administrative Instruction clearly states that sick leave is an entitlement. Credit for material damages for non-renewal and moral damages may accrue while the staff member is on sick leave because sick leave is not granted in compensation for the loss of earning or loss of expectations but because of incapacitation for

> service by reason of illness that continues beyond the date of expiration of the appointment.

87. In the light of the principles laid down by UNAT, the Tribunal has to consider whether there was a breach of the Applicant's substantive entitlements arising from substantive and/or procedural irregularities and whether the breach was of a fundamental nature.

88. In the present matter the Tribunal relies on the pleadings and the averments of the Applicant. From the pleadings the following substantive irregularities are very apparent: the processing of the extension of her contract and her home leave entitlement was done in an amateurish manner and in total disregard of the rules governing home leave and sick leave; the mistake in the duration of the extension of her contract remained without explanation; the delay in responding to her requests on home leave; the failure of the administration to get back to the Applicant in spite of an undertaking to that effect and the complete disregard and silence in the face of her impassioned plea in the letter she sent to Mr. Besnier.

89. From these averments the reasonable inference is that there was a breach of the substantive entitlements arising from the Applicant's contract of employment resulting from a number of substantive and procedural irregularities. The Tribunal does not consider that evidence establishing the existence of moral injury must compulsorily be *viva voce* evidence. Such a fact can be gathered and/or inferred from the pleadings and documents produced by a party.

90. The Tribunal considers that if the pleadings contain a clear showing of "harm" as in the case of the Applicant that is evidence enough to grant an award for moral damages.

Judgment

91. Based on the circumstances of the case, the Tribunal awards the Applicant moral damages in the amount equivalent to three months' net base salary.

92. Additionally, the Tribunal directs the Respondent to grant the Applicant her home leave. In the event that the Applicant is no longer with the Organization, the Respondent is directed to pay her the equivalent of her home leave entitlement.

(Signed)

Judge Vinod Boolell

Dated this 19th day of June 2015

Entered in the Register on this 19th day of June 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi