UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/002
Judgment No.: UNDT/2018/099
Date: 5 October 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

HAQ and KANE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Alan Gutman, ALS/OHRM, Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 9 January 2017, two Applicants, the former Under-Secretary-General for Field Support ("USG/DFS"), and the former High Representative of Disarmament and former Under-Secretary-General for the United Nations Office for Disarmament Affairs ("USG/UNODA"), filed an application in which they contest:

> The rejection by the Secretary-General 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.

2. As remedies, the Applicants request the United Nations Dispute Tribunal to find that the breach of duty of care entailed the responsibility of the Organization and that the Applicants should be duly compensated for the consequences in the amount of two years' net-base pay as monetary and moral damages.

3. In his reply, the Respondent contends that the application is not receivable and without merit.

Facts and procedural background

4. Both Applicants are long serving career international civil servants who, during the course of their careers, served at progressively higher levels of responsibility and were requested and agreed to serve at the Assistant Secretary-General ("ASG") and Under-Secretary-General ("USG") levels prior to their separation from service.

5. Applicant Ameerah 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. In 2004, when having 28 years of contributory service, she was appointed Deputy Special Representative of the Secretary-General for the United Nations Assistance Mission to Afghanistan ("UNAMA") at the ASG level. 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 USG level. From 2012 to 2015, she served as USG for the United Nations Department of Field Support at New York Headquarters. The Applicant retired in January 2015.

6. Applicant Angela Kane joined the United Nations Secretariat in 1977 at the P-2 level as Editor/Writer in the Department of Public Information in New York. She subsequently served as Political Affairs Officer in the Executive Office of the Secretary-General, later on with UNDP, with the United Nations Population Fund ("UNFPA") in Jakarta, Indonesia, with the Department for Disarmament Affairs, and with the Executive Office of the Secretary-General. In 1995, she was promoted to the D-2 level as Director, Department of Public Information, and then as Director, Department of Political Affairs. In 2002, when having 25 years of contributory service, she was appointed at the ASG level as Deputy Special Representative of the Secretary-General for the United Nations Mission in Ethiopia and Eritrea ("UNMEE"). In 2004, she was appointed to ASG first as Deputy in the Department of General Assembly and Conference Management ("DGACM") and in 2006 as Deputy in the Department of Political Affairs ("DPA"). In 2008, she was appointed USG for the Department of Management ("DM"). In 2012, she served as USG and High Representative of the Office of Disarmament Affairs until August 2015 when she retired.

7. During their tenure at the ASG level, both Applicants were required to give up their permanent contracts, forfeiting the right to return to service at the D-2 level upon completion of their higher level fixed-term appointments. New fixed-term

appointments were issued with no break in service. The new appointments set out the terms and conditions of employment including remuneration and emoluments. In spite of references to specific applicable provisions of the Staff Regulations and Rules, neither these initial, nor any of the subsequent letters of appointment, contained any reference to pension entitlements or to the specific exception contained in the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund ("UNJSPF Regulations") imposing a cap on the pensions of ASG and USG appointees.

8. In 1985, the United Nations General Assembly adopted a number of cost saving amendments to the UNJSPF Regulations, including the imposition of an exception to the way retirement benefits are calculated for staff who retire at the ASG and USG levels. A cap was imposed equivalent to either 60% of the participant's pensionable remuneration or to the maximum benefit payable to a D-2, top step retiring at the same time. This decision was codified in art. 28 (d) of the UNJSPF Regulations. The cap specifically targets long serving career staff members who are already participants in the Pension Fund ("UNJSPF"). The cap does not apply to increases in pensionable remuneration and hence levels of contributions at the higher levels.

9. Upon submission of their separation documents, both Applicants eventually received communications from the UNJSPF notifying them of their entitlements. Both Applicants were surprised to learn that their retirement benefits were equivalent to what they would have received at the D-2 level in periodic benefits and at the P-5 level for lump sum withdrawals, due to the regressive nature of the benefit calculation for those serving beyond the mandatory age of separation of 60 and the effects of the cap on benefits accumulated during their previous 10 and 13 years of service, respectively, at the higher levels.

10. Following inquiries to the UNJSPF, the Fund advised that the UNJSPF Regulations had been correctly applied and that the Pension Board was not empowered to make any adjustments. Applicant Ms. AH requested a review of that

determination by the Standing Committee of the UNJSPF, but the result was unchanged.

11. On 26 May 2016 the Applicants addressed a letter to the Secretary-General who had personally appointed them to their positions. The letter made specific reference to the regressive features of the UNJSPF Regulations and the particular effects for those long-term staff serving at the ASG and USG levels, including the terms of Article 28 (d). They specifically queried why the information had not been disclosed to them that while paying significantly higher contributions, their pension benefits were in effect being reduced and why other options that were available to prevent this had never been explained to them or offered as alternatives. The Applicants concluded by asking the Secretary-General to recognize his obligation to mitigate the adverse effects on the Applicants.

12. On 7 July 2016, the Under-Secretary-General for Management ("USG/DM") replied on behalf of the Secretary-General. The letter set out an explanation of the application of Article 28 and noted that every staff member had the responsibility to look into his or her respective situation. It concluded that since their entitlements had been correctly calculated there was no basis for the Organization to pay any compensation.

13. On 3 August 2016, the Applicants met with the UNJSPF in order to better understand some of the technical issues raised in the Secretary-General's response. They queried why the UNJSPF Benefit Estimator and annual statements from the UNJSPF failed to take into account the effect of the Article-28 cap and were told that calculation for the ASG and USG levels had to be inputted manually. They also cited the provisions of art. 21(a) of the UNJSPF Regulations which offers the option of not participating in the UNJSPF. The UNJSPF agreed that art. 21 indeed allowed non-participation but were unclear why it was not applied in the Applicants' case.

14. The Applicants contacted the United Nations Office of Mediation Services ("UNOMS") to try to solve the matter informally. On 8 August 2016, the

Management Evaluation Unit ("MEU") agreed to extend the 60-day deadline for management evaluation pending the efforts of UNOMS to pursue an informal resolution.

15. On 1 November 2016, following unsuccessful mediation of the case, the Applicants submitted a joint request for management evaluation of the Secretary-General's decision to reject their claim and to take no further action.

16. On 10 November 2016, the Officer-in-Charge ("OiC") of MEU replied to the Applicants contending that their request was not receivable.

17. On 9 January 2017, the two Applicants filed the present application.

18. On 10 January 2017, the Dispute Tribunal transmitted the application to the Respondent and the case was assigned to the undersigned Judge.

19. On the same day (10 January 2017), the New York Registry acknowledged receipt of the application and transmitted it to the Respondent, instructing him to file a reply by 9 February 2017.

20. On 9 February 2017, the Respondent filed a reply in which he claims that the application is not receivable and without merit.

21. By Order No. 45 (NY/2017) issued on 17 March 2017, the Tribunal ordered the Applicants to file a response to the Respondent's contentions on the alleged non-receivability of the application, and also ordered the parties to attend a Case Management Discussion ("CMD") on 5 April 2017.

22. On 31 March 2017, as per Order No. 45 (NY/2017), the Applicants filed their response to the Respondent's contentions on the alleged non-receivability of the application.

23. Upon the request of Counsel for the Applicants, by Order No. 66 (NY/2017) dated 31 March 2017, the Dispute Tribunal postponed the CMD until 19 April 2017.

24. At the CMD held on 19 April 2017, one of the Applicants, Ms. Haq was present in person, while the other Applicant, Ms. Kane, participated via telephone from Vienna. Both Applicants were assisted by their Counsel, Mr. George Irving, who was present in person. The Respondent was represented by Ms. Christine Graham, in Mr. Alan Gutman's absence, and Ms. Pallavi Sekhri (both present in person). At the Tribunal's enquiry, Ms. AH confirmed that her separation date was 31 January 2015 and Ms. AK stated that her separation date was 31 August 2015. Pursuant to art. 18.2 of the Dispute Tribunal's Rules of Procedure, the Tribunal requested the parties to provide additional information and supporting documentation considered relevant for a fair disposal of the proceedings, as reflected in the orders set out below. The Tribunal further requested the Applicants to indicate whether they wished to adduce additional evidence, including oral evidence regarding their requests for moral damages. The parties agreed to submit the information and documentation by 17 May 2017 after which each party would have the option of providing comments on the other parties' submission by 2 June 2017.

25. By Order No. 81 (NY/2017) dated 21 April 2017, the Tribunal provided the following orders:

> … By […] 17 May 2017, the Applicants [were] to provide information and supporting documentation on whether any of them had contested the decision of the [UNJSPF] concerning their pension entitlements by filing an appeal before the UNJSPF Committee of UNJSPF for consideration during its 15 July 2015 meeting and, if so, if the outcome had been further appealed to the [United Nations] Appeals Tribunal.
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> … By […] 17 May 2017, the Respondent [was] to provide the available information and supporting documentation on:
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> > a. The correspondence between the [MEU] and the [UNOMS] regarding the Applicants' cases related to the extension of deadline to file the management evaluation requests;
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> > b. The rules of procedure and the methodology according to which the UNJSPF calculates a staff member's pension; and

> c. How the calculation of the 60 percent of the pensionable remuneration for an Under-Secretary-General was made on 31 January 2015 and on 31 August 2015, respectively, and how the calculation of the maximum benefit payable at the standard annual rate to a D-2 level staff member retiring on 31 January 2015 and 31 August 2015, respectively, was made;
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> … By […] 2 June 2017, each party [was] to comment on the other party's submissions due on 17 May 2017 and provide information on whether s/he wishes to adduce any further written and/or oral evidence.

26. On 17 May 2017, the parties filed their submissions as per Order No. 81 (NY/2017). Counsel for the Applicants requested that a hearing be held to give oral evidence on moral damages, preferably after 20 June 2017, when both Applicants could be present in New York.

27. On 24 May 2017, the Respondent filed additional documentation as evidence.

28. On 2 June 2017, each of the parties filed their comments to the other party's 17 May 2017 submission in accordance with Order No. 81 (NY/2017). The Applicants made no further request for written documentation, but reiterated their previous request for an oral hearing on the issue of moral damages. The Respondent, however, requested the Tribunal to decide on the receivability and the merits of the case on the basis of the written submissions of the parties, arguing that "[…] [i]t would not be in the interest[…] of judicial economy to hear evidence on moral damages absent a finding of liability", as the Tribunal may not compensate the Applicants for moral damages in the absence of a breach of a legal right.

29. On 8 June 2017, by Order No. 114 (NY/2017), the Tribunal instructed the parties to participate in a hearing in the courtroom of the Tribunal in New York on 28 June 2017 on the limited issue of the Applicant's alleged moral damages.

30. On 28 June 2017, both Applicants, together with their Counsel, Mr. George Irving, and the Respondent's Counsel, were present at the hearing. Following the testimonies of both Applicants, the parties' Counsel provided brief closing

arguments. As requested by the Applicants' Counsel and agreed by the Respondent's Counsel, the Tribunal allowed the parties to file written closing submissions on both receivability and the merits based on the evidence already before the Tribunal. The Tribunal informed the parties that the transcripts of the hearing would be requested and made available to both of them for the preparation of their written closing submissions. Both parties agreed to submit their written closing submissions by 18 August 2017, a deadline which was to be extended, if requested, depending on the date the transcripts were made available to the parties.

31. By Order No. 126 (NY/2017) issued on 29 June 2017, the Tribunal instructed the New York Registry to make the necessary arrangements to have a written transcript prepared and upon receipt to be made available to the parties, and ordered the parties to file, by 18 August 2017, their written submissions based only on the evidence already before the Tribunal addressing receivability and the merits.

32. The transcripts were made available on 18 July 2017 and were uploaded to the eFiling portal on 1 August 2017.

33. The parties filed their closing submissions on 18 August 2017.

Applicants' submissions

34. The Applicants' principal contentions read as follows (emphasis and footnotes omitted):

> i) Receivability
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> … The Secretary-General in his reply to the Applicants denied them compensation for his failure to afford the proper duty of care resulting in substantial economic harm. The decision was unambiguous and final. Nevertheless, the later management evaluation posited that the submission was not receivable since the Applicants had not identified an administrative decision that could be reviewed.
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> … The contested decision authorized by the Secretary-General acknowledged that the grievance of the Applicants had been reviewed by the Secretary-General himself and closely coordinated with the

Executive Office of the [Secretary-General], Office of Legal Affairs [("OLA")], Department of Management offices and the [UNJSPF] Secretariat. It noted that since the pension benefits of each Applicant were calculated in accordance with the [UNJSPF Regulations, no compensation was warranted for the outcome. The management evaluation reaffirmed the argument that this was a matter within the purview of the [UNJSPF] and that no discrete contestable administrative decision by the Secretary-General had been made. Neither communication addressed the argument of the Applicants that the principles of good faith and transparency had not been adhered to by the Respondent.

… The responses of the Administration rest on a misunderstanding of the gravamen of the Applicants' claim. They clearly stated they were not contesting the calculation of their benefits by the Pension Fund, but rather were contesting the decision of the Secretary-General as Chief Administrative Office[r] of the Organization not to address and to rectify his failure to advise them of the negative implications for their pensions of the contractual arrangements for higher level service repeatedly presented to them or to disclose the alternative contractual solutions that existed to avoid these negative repercussions. In failing to afford this basic duty of care, the responsibility of the Organization is entailed for the consequences.

… Appointments at the levels of [ASG] and [USG] under [s]taff [r]egulation 4.5 are made "under such terms and conditions consistent with the present [Staff] Regulations as the Secretary-General may prescribe." Both Applicants were made to give up their permanent appointments at the D-2 level and were given new successive fixed term appointments upon their assumption of duties at the [ASG] and subsequently [USG] levels. None of their appointments made reference to the change such service triggered in terms of how their pensions would eventually be determined. Consequently, there was no disclosure of alternative modalities that could have been employed to avoid the negative financial consequences of their higher level service. While increased pensionable remuneration for staff at other levels resulted in corresponding increases in retirement benefits, the Applicants were unknowingly being penalized. The Applicants would eventually expend hundreds of thousands of dollars in contributions based on increased levels of pensionable remuneration without seeing any change in their entitlements. In effect, the use of the term "pensionable remuneration" for their [ASG] and [USG] salaries was itself misleading.

… Following their separation from service in 2015, and upon being apprised of the unexpected and regressive effects of their service at the higher levels, the Applicants began a process of extensive inquiries and consultations during which it became clear that the specific contractual arrangements that had been used to extend their services required the [UNJSPF] to apply these provisions. They eventually brought this to the attention of the Secretary-General in order to mitigate, in an equitable manner, the effects of the failure to provide full disclosure that occurred at the time he appointed them to these positions.

… The Applicants contend that while the Respondent has no discretion over the application of the [UNJSPF's] Regulations, he does have discretionary authority over the contractual modalities of staff and a clear duty of care to ensure the rights of staff members are respected ([staff regulation] 1.1 (c)). The requirement of good faith and fair dealing is an inherent part of this obligation. The refusal to recognize and address the failure to act in accordance with this principle is an appealable administrative decision that directly affects the terms and conditions of employment.

… What constitutes an appealable administrative decision has been the subject of jurisprudence by the former [United Nations] Administrative Tribunal [("UNAdT")] and by the [United Nations] Appeals Tribunal. The [Appeals Tribunal] held in *Lee* [2014-UNAT-481, para. 49] [that] the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

… The Applicants maintain that by refusing to rectify the negative effects of an adverse contractual arrangement taken in violation of their right to good faith and fair dealing, the Respondent has taken a final decision with direct legal consequences of their terms of appointment. This administrative decision is appealable.

… The principle of good faith and due process in granting access to justice recognizes the right to a fair hearing on issues that are fundamental to the employment relationship. The date of an administrative decision is based on objective elements that both parties ([A]dministration and staff member) can accurately determine. Time limits for contesting decisions run from the time the staff member knew or should have known of the adverse action. The authority to rectify the adverse consequences of the Applicants' service rests with

the Secretary-General and this authority was exercised in a final decision to reject the Applicants' claims after they had been informed of the effects on their pensions. Although this relates back to contractual arrangements for past service, this is more than a reiteration of an earlier decision.

… The Applicants' damages were manifested at the time when a determination of their entitlements was made. This was only communicated to them when their service was concluded. These consequences could not have been known at the time their initial contracts of employment were concluded, precisely because of the lack of transparency that occurred. The Respondent should not be shielded from liability because of his own past failure to disclose information having a future direct legal impact on the Applicants' retirement income.

… While the Appeals Tribunal has not had an opportunity to pass judgment on this specific issue, a case from the former [UNAdT] is instructive. In the case of [UNAdT Judgement No. 1495, *Annan* (2009)] the Administrative Tribunal reviewed the claim of a former Secretary-General of the United Nations for payment of accumulated benefits for the period he served as Secretary-General, which had been withheld by the [UNJSPF]. A number of findings are relevant.

… The UNAdT found that the cause of action arose not earlier when the contested interpretation was first elaborated, but only after the applicant had received notice and questioned the payment of his accumulated benefits since, "a decision could not validly be reached until a formal request for payment of accumulated benefits was made..."

ii) On the [m]erits

… The UNAdT, in finding in favour of the applicant, based its decision in *Annan* on the following considerations:

> "... the Tribunal is guided by the principle, well established in its jurisprudence, that in complex matters relating to pensions, "the Administration has to be especially careful" (Judgement No. 1185, *Van Leewen* (2004) and transparent (Judgement No. 1091, *Droesse* (2003)).

… The UNAdT found further in *Annan* that the Tribunal should also be guided by the principle that decisions should be construed as having a lesser rather than a greater adverse effect […] on the rights of staff.

… In applying these principles to the present case, the Applicants submit that the record demonstrates that the Respondent failed in his duty of care insofar as he failed to apprise the Applicants of the full implications for their pensions of their continued service under their new contracts or to advise them that other contractual modalities were possible to avoid the negative effects of the [UNJSPF] rules they failed to disclose.

… The UNAT has recognized the duty to pay due regard to the interests of staff and to disclose any adverse consequences of its actions. The discretionary power of the Respondent is not unfettered since he "has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and employee is implied in every contract of employment. And both parties must act reasonably and in good faith."

… The Respondent tries to avoid accountability by arguing that this was a matter for the [UNJSPF] and any claims over the administration of benefits should be submitted through the procedures set forth in the UNJSPF Regulations. This argument is misplaced as the Applicant[s] are not arguing that their benefits were miscalculated.

… The Respondent also argues that he is relieved of any responsibility for the ensuing negative effects of the cap on benefits since it was the Applicants' responsibility to familiarize themselves with the applicable UNJSPF Regulations and Rules. This begs the question of why the Administration should be relieved of any obligation to disclose the potential adverse effects of the contractual arrangements it was proposing since it is presumed that the Administration is in a better position to know and disclose such details in drafting its employment contracts.

… In addition, the general information that was provided is misleading. The Respondent no longer provides staff with copies of the UNJSPF Regulations but merely refers to the [UNJSPF] website for information. The website, however, is no more transparent on this issue. The information disseminated to participants on the calculation of their benefits is not applicable to the Applicants' service since it does not mention that a cap may affect the general formula for calculating benefits which according to the website is based on the staff member's final average remuneration, defined as the average of pensionable remuneration for the highest 36 months of the last five years of service […]. No relevant exceptions are noted and no reference is made to the "cap". The [International Civil Service Commission, ("ICSC")] website indicates only that pensions are

calculated on the basis of the staff member's final average remuneration […], which is not the case for the Applicants.

… While the contracts issued to the Applicants refer to the UNJSPF Rules, they draw no specific attention to any particular provision that may affect their future benefits. On the other hand, when the Staff Rules are referenced, specific mention is made to the paragraphs in the [Staff] Rules that the Administration deems to be of special interest. It is reasonable for staff to conclude that any relevant provisions of the UNJSPF Regulations would similarly be brought to their attention.

… Nor does the [UNJSPF] Fund itself disclose this information in a timely manner. The annual pension statements furnished to staff merely list their own contributions as lump sums not segregated by monthly amounts suggesting that these are being accumulated as future benefits, and no information is provided on how future benefits will in fact be calculated […]. The final calculations of benefits are not provided until after separation from service, so that there is a complete lack of transparency on the negative effect of any caps or of long service. The same is true of the debriefings or documentation that are given to staff prior to their retirement. No mention is made of the cap. Consequently, absent extraordinary measures to ascertain and understand the workings of the benefits system, no reasonable person could be expected to anticipate what effect the individual UNJSPF Regulations might have on their future retirement income.

… The Administration, however, is held to a higher standard. In particular, they are expected to know, advise on and follow the [UNJSPF] Regulations, and how they affect staff. This includes not only the knowledge that under [art.] 28 [of the UNJSPF Regulations] retirement benefits are capped at the D-2 level for those with long service who serve above that level (and at the P-5 level for lump sum withdrawals), but also that participation can be expressly excluded from participation in the UNJSPF under [art.] 21 [of the UNJSPF Regulations] by stipulating it in the terms of the contract […]. This specific provision is carried over into [s]taff [r]ule 6.1. On information and belief; this modality has in fact been used to the benefit of other staff members whose retirement benefits from other sources might otherwise be adversely affected.

… The net result is that the Administration knowingly proceeded to withdraw hundreds of thousands of dollars in pension contributions from each of the Applicants, knowing that the monies would never come back to them. This result could have been avoided by excluding pension coverage or by providing a brief break in service and allowing

them to get their contributions back through a withdrawal settlement. None of these options were identified or discussed. More egregiously, the Applicants were denied the opportunity of making informed career choices based on a clear exposition of their emoluments and of the effects of further service on their pensions. This is an obvious concern for long serving staff as retirement approaches.

… The [United Nations] Appeals Tribunal has set out a standard for judging the reasonableness of [a]dministrative action, namely that it be legal, rational, procedurally correct and proportionate. Furthermore, as held in *James* UNDT/2009/025, para. 28, "[i]t is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process." The actions of the Respondent in this case do not reflect the best practices of a good employer.

iii) Remedies

… The Respondent confuses the request made to the Secretary-General for a just and equitable remedy by suggesting that no equitable compensation is payable under the terms of appointment and that there are no legal grounds to pay compensation. While the Secretary-General was invited to find an equitable remedy for the Applicants' situation, their claim was for a breach of the duty of care, which is a contractual issue. The [United Nations] Appeals Tribunal has recognized such a duty for reasons of equity and good faith. Given the inability to rectify the contractual result given the passage of time, the only appropriate remedy is compensation. The purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. The legal remedy for contractual breach of the duty of care is to make the Applicants whole by addressing the negative consequences of the dereliction.

… This can be determined by approximating the financial disadvantage in which the Applicant[s] were placed, i.e., the effective loss of their own contributions to the UNJSPF which could have been avoided through the disclosure and application of appropriate alternative contractual arrangements. Given the period of time involved, compounded interest should be added since the effects of the breach of the Applicants' rights also entails the lost resources which could have been used to their benefit.

… A breach of due process can separately warrant the award of moral damages. In *Asariotis* 2013-UNAT-309, para. 36, the Appeals Tribunal stated, by way of general principles:

> To invoke its jurisdiction to award moral damages, the [United Nations Dispute Tribunal] 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 can be stated, by way of general principle, is that damages for a moral injury may arise:
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> > (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 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 [Dispute Tribunal] is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

… The breach of the Applicants' right to full disclosure of the terms of their appointments, thereby depriving them of the opportunity to make informed choices concerning their careers, warrants the payment of additional moral damages.

… The Applicants estimate the total loss from the violation of their rights at two years' net base pay given the considerable financial resources affected.

iv) Conclusion

> … Had the Applicants been advised of the full implications of their continued service for their future retirement income, they could have considered alternative scenarios including the option on non-participation offered in the UNJSPF Regulations. The failure of the Respondent to honor his duty of care deprived the Applicants of this choice and the results have entailed significant adverse effects.
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> The Applicants request the Tribunal to find that the breach of the proper duty of care entailed the responsibility of the Organization and that the Applicants should be duly compensated for the consequences in the amount of two years' net base pay as monetary and moral damages.

Respondent's submissions

35. The Respondent's principal contentions are as follows (emphasis and footnotes omitted):

> … In the letter to the Secretary-General, the Applicants had requested compensation for the alleged failure to disclose that [art.] 28(d) of the [UNJSPF Regulations] caps the periodic benefits payable to staff members serving at the [ASG] and [USG] levels.
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> … The Application is not receivable. First, the Application is time-barred. The Applicants did not request management evaluation within the statutory period of staff rule 11.2(c). The Applicants' letter to the Secretary-General is in substance a request for administrative review of the means by which they were appointed to the ASG level. [Ms. AH] was appointed to the ASG level in 2004. [Ms. AK] was appointed to the ASG level in 2002. The deadline for request for administrative review expired 60 days after their respective appointments at the ASG level. Furthermore, [art.] 8(4) of the [Dispute Tribunal's] Statute operates as an absolute bar to hearing an appeal filed more than three years after the contested decision.
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> ... If the 7 July 2016 letter from the [USG/DM] is considered as the contested decision, the Application remains time-barred. The deadline for requesting management evaluation of the USG/DM's correspondence expired on 5 September 2016. The Applicants submitted their request for management evaluation on 1 November 2016. As no official with delegated authority had suspended the

deadline for management evaluation pending efforts for informal resolution conducted by [UNOMS], the Application is not receivable.

... Additionally, the Application is not receivable as the Applicants do not identify an administrative decision. The Applicants received the correct pension. In effect, the Applicants are seeking a discretionary payment made under the guise of equity; that is, a payment not based on a legal obligation or right set out in their terms of appointment. As such, a decision to not make such a payment does not constitute an administrative decision pertaining to the terms of appointment or contract of employment.

... Second, should the Dispute Tribunal find the Application receivable, it has no merit. The Applicants' letters of appointment fully complied with the provisions of the [S]taff [R]egulations and [R]ules on the issuance of letters of appointment and the enrollment of staff members into the [UNJSPF]. Staff members are charged with knowledge of the Organization's legal and regulatory frameworks. The [UNJSPF Regulations] detailing their entitlements at the ASG and USG levels were readily available to the Applicants.

... Lastly, there is no remedy available to the Applicants. The Applicants have suffered no harm from the USG/DM's letter. They had no legal right to receive a discretionary payment.

SUBMISSIONS ON RECEIVABILITY

The Application is not receivable *ratione temporis*

… The Application is not receivable. The Applicants did not request management evaluation within the 60 day statutory period of staff rule 11.2(c).

… As a mandatory first step in the appeals process, a staff member must request management evaluation of a contested decision, in accordance with [s]taff [r]ule 11.2. This request should be lodged within 60 days of the staff member receiving notification of the contested decision. The Dispute Tribunal does not have the power to alter the deadline for requesting management evaluation. Furthermore, [art.] 8(4) of the Dispute Tribunal[']s] Statute operates as an absolute bar to hearing an appeal if more than three years have elapsed since the contested decision. This three year limitation cannot be waived at the request of an applicant.

... The Secretary-General offered [Ms. AH] an appointment to the ASG level in 2004, and [Ms. AK] in 2002 […]. Though the Applicants agreed to further appointments afterwards, the alleged omissions

concerning their pension entitlements at the ASG level occurred upon their offers of appointment in 2004 and 2002, respectively. As such, the 60 day period to request management evaluation and the three year period under [art.] 8(4) of the Dispute Tribunal[’s] Statute began on those dates. The Applicants did not initiate any formal challenge within those statutory time periods. They are therefore time-barred from challenging the means by which they were appointed to the ASG level.

… As in [UNAdT Judgement No. 1211, *Muigai* (2005)], the Applicants seek to revive expired claims through their correspondence with the Secretary-General. They cannot do so. The time for initiating an appeal begins once the decision is made, and is not restarted with the staff member again bringing up the issue. Applicants may not unilaterally determine the date of administrative decision simply by communicating with the administration.

... The Applicants appear to suggest that their claims should not be time-barred because they only became aware of the actual amount of their pension benefits upon their retirement from the Organization. This argument has no merit. First, the dates suggested by the Applicants have no relevance to the Applicants’ claims. The Applicants by their own admission are not challenging the computation of their pension benefits. Instead, they are challenging the means by which they were appointed to the ASG level. Therefore, the relevant dates are the dates that the Applicants received their first offers of appointment at the ASG level. Second, the Applicants’ claims remain time-barred if their suggested dates are accepted. The [UNJSPF] notified [Ms. AH] of her benefits on 10 March 2015, and notified [Ms. AK] of her benefits on 1 October 2015. The deadline for requesting management evaluation therefore expired on 9 May 2015, and 30 November 2015, respectively. The Applicants did not request management evaluation before those deadlines.

... Even if the Dispute Tribunal were to consider the contested decision the correspondence of the USG/DM dated 7 July 2016, the deadline for management evaluation expired on 5 September 2016 and is time-barred. The Applicants submitted their request on 1 November 2016. As no official with delegated authority had suspended the deadline for management evaluation pending efforts for informal resolution conducted by [UNOMS], the Application is not receivable. An error made by [MEU] concerning a deadline for management evaluation, or the availability of extension of time, has no legal effect. It does not vest the Dispute Tribunal with jurisdiction. The Applicants appear to be of the view that [MEU] suspended the management evaluation deadline pending efforts at informal resolution […]. The

[MEU] does not have the authority to do so. Section 10.2(d) of ST/SGB/2010/9 [(Organization of the Department of Management)] limits the function of the [MEU] to recommending the extension of deadlines to the USG/DM.

The Application is not receivable *ratione materiae*

... Under [art.] 2.1 (a) of its statute, the Dispute Tribunal has jurisdiction to hear an appeal against an administrative decision. An administrative decision is a unilateral decision taken by the administration in a precise individual case which produces direct legal consequences to the legal order. The Appeals Tribunal has held that "to be reviewable, the administrative decision must have direct legal consequences on an individual's terms of appointment."

… The letter of the USG/DM dated 7 July 2016 is not a reviewable administrative decision. It carried no direct legal consequences. The Applicants in their 26 May 2016 letter to the Secretary-General sought payment under the principle of "equity", rather than the payment of an entitlement that the Organization was obliged to pay under their terms of appointment. This language is echoed in their request for management evaluation.

… In effect, the Applicants sought a discretionary payment from the Secretary-General. By its very nature, the Administration's response to such a request does not constitute an administrative decision under [art.] 2(1)(a) of the [Dispute Tribunal's] Statute.

… The Appeals Tribunal has found that a discretionary payment cannot be reviewed by the Dispute Tribunal. A discretionary payment cannot violate a staff member's terms of appointment or contract of employment, or any Staff Regulation, Rule or other administrative issuance. Notably, the Applicants in their correspondence to the Secretary-General did not identify any right under their terms of appointment for the payment of the entitlement they sought, i.e., a refund of their mandatory pension contributions.

SUBMISSIONS ON THE MERITS

The letters of appointment met the requirements of the [S]taff [R]egulations and [R]ules

… The Respondent denies all facts and claims presented by the Applicant[s] unless specifically admitted in this [r]eply.

… The Applicants' letters of appointment met the requirements of the [S]taff [R]egulations and [R]ules. Annex II of the [S]taff

[R]egulations and [R]ules provides the entirety of information that must be contained in the letters of appointment […].

… Annex II does not require the Secretary-General to counsel the Applicants on their entitlements under the [UNJSPF]. Nor does it require the Secretary-General to provide personalized advice to the Applicants […] on how to maximize their entitlements under the [UNJSPF Regulation].

… The Applicants argue that the duty of good faith and fair dealing imputes additional requirements not contained in Annex II. This argument has no merit.

… First, it is settled law that staff members are charged with knowledge of the legal and regulatory provisions governing their employment with the Organization. The Appeals Tribunal has stated that "ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules and Regulations". In accepting their letters of appointment, the Applicants were required to affirm that they had reviewed the [S]taff [R]egulations and [R]ules.

… The Applicants present no compelling explanation of why the presumption of knowledge should be set aside. Nor can they do so. The Applicants were staff members of particular sophistication and experience with the Organization. Both achieved senior positions within the Organization's hierarchy in which they were not only required to know its laws, but also to implement and suggest revisions to those laws. [Ms. AK] not only served as the representative of the Secretary-General on the UNJSPF Committee, but also issued under her authority a number of administrative instructions, including ST/AI/2003/8/ Amend.2 [(Retention in service beyond the mandatory age of separation and employment of retirees)], which relates to the employment of former staff members in receipt of a pension benefit.

… The [UNJSPF's Regulations] and [R]ules are easily and publicly available. They can be accessed through the [UNJSPF's] website. Once on the [UNJSPF's] website, a sidebar of options includes "Regulations [and] Rules," which leads directly to the [UNJSPF] Regulations and Rules. [art.] 28(d) can be found on page 12 of the corresponding document. The [UNJSPF's] website can be located on Google by simply searching for "UNJSPF Regulations [and] Rules," or a variation of those terms. A staff member also has the option of requesting a copy of those Regulations and Rules directly from the [UNJSPF], or through their human resources or executive office focal points.

… Second, it follows from the presumption of knowledge that the obligation to seek advice on the law is on the staff member. Such advice is available to staff members free of charge from a variety of sources including the Office of Human Resources Management ("OHRM"), and the Office of Staff Legal Assistance ("OSLA").

… In the case of pension benefits, the appropriate source of advice is the [UNJSPF], and not [the] Secretary-General. Pension benefits are administered by the [UNJSPF] Board, the staff pension committee of each member organization and their respective secretariats, which are independent of the Secretary-General. The [UNJSPF] has its own review and appeal procedures, and its own resources for advising staff members. Both Applicants had the option to visit the [UNJSPF's] offices in New York and Geneva prior to accepting their offers of appointment at the ASG level.

… Third, in accordance with [s]taff [r]ule 6.1, participation in the [UNJSPF] is mandatory for staff members appointed for six months or longer. The duty of good faith and fair dealing does not imply an obligation on the Secretary-General to advise staff members on how to avoid or otherwise "game" this rule for their own benefit.

… Such advice would also run contrary to the purpose and structure of the [UNJSPF]. The General Assembly set up the [UNJSPF] to provide social benefits for staff from around the world, who do not have access to their own national schemes. As a defined benefit plan, the contributions by staff and member organizations are pooled and invested in order to pay benefits. All UNJSPF participants and member organizations contribute the same percentage of pensionable remuneration regardless of their age, length of service, career progression, marital status, family size and duty station. Assets are not segregated by participant nor is there an accounting by participant of the value of benefits paid compared to contributions made by the [UNJSPF].

… Lastly, there is no legal basis for the Applicants to claim that they have suffered adversely from participation in the [UNJSPF]. They have contributed and been paid in accordance with the [UNJSPF] [R]egulations and [R]ules. As participants in the defined benefit scheme, the Applicants have enjoyed the right to draw upon the promised benefits, including disability coverage and survivor benefits. The Applicants, however, in hindsight wish that they would have paid less for the benefits they have enjoyed during and after their service with the Organization. This desire has no basis in law.

> … Any decision to pay additional amounts under the principle of equity would be against the intention of the General Assembly. The Applicants cannot argue, nor can they present any evidence of bad faith or unfairness in a decision of the Secretary-General to respect the decision of the General Assembly.
>
> No remedy is available to the Applicants
>
> … There is no remedy available to the Applicants. Their appointments and their participation in the [UNJSPF] were in full accord with the [S]taff [R]egulations and [R]ules. They suffered no harm from the USG/DM's correspondence advising them that their pension benefits were calculated in accordance with the [UNJSPF's] [R]egulations. The Applicants have no legal right to receive a discretionary payment under equity.
>
> RELIEF
>
> … In view of the foregoing, the Respondent respectfully requests that the Application be dismissed.

36. In their submission filed on 28 March 2017 on the receivability issues the Respondent raised in his reply, the Applicants stated as follows:

> Receivability *ratione temporis*
>
> … The Respondent's arguments that the Appellants failed to request management evaluation within the 60-day statutory period involve several incorrect assumptions.
>
> … The first assumption is that the dates of the contested decision occurred in 2004 and 2002, respectively, when the Applicants were first appointed to the ASG level.
>
> … The Respondent's argument is misconstrued, since unlike the case cited, this is not an example of requesting repeated confirmation of decisions that have been previously communicated. The claim arises out of a continuing pattern of non-disclosure. In cases of acts of omission by the Respondent, the failure to act must first be recognized and then notified to the Respondent for rectification, followed by a request for management evaluation where appropriate. The applicable jurisprudence confirms the Applicants followed the correct procedure.
>
> … The Appeals Tribunal has indicated that for the purpose of enabling the parties and the Tribunals to identify and correctly

calculate the date from when the applicable time limits start to run, an administrative decision has to be in writing. Where the Administration does not provide a written decision, it cannot lightly argue receivability *ratione temporis*. There was no consideration and response articulated to the Applicants on their claim until they received the letter on behalf of the Secretary-General on 7 July 2016 rejecting their request for compensation for their losses. This recalls the Appeals Tribunal's jurisprudence in *Elmi* [2016-UNAT-704, paras. 19-24], affirming that a response denying correction of a past anomaly is a new administrative decision triggering new time limits.

… With respect to whether the Applicants' complaint should have been filed earlier, the Appeals Tribunal has also indicated that [s]taff [r]ule 11.2 (c) concerning management evaluation deadlines applies to both explicit and implicit decisions and that with an implied administrative decision, the Dispute Tribunal must determine the date on which the staff member knew or reasonably should have known of the decision he or she contests. Stated another way, the Dispute Tribunal must determine the date of the implied decision based on "objective elements that both parties (Administration and staff member) can accurately determine."

… The Respondent argues that the Applicants ought to have been aware of the application of all the [UNJSPF] Regulations to their particular situations from the dates of their appointment. While the applicable Letters of Appointment made specific reference to certain rules affecting the Applicants' remuneration, there was no reference made to the provisions of [art.] 28 of the UNJSPF Regulations, which carried enormous consequences. By failing to disclose this to the Applicants so they could ascertain the full implications and make an informed decision, the Applicants were left in the dark until the final calculations were communicated by the [UNJSPF]. The Applicants are not contesting the applicability of the cap on pensions to their situation. Their initial requests for explanations revealed that there was no violation of the [UNJSPF] Fund Regulations but that their contractual arrangements with the Organization were the source of the adverse consequences. Their claim arises from the failure of the Administration to provide full disclosure of the implications of [art.] 28 on their conditions of employment. Moreover, since the impact of the adverse consequences of [art.] 28 is not fully determined or communicated until after separation, the Applicants submit that it is not reasonable to argue that they should have acted sooner. Although the Respondent argues that the information is available to those who search for it, he does not dispute the lack of specific disclosure of this provision in any of the private or public communications on retirement benefits.

… Once having been made aware of the consequences of their service at the higher levels on their pensions and the fact that this resulted from the specific contractual arrangements that were applied to their service, the Applicants proceeded to address the issue to the Secretary-General to seek redress. His rejection of responsibility for the adverse outcome and refusal to compensate the Applicants for the results, forms the contested decision. This interpretation is consistent with the jurisprudence of the former Tribunal that the cause of action over conditions of service affecting pensions arises only after the staff member had received notice of his accumulated benefits since, "a decision could not validly be reached until a formal request for payment of accumulated benefits was made..."

… Since the contested decision is not the calculation of the benefits but the refusal of the Secretary-General to recognize and address the adverse effects of the contractual arrangements he had made, the Applicants could only have reasonably been expected to be aware of this issue after the adverse consequences and their cause were known. The cause was the contractual arrangements imposed on the Applicants without full disclosure. The Respondent has not addressed the fact that alternative contractual arrangements could have been used to avoid these adverse consequences.

… Staff Regulation 1.1 (c) imposes a general duty on the Secretary-General to ensure that the rights and duties of staff members, as set out in the [United Nations] Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected. This implies a good faith duty to disclose those decisions of the General Assembly having a specific impact on affected staff. Since the Respondent's failure to act occasioned significant detriment to the Applicants, they duly formulated their concern and requested redress. The refusal to rectify the consequences of the breach of duty of care constitutes a clear and unambiguous legal consequence having a direct impact on the terms of appointment or contract of employment of the Applicants.

… It is also worth noting that neither the decision letter itself nor the management evaluation raised the objection that the Applicant[s'] request was time barred. Having proceeded to make a decision, the Respondent should be prepared to defend it.

… The second argument put forward concerns the date of the request for management evaluation. The Respondent contends [that] no official with delegated authority suspended the deadline pending the efforts for informal resolution.

… Staff [r]ule 11.2 provides that the deadline for management evaluation may be extended by the Secretary-General pending efforts for informal resolution conducted by the [UNOMS], under conditions specified by the Secretary-General. This, like many administrative matters, has been delegated.

… On 9 August 2016 the Officer-in-Charge of the MEU, writing in his official capacity advised [Ms. AK] that upon confirmation from the [UNOMS], "we'll extend the 60-day deadline for management evaluation pending the efforts at informal resolution" […]. That same day the [UNOMS] wrote to the MEU confirming the same. (Ibid.) The deadline was extended to 3 November 2016. (Ibid.).

… The Respondent now argues that the MEU does not have the authority to extend the deadline. This rather specious argument that the MEU does not have the authority under Section 10.2(d) of ST/SGB/2010/9, appears to be made in bad faith. It is not clear on what basis the Respondent assumes the MEU lacked approval for its actions. The final management evaluation, which was copied to a number of officials including the [USG/DM], did not raise the argument of receivability. Even in the absence of written consent, as the Appeals Tribunal held in *Wu* 2013-UNAT-306, para. 25, "it is arguably not unreasonable...for the [Dispute Tribunal] to infer that the [UNOMS's] participation in settlement negotiations amounted to the Secretary-General's implicit extension of the management evaluation deadline for the period of the negotiations."

… In any case the argument is irrelevant to the present application since the Applicants are entitled to rely upon the actions of those who hold themselves out as the Administration's authorized agents. The [MEU] clearly conveyed approval for the extension and gave a specific deadline for compliance which was then met. The principle of good faith would preclude intentionally misleading the Applicants into jeopardizing their right to a fair hearing on their claims.

Receivability *ratione materiae*

… The Respondent argues that there is no administrative decision to be reviewed because the letter of 7 July 2016 is not a reviewable administrative decision. In support of his argument the Respondent misconstrues the Applicants' request as having sought a discretionary or *ex gratia* payment from the Secretary-General. This was not the object of the letter to the Secretary-General.

… The Respondent is confusing the nature of the Applicant's request to the Secretary-General stated as follows:

> "We believe this anomaly has to be addressed and that an adjustment is required as a matter of equity. The abridgment of the duty of care to provide full disclosure of the terms of employment in and of itself warrants the payment of damages, since it deprived us of arriving at an informed decision on our career options."

… The Respondent is conflating the call for an equitable solution with the idea of a discretionary payment in the absence of a legal claim. The Applicants' claim is contractual. Based on the violation of the duty of care and failure to provide reasonable disclosure, the Applicants suffered significant financial losses for which they are entitled to compensation. They also raise in their letter the matter of policy, which they felt also needed to be addressed as a matter of equal treatment, insofar as the current policy unfairly discriminates against long serving staff. A change of policy, however, would not address their situations. The Applicants never asked for an *ex gratia* payment, which is only made in the absence of any legal liability. The fair and equitable remedy envisaged by the Applicants is not in the nature of an *ex gratia* payment, but rather in the form of compensation for violating an essential part of their conditions of service with direct economic consequences for them. The cases citing rules governing *ex gratia* payments are therefore inapplicable.

… The Applicants maintain that the Secretary-General's rejection of their claim constitutes an administrative decision under the definition provided in the Tribunal's jurisprudence. The Appeals Tribunal has affirmed that an administrative decision may take the form of an action or a failure to act, and that "... not taking a decision is also a decision." Based on the jurisprudence enunciated in [UNAdT Judgement No. 1157, *Andronov* (2003)], the [Appeals Tribunal] has affirmed that an administrative decision is characterized by the fact that it is taken by the administration, is unilateral and of individual application, and carries direct legal consequences. In *Andati-Amwayi* 2010-UNAT-058, paras. 17-19, the [Appeals Tribunal] further explained that in matters of appointment it is straightforward to determine what is a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member. The [Appeals Tribunal] has specifically recognized the application of this interpretation to the case of a staff member requesting and being denied a payment relating to past service:

> "The Agency's refusal of a retrospective payment of the higher [Special Occupation Allowance, ("SOA")] was an administrative decision which clearly and

> unequivocally impacted on [the Applicant]'s terms and conditions of appointment."
>
> … There are few conditions of service more critical to the employment relationship than the financial arrangements for retirement. When those conditions are adversely affected by a new contractual arrangement, there is a duty both to fully disclose and to mitigate the adverse effects. The refusal to recognize that duty or to address its consequences is an administrative decision. The Applicants therefore request the Tribunal to find their application receivable.

Considerations

Applicable law

37. Staff Regulation 1.1(c) on the status of staff provides that:

> The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.

38. Staff Regulation 6.1 of 2002 (ST/SGB/2002/1) provides that:

> Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund.

39. Staff Rule 106.1 of 2002 (ST/SGB/2002/1) states that:

> Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund.

40. Regulation 6.1 of 2007 (ST/SGB/2007/4), of 2008 (ST/SGB/2008/4), of 2012 (ST/SGB/2012/1), and of 2014 (ST/SGB/201/1), all established:

> Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund.

41. Annex II to ST/SGB/2014/1) on the letter of appointment provides in the relevant part:

> (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; (vii) That a temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment; (viii) That a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;
>
> (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. Staff Rule 3.18 provides:

> (a) Staff assessment shall be deducted, each pay period, from the total payments due to each staff member, at the rates and subject to the conditions prescribed in staff regulation 3.3 and staff rule 3.2.
>
> (b) Contributions of staff members who are participating in the United Nations Joint Staff Pension Fund shall be deducted, each pay period, from the total payments due to them.
>
> (c) Deductions from salaries and other emoluments may also be made for: (i) Contributions, other than to the United Nations Joint Staff Pension Fund, for which provision is made under the present Rules; (ii) Indebtedness to the United Nations; (iii) Indebtedness to third parties when any deduction for this purpose is authorized by the Secretary-General; (iv) Lodging provided by the United Nations, by a Government or by a related institution; ST/SGB/2014/1 34/111 14-02545 (v) Contributions to a staff representative body established pursuant to staff regulation 8.1, provided that each staff member has the opportunity to withhold his or her consent to or at any time to discontinue such deduction, by notice to the Secretary-General.

43. The UNJSPF Regulations of 2003 and 2007 provide:

Art. 21 – Participation

(a) Every full-time member of the staff of each member organization shall become a participant in the Fund:

(i) Upon commencing employment under an appointment for six months or longer or upon accepting such an appointment while in employment; or,

(ii) Upon completing, in the same or more than one member organization, six months of service without an interruption of more than thirty days whichever is earlier, provided that participation is not expressly excluded by the terms of staff member's appointment.

(b) Participation shall cease when the organization by which the participant is employed ceases to be a member organization, or when he or she dies or separates from such member organization, except that participation shall not be deemed to have ceased where a participant resumes contributory service with a member organization within 36 months after separation without a benefit having been paid.

[…]

Art. 27 – Entitlement to benefits

(a) A participant who is not eligible for a retirement benefit under article 28 or a disability benefit under article 33 may elect on separation to receive an early retirement benefit or a deferred retirement benefit or a withdrawal settlement if he or she satisfies the conditions of article 29, 30 or 31 respectively.

(b) Retirement, early retirement and deferred retirement benefits shall be payable at periodic intervals for life

Art. 28 – Retirement benefit

(a) A retirement benefit shall be payable to a participant whose age on separation is the normal retirement age or more and whose contributory service was five years or longer.

(b) The benefit shall, subject to (d), (e) and (f) below, in respect of any period or periods of participation commencing on or after 1 January 1983, be payable at the standard rate obtained by multiplying:

(i) The first five years of the participant's contributory service, by 1.5 per cent of the final average remuneration;

(ii) The next five years of contributory service, by 1.75 per cent of the final average remuneration;

(iii) The next 25 years of contributory service, by 2 per cent of the final average remuneration; and

(iv) The years of contributory service in excess of 35 and performed as from 1 July 1995, by 1 per cent of the final average remuneration, subject to a maximum total accumulation rate of 70 per cent.

However, in respect of a participant with a prior period of contributory service of five years or longer ending between 1 January 1978 and 31 December 1982, the standard annual rate specified above shall be calculated by taking into account as periods of contributory service for the purpose of subparagraphs (i), (ii) and (iii) above the period of contributory service before 1 January 1983.

(c) The benefit shall, subject to (d), (e) and (f) below, in respect of any period of participation commencing prior to 1 January 1983, be payable at the standard annual rate obtained by multiplying:

(i) The first 30 years of the participant's contributory service, by 2 per cent of the final average remuneration;

(ii) The years of contributory service in excess of 30, but not exceeding five, by 1 per cent of the final average remuneration; and

(iii) The years of contributory service in excess of 35 and performed as from 1 July 1995 by 1 per cent of the final average remuneration, subject to a maximum total accumulation rate of 70 per cent.

(i) However, except as provided in (ii) below, the benefit otherwise payable at the standard annual rate in accordance with the applicable provisions of (b) or (c) above to a participant at a level above D-2, top step, of the scale of pensionable remuneration indicated in article 54 (see appendix B below), shall not exceed, as at the time of the participant's separation, the greater of:

(A) 60 per cent of the participant's pensionable remuneration on the date of separation; or

(B) The maximum benefit payable under the provisions of (b) or (c) above to a participant at the level D-2 (top step for the preceding five years) separating on the same date as the participant;

(ii) However, for a participant separating at the level of Under-Secretary-General, Assistant Secretary-General or their equivalent level, to whom the provisions of (i) above are applicable, the benefit payable shall not be less than the benefit

> that would have been payable at the standard annual rate if the participant had separated from service on 31 March 1986; for participants separating at other levels above D-2, top step, in the scale of pensionable remuneration in appendix B below, to whom the provisions of (i) above are applicable, the benefit payable shall not be less than the benefit that would have been payable at the standard annual rate if the participant had separated from service on 31 March 1993; for participants who entered or re-entered the Fund at an ungraded level before 1 April 1993, the provisions of (i) above shall not be applicable.[…]

Art. 29 – Early retirement benefit

Participation in the Fund has commenced or recommenced prior to 1 January 2014:

(a) An early retirement benefit shall be payable to a participant whose age on separation is at least 55 but less than the normal retirement age and whose contributory service was five years or longer.

(b) The benefit shall be payable at the standard annual rate for a retirement benefit, reduced for each year or part thereof by which the age of the participant on separation was less than the normal retirement age (60 or 62), at the rate of 6 per cent a year, except that: (i) If the contributory service of the participant was 25 years or longer but less than 30 years, the standard annual rate would be reduced by 2 per cent a year in respect of the period of contributory service performed before 1 January 1985, and 3 per cent a year in respect of the period of such service performed as from 1 January 1985; or (ii) If the contributory service of the participant was 30 years or longer, the standard annual rate would be reduced by 1 per cent a year; provided however that the rate in (i) or (ii) above shall apply to no more than five years. Participation in the Fund has commenced or recommenced on or after 1 January 2014:

(c) An early retirement benefit shall be payable to a participant whose age on separation is at least 58 but less than the normal retirement age and whose contributory service was five years or longer.

(d) The benefit shall be payable at the standard annual rate for a retirement benefit, reduced for each year or part thereof by which the age of the participant on separation was less than the normal retirement age (65), at the rate of 6 per cent a year, except that: (i) If the contributory service of the participant was 25 years or longer, the standard annual rate would be reduced by 4 per cent a year; and (ii) The rate in (i) above shall apply to no more than five years.

(e) The benefit may be commuted by the participant into a lump sum to the extent specified in article 28(g) for a retirement benefit.

Art. 40 – Re-entry into participation in the pension fund

(a) If a former participant who is entitled to a retirement, early retirement or deferred retirement benefit under these Regulations again becomes a participant, entitlement to such benefit or to a benefit derived therefrom shall be suspended and no benefit shall be payable until the participant dies or is again separated.

(b) Such a participant who again becomes a participant and is again separated after at least five years of additional contributory service shall also be entitled, at the time of such subsequent separation, in respect of such service and subject to paragraph (d) below, to a retirement, early retirement or deferred retirement benefit, or a withdrawal settlement under article 28, 29, 30 or 31, as the case may be.

(c) Such a participant, who again becomes a participant and is again separated after less than five years of additional contributory service, shall, in respect of such service, become entitled to: (i) A withdrawal settlement under article 31; or (ii) Subject to (d) below, a retirement, early retirement or deferred retirement benefit, as the case may be, under article 28, 29 or 30, based on the length of such additional contributory service; provided, however, that such benefit may not be commuted into a lump sum, in whole or in part, and shall not be subject to any minimum provisions.

(d) Payment of benefits under (b) or (c) (ii) above shall commence on the date of the resumption or commencement, as the case may be, of payment of benefits suspended under (a) above. In no event shall the total benefits payable to or on account of a former participant in respect of separate periods of contributory service exceed the benefits which would have been payable had the participation in the Fund been continuous.

(e) Article 40 shall apply mutatis mutandis to the ungraded officials who are appointed or elected irrespective of whether they join the Fund again during their tenure as elected officials. There is no retroactive payment of suspended UNJSPF benefits that may have been accrued from previous participation in the Fund.

Art. 51 – Pensionable remuneration

(a) In the case of participants in the General Service and related categories, pensionable remuneration shall be the equivalent in dollars

of the sum of: (i) The participant's gross pensionable salary, as determined on the occasion of comprehensive salary surveys and subsequently adjusted between such salary surveys, in accordance with the methodology approved by the General Assembly and set out in appendix A to these Regulations; (ii) Any language allowance payable; and (iii) In the case of a participant who became entitled to a pensionable non-resident's allowance prior to 1 September 1983, and for as long as he or she continues to be entitled thereto, the amount of such allowance.

(b) In the case of participants in the Professional and higher categories, the scale of pensionable remuneration, shall be as set out in the ICSC website (see appendix B hereto). It shall be adjusted on the same date as the net remuneration amounts of officials in the Professional and higher categories in New York are adjusted. Such adjustment shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration amounts, as determined by the International Civil Service Commission.

(c) (i) In the case of participants who are appointed or elected as ungraded officials on or after 1 April 1995, their pensionable remuneration shall be established by the competent legislative organ which determines their other conditions of service, in accordance with the methodology recommended by the International Civil Service Commission and endorsed by the General Assembly, and shall be subsequently adjusted in accordance with the procedure in (b) above; (ii) In the case of participants who were ungraded officials on 31 March 1995, their pensionable remuneration shall be maintained, without adjustment, until surpassed by the level of pensionable remuneration derived from application of the methodology referred to in (i) above.

(d) In the case of participants in the United Nations Field Service category, the scale of pensionable remuneration shall be as set out in the OHRM website (see appendix C hereto), and shall be subsequently adjusted in accordance with the procedure in (b) above.

(e) No step increments beyond the top step of the gross pensionable salary scale or the scale of pensionable remuneration established according to the methodology approved by the General Assembly on the recommendation of the International Civil Service Commission shall be recognized for participants entering or re-entering the Fund on or after 1 January 1994. Nevertheless, any step increments awarded in conformity with the provisions of the appropriate staff regulations or rules of a member organization to a staff member in service in that organization before 1 January 1994 shall be recognized by the Fund for pension contribution and benefit calculation purposes.

Receivability framework

44. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases which are not receivable.

45. The Dispute Tribunal's Statute and Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

46. It results that, in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

47. The Applicants are former staff members and retirees and they both held a fixed-term appointment at the USG level at the time they filed their application. Therefore, the application is receivable *ratione personae*.

Receivability ratione materiae

48. As mentioned above, an application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute).

49. The Tribunal will further analyze if the two cumulative and mandatory conditions mentioned above are fulfilled.

50. Regarding the first condition, namely if the contested decision is an administrative decision which can be appealed before the Dispute Tribunal, the Tribunal notes that the Respondent contends that the application is not receivable *ratione materiae* because:

> … The letter of the USG/DM dated 7 July 2016 is not a reviewable administrative decision. It carried no direct legal consequences. The Applicants in their 26 May 2016 letter to the Secretary-General sought payment under the principle of "equity", rather than the payment of an entitlement that the Organization was obliged to pay under their terms of appointment. This language is echoed in their request for management evaluation.

And because:

> … The Secretary-General has no authority to administer pension entitlements. Pension entitlements are determined by the [United Nations] General Assembly, outlined in the [UNJSPF] [R]egulations, and administered by the [UNJSPF], all of which are independent of the Secretary-General.
>
> … […] [T]he Dispute Tribunal is not the appropriate forum for the Applicants to seek redress for their disappointment with their pension entitlements. The Dispute Tribunal's Statute does not grant it jurisdiction over claims with respect to [UNJSPF] entitlements (*Fayache*, UNDT/2017/001).

51. The Tribunal notes that in *Harb* (2016-UNAT-643), the Appeals Tribunal stated (footnotes omitted):

> 25. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal. In *Andronov*, the former Administrative Tribunal stated:
>
> … There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.
>
> 26. In the seminal case of *Andati-Amwayi*, the Appeals Tribunal defined what constitutes an administrative decision susceptible to challenge as follows:
>
> … What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

> … In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.
>
> ... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.
>
> 27. In short, as held by this Tribunal in *Lee*, the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

52. The Tribunal notes that in the present case the Applicants are not contesting the calculation of their respective pensions, but the fact that the Secretary-General has refused to recognize and address the adverse effects of the contractual arrangements the former Secretary-General had made with the Applicants when he appointed them as ASG in 2002 and 2004, respectively. The Tribunal also notes that the nature of the contested administrative decision concerns the breach of the Applicants' right to be fully and accurately informed about an essential element of their respective contract regarding their pension contribution/entitlements and the resulting consequences/implications.

53. The Tribunal considers that the Applicants' contractual clause included in their letter of appointments as ASG and USG under the title "Information", which referred, in a generic manner, to the "Regulations and Rules relating to the United Nations Joint Staff Pension Fund", was effectively activated and produced effects only after the Applicants' separation from the Organization as a result of their retirement.

54. Moreover, the Tribunal notes that in *Elmi* 2016-UNAT-704 the Appeals Tribunal decided as follows (footnotes omitted):

> 4. On 11 February 2015, the UNDT issued the impugned Judgment on Receivability, finding Mr. Elmi's application receivable. In reaching its decision, it stated:
>
> > 2 … The [Secretary-General] challenges the receivability of this Application on the grounds that the ASG/OHRM's written decision of 27 February 2014 to deny [Mr. Elmi]'s request for retroactive promotion constituted a separate administrative decision which must be the subject of a separate management evaluation request under staff rule 11.2(a). This is notwithstanding the fact that in his management evaluation request of 6 February 2014, [Mr. Elmi] had asked the Administration to consider his application for retroactive promotion to 1 January 2012. … The [Dispute] Tribunal has carefully considered the parties' pleadings including the authorities cited by [Mr. Elmi] and finds that the [Secretary-General]'s submissions on receivability have no merit and are logically incoherent. The Tribunal does not consider it a mere coincidence that the ASG/OHRM delayed her response to [Mr. Elmi] from 5 November 2013 to 27 February 2014. The ASG/OHRM's response came only 21 days after [Mr. Elmi]'s request for a management evaluation. Were it not for the request, it appears that [Mr. Elmi] would have had to continue waiting for a response. … The [Dispute] Tribunal is of the view that in such circumstances, to require [Mr. Elmi] to submit a new management evaluation request regarding the same subject matter of his retroactive promotion would amount, as correctly

> argued by [Mr. Elmi], to a waste of time and resources for both [Mr. Elmi] and the Administration. The [Secretary-General] is essentially asking the Tribunal to sacrifice substance on the altar of form! [Mr. Elmi] has to all intents and purposes complied with the requirements of art. 8.1(c) [of the UNDT Statute]. The Administration has had an opportunity to evaluate his request and has refused it. [Mr. Elmi] is now entitled to come before the [Dispute] Tribunal.

Receivability

19. The Secretary-General submits that previous administrative decisions of March and June 2013 taken with respect to SPA and promotion already notified Mr. Elmi that there would be no retroactive effect to his pension benefits. In his view, Mr. Elmi's request of 5 November 2013 cannot "reset the clock" and the 27 February 2014 letter from the ASG/OHRM can only be interpreted as an explanation of these prior administrative decisions; as Mr. Elmi requested management evaluation as late as 6 February 2014, his application was not receivable *ratione temporis*.

20. In its Judgment on Receivability, the UNDT declared Mr. Elmi's application receivable. Though explicitly only examining receivability *ratione materiae*, it is implied that the application was also receivable *ratione temporis*. We find no fault in this implied finding, nor do we find that the UNDT exceeded its competence.

21. Notwithstanding the question as to whether the Secretary-General is estopped from raising the issue of receivability *ratione temporis* on appeal, his assertions are without merit. Neither the 6 March 2013 granting of SPA nor the promotion of Mr. Elmi effective June 2013 are the relevant administrative decisions for the statutory time limits in

this case. Rather, the relevant administrative decision triggering the time limits is the ASG/OHRM's letter of 27 February 2014.

22. The Secretary-General, on appeal, cannot claim that this letter does not constitute a new administrative decision and that it must be interpreted "as an explanation of the two administrative decisions taken with respect to [Mr. Elmi's] pension contribution between 1 January 2012 and 31 May 2013". This assertion is inconsistent with his reply from 15 May 2014 to Mr. Elmi's UNDT application where he expressly stated that "the ASG/OHRM's decision to deny the joint request constituted a separate administrative decision". After having informed Mr. Elmi and the Dispute Tribunal that the 27 February 2014 letter constitutes an administrative decision, the Secretary-General cannot and may not change his mind on this matter.

23. Furthermore, in our view, the 27 February 2014 letter from the ASG/OHRM is in fact a new and fresh administrative decision. By its content, it is obvious that the ASG/OHRM did not simply refer to earlier (SPA or promotion) decisions. If this were the case, it would have been sufficient to tell Mr. Elmi that the earlier SPA and promotion decisions had already decided the matter and that there was no need or room to examine his request for retroactive promotion "for pension purposes". However, this is not what the ASG/OHRM did. Not only did she "consider" Mr. Elmi's request "carefully" but she even consulted the Pension Fund on the consequences of a retroactive promotion and clarified whether or not Mr. Elmi had received SPA; additionally, she gave full and thorough reasoning as to why she would not agree to his request. It is evident to this Tribunal that by her letter of 27 February 2014, the ASG/OHRM exercised discretion as to whether or not to grant Mr. Elmi retroactive promotion "for pension purposes" and thus issued a new administrative decision.

> 24. Hence, although the Applicant's request of 5 November 2013 for a retroactive promotion could not "reset the clock", the new administrative decision of 27 February 2014 can. When the Administration decides to release a fresh administrative decision, new time limits are triggered.

55. In light of the above-mentioned jurisprudence, the Tribunal considers that the contested decision, namely the 7 July 2016 letter issued and signed on behalf of the Secretary-General by the then USG/DM, is 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 UNJSP Board in relation to their pensions. As results from its content, the contested decision did not simply refer to and /or uphold previous contractual terms and/or decisions. The decision was taken after the matter related to the Applicants' pension benefit entitlements under UNJSPF Regulations was reviewed by the then Secretary-General and closely coordinated with its Executive Office, OLA, DM offices and the Pension Fund Secretariat, as stated in its content. The letter gave full and thorough reasoning as to why the Applicants' request was not granted by the then Secretary-General, who exercised his discretion in this regard.

56. The Tribunal underlines that the Secretary-General's authority and discretion to decide on the Applicants' request was not argued and/or contested at any point before the contested decision was issued (after consultation with, *inter alia*, the UNJSPF Secretariat) or during the management evaluation review. Therefore the Tribunal will reject the Respondent's argument that the Secretary-General was not competent to take the contested decision.

57. The Tribunal therefore finds that it has jurisdiction over the present application, since the contested decision is an administrative decision reviewable by the Tribunal, and concludes that the first condition is fulfilled.

58. Regarding the second condition, the Tribunal notes that the Applicants addressed a letter to the Secretary-General on 26 May 2016 after obtaining all the requested clarifications from the UNJPF regarding the calculation methodology and its practice in establishing the amount of their pensions. The Secretary-General provided them with a reply on 7 July 2016.

59. The United Nations Administrative Tribunal in Judgment No. 1495, *Annan* (2009), decided that the cause of action over conditions of service affecting pensions arises only after the staff member had received notice of his accumulated benefits since "[…] a decision could not be validly reached until a formal request for payment of accumulated benefits was made […]". The Tribunal finds similarly that the Applicants only became aware *after* they were separated from the Organization of the effects of the contractual clause related to their pension, namely that they could have contributed lesser amounts of money during the years they served as ASG and USG, since their level of pension would have remained the same, and that the present contested administrative decision related to this issue was taken following the Applicants' letter of 26 May 2016, through the Secretary-General's response to the letter, on 7 July 2016. The Applicants had 60 days to file a request for management evaluation of the contested decisions, namely until 7 September 2016.

60. On 9 August 2016, within the deadline to file their request for management evaluation, the Applicants wrote an email to MEU requesting confirmation that the 60-day deadline would be extended pending possible informal resolution of the matter. On 9 August 2016, MEU, after contacting UNOMS, agreed to extend the 60-day deadline for management evaluation pending the mediation efforts; UNOMS confirmed the deadline extension on 9 August 2016 via a return email to MEU, and the deadline was set to 3 November 2016. The Tribunal notes that, following the unsuccessful mediation of the case, the Applicants filed a joint request for management evaluation of the contested decision on 1 November 2016, within the agreed deadline.

61. The Appeals Tribunal stated in *Kazazi* 2015-UNAT-55) that "[..] in *Faraj*, it was the very authority that was to conduct the decision review, in that case the Director of Operations For the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), who informed the staff member that he could request a further decision review with the same office pursuant to Area Staff Rule 113.3. Consequently, we held that the staff member rightfully acted pursuant to the instructions of the Director when he filed a second request for decision review".

62. The Tribunal considers that in the present case it was the very authority that was to conduct the review, namely MEU, that agreed to extend the deadline for the Applicants to file their requests for management evaluation of the contested decisions pending the mediation efforts, and informed them accordingly. The Applicants respected the instructions received from [name redacted, "Mr. MM"], the then OiC of MEU, and filed their requests for management evaluation before the expiration of the extension granted by the OiC/MEU. Therefore, the second condition for the receivability of the case *ratione materiae* is fulfilled.

63. The Tribunal concludes that both conditions for the application to be receivable *ratione materiae* are fulfilled.

Receivability ratione temporis

64. The Tribunal notes that the Applicants jointly filed the present application on 9 January 2017, within 90 days from the date they received the response from the MEU (10 November 2016), thereby rendering the application receivable *ratione temporis*.

65. In light of the above consideration that the contested administrative decision is the response received by the Applicants on 7 July 2016, the Tribunal considers that the Respondent's contention raised during the hearing and sustained also in his closing submissions that the application is not receivable *ratione temporis*, pursuant to art. 8.4 of the UNDT Statute and art.7.6 of the Rules of Procedure, because was

filed more than three years after the Applicants' receipt of their letters of appointment as ASG and USG, is to be rejected.

On the merits

66. In light of the above conclusion that the contested administrative decision is receivable *ratione personae*, *ratione temporis* and *ratione materiae*, the Tribunal will analyze its lawfulness, namely whether the Administration fulfilled its obligation to provide full and accurate information to the Applicants on their pension benefits and entitlements at the time of each of their appointments at the ASG and USG levels (2004-2010 and 2002-2008, respectively in 2010 to January 2015 and 2008 to August 2015), during their mandates and up until they retired, and if the correlative fundamental right of the Applicants to receive such information was respected.

67. The Tribunal notes that, pursuant to staff rule 6.1, it is mandatory ("shall") for all staff members with a six months or longer appointments, without an interruption of more than 30 calendar days, to become participants in the United Nations Joint Staff Pension Fund, provided that participation is not excluded by their letters of appointment.

68. Pursuant to annex "Letter of appointment", to the Staff Regulations and Rules, the letter of appointment "shall" state, *inter alia*, "(i) that the appointment is subject to the provisions of the staff regulations and 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", and "(vi) any special conditions which may be applicable". Further, according to let. b) from the same annex, the Organization has the obligation to transmit, together with the letter of appointment, a copy of the Staff Regulations and Rules. In accepting the appointment, the staff member must state ("shall") that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and Rules. Moreover, the Tribunal considers that,

pursuant to the mandatory requirement of staff rule 4.1, the letter of appointment must contain expressly or by reference, all the terms and conditions of employment. The terms and conditions of retirement specific to any position and type of appointment are a fundamental and essential element of the employment contract and must be defined in an accurate and complete manner. Such terms and conditions must be identified, described and explained, if necessary, and cannot be reduced to a vague and general information or reference to the UNJSPF Regulations.

69. The Tribunal considers that, *mutadis mutandi*, when the letter of appointment includes conditions/clauses referring to pension and/or to the UNJSPF Regulations, the Organization has the obligation to provide the staff member with and the staff member has the correlative right to receive copies of both the Staff Regulations and Rules and the UNJSPF Regulations, in order to read and to be able to state in the letter of appointment that s/he accepts accept all the conditions laid down in the regulations and rules applicable to her/his category of appointment..

70. The Tribunal further considers that it clearly results from the above-mentioned mandatory provisions that 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). The staff member has the correlative right to be fully and accurately informed and provided with a copy of the Staff Regulations and Rules including, if necessary, the ones relating to the UNJSPF, together with the letter of appointment, and to sign the letter of appointment only after s/he has been acquainted with them and accepted them.

71. The Tribunal notes that both Applicants were long serving career staff members with permanent contracts when they were appointed without break in service at the level of ASG and USG and it is uncontested that they changed their

contractual status from a permanent appointment at the D-2 level to a fixed-term appointment at the ASG level and later to a fixed term contract from the ASG level to at the USG level. This change had implications to their right to pension, because, while their contributions were to increase, since they were to be deducted from a higher salary, pursuant to the mandatory staff rule 3.18, their retirement benefits were to remain at the previous D-2 level during their entire mandates, due to the existence of a cap of the retirement benefit applicable to the participants at the ASG and USG level pursuant to art 28 (d) of the UNJSPF Regulations.

72. Having carefully reviewed the Applicants' respective letters of appointment at the ASG and USG levels, the Tribunal notes that they all included a paragraph titled "Information" which reads as follows: "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 and entitlements". The letters of appointment were signed by the Applicants, certifying that they accepted "the appointment described, subject to the conditions therein specified and to those laid down in the Staff Regulations and Rules", effective at the date of the acceptance, which represents the confirmation that both Applicants were provided by the Organization with a copy of the Staff Regulations and Rules, that they were aware of their content and accepted them as applicable to their contracts. However, there is no mention in the Applicants' acceptance of their appointments confirming that they were also provided with a copy of the UNJSPF Regulations, being therefore aware of their content and accepting their contracts to be subject to all the legal provisions applicable to their new appointments both at the ASG and USG levels.

73. The Tribunal underlines that staff regulation 3.3 relating to the Staff Assessment Plan and the only element related to the Applicants' pension included in the annex to their letters of appointment, namely the *quantum per annum* of the "pensionable remuneration", are part of the Staff Regulations and Rules, and the Applicants confirmed that they were informed and accepted their contracts to be

subject to them. However, the UNSJPF Regulations constitute a separate document from the Staff Regulations and Rules, and there is no evidence that such UNJSPF Regulations were provided to the Applicants prior to their acceptance of their appointments.

74. In the absence of any mention of the UNSJPF Regulations in the Applicants' acceptance of their contracts, the Tribunal concludes that there is no evidence that the Organization fulfilled its obligation to officially, fully and accurately inform the Applicants of their content by providing them with a copy before the acceptance of any of their appointments at the ASG and USG levels.

75. Furthermore, the Tribunal notes that in the Applicants' letters of appointment at the ASG level, under "Special Conditions", it is clearly mentioned that they agreed to forego their right to revert to their D-2 status at the end of their appointment as ASG, "without prejudice to the entitlements that they accrued as a result of [their] continuing service with the Organization". It results that, while the Applicants' entitlements at the D-2 level acquired prior to their appointments at the ASG level were expressly mentioned in every letter of appointment and it was agreed to preserve those rights, there was no mention in such letters either of the UNJSPF Regulations, including arts. 21, 28 40 and 51, or of any changes in the Applicants' future benefits and entitlements, in case they were to retire at the ASG level, such as: the increased *quantum* of their future contributions to the pension corresponding to the new higher level of salary pursuant to the mandatory staff rule 3.18, and/or the special effects of the calculation methods established in art.28.d of the UNJSPF Regulations, namely that their future increased contributions during their entire mandates will no longer be reflected in the *quantum* of their pension, due to the existence and applicability of a cap to the maximum benefit payable to a participant at the ASG or USG level equal to the benefit payable to a participant at D-2 and its effective impact to the benefit payable to a participant separating at the level of USG, ASG or their equivalent level. No such mention was included in the Applicants' letters of appointment at the USG level. No explanations and/or alternative solutions

applicable to their unique situation were provided to the Applicants at the beginning or during any their mandates as ASG or USG level.

76. It results that the Applicants' letters of appointment at the ASG and USG level did not contain any clear and accurate information and/or specific explanations regarding their right to pension, namely on their future pension benefits and entitlements, which together with the reference to the relevant UNJSPF Regulations could have been considered to provide basic relevant information to the Applicants in the absence of a copy of the UNJSPF Regulations.

77. In the absence of evidence that the Applicants, long-serving career staff members, were timely, fully and accurately informed of the their essential and fundamental right to pension, as part of the terms of any of their letters of appointment at ASG and USG levels, and that they were provided with a copy of the UNJSPF Regulations, the Tribunal concludes that, the Applicants accepted their appointments at the ASG/USG levels unaware of the applicable rules, including UNJSPF Regulations and of their legal consequences on their pension benefits and entitlements as a result of the change in their contractual status from staff members to UN officials.

78. While the Tribunal appreciates that any staff member has the responsibility to become aware, fully understand the content of the legal framework governing their employment contract before signing it, including the ones relating to the UNJSPF, and to ask clarifications or explanations if necessary, the staff member can only do that after the Organization respects its obligation to fully and accurately inform her or him by providing copies of such applicable legal framework. Therefore, the Tribunal considers that such an obligation of the staff member and therefore the resulting presumption that a staff member knows the applicable framework, as stated by both the Dispute and Appeals Tribunals in their constant jurisprudence, is a derivate obligation and can exist and produce legal effects only if the Organization fulfilled its primary obligation to formally inform the staff member of their content prior the acceptance of the contract.

79. The Tribunal considers that it cannot be presumed that the Applicants were already aware of the content of the UNJSPF Regulations, including arts. 21, 28 and 40, applicable to their new positions when they signed their letter of appointments at the ASG and USG level, based only on the fact that they were long-serving staff members. At most, it could be assumed that the Applicants were previously aware only of the Staff Regulations and Rules and the UNJSPF Regulations, in as much as those were applicable to their previous employments as staff members with continuing contracts at D-2 level. The Tribunal considers that their new contracts at the ASG and USG levels should have included the relevant legal provisions of art. 28.d (ii) and art. 40 of UNJSPF Regulations, which were previously not applicable and therefore unknown to them as staff members at the D-2 level. Only at the time of their appointment at the ASG and USG levels could Applicants have reviewed the newly applicable provisions and consider if any additional clarifications were needed. The only reference included in the annex to their contracts at the ASG and USG levels was the one related to the *quantum per annum* of the pensionable remuneration. The pensionable remuneration is expressly identified in staff rule 3.5 by reference to art. 51 of the UNJSPF Regulations and is usually included in part of the Staff Regulations and Rules, but does not reflect any of the important information and relevant of arts. 21 and 28 d(ii) of the UNJSPF Regulations.

80. In addition, the Tribunal notes that staff rule 3.18 establish a mandatory deduction for staff members participating in the UNJSPF for each period from the total payments due to them. It results that, if the total payments due to a staff member increase for different reasons (like, for example, promotion and/or new appointment), their contribution to the pension fund will increase accordingly. It results that staff rule 3.18 provides that UNJSPF is established on the principles of obligatory and contributory participation to the Fund of the all the staff members, which is essential for its existence. Further, the United Nations pension system also respects the principle of autonomy, reflected in the creation of the UNJSPF as an independently administered fund with specific regulations (the UNJSPF Regulations) and administered by the UNJSPF Board, a staff pension committee for each member

organization, and a secretariat to the board and to each committee (art. 4 of the UNJSPF Regulations).

81. The Tribunal further notes that art. 28(d)(i) and (ii) of the UNJSPF Regulations establishes a cap to the amount of retirement benefit payable to a contributing staff member separating at the level of USG, ASG or their equivalent, in direct relation to the benefit to a participant at the D-2 level, top step. However, the contribution to the pension fund of staff members and UN Officials or their equivalent level in such positions calculated on the scheme provided by art. 28(d) of the UNJSPF Regulations, will continue to be proportional to the higher level of their corresponding salaries until the date of their effective separation from the Organization, and never to be reflected in the amount of their respective retirement benefit.

82. The International Labour Organization Convention on Invalidity, Old-Age and Survivor's Benefits (No.128 of 1967) defines in art.1 *inter alia* the following terms:

> … (i) the term qualifying period means a period of contribution, or a period of employment, or a period of residence, or any combination thereof, as may be prescribed;
> … (j) the terms contributory benefits and non-contributory benefits means respectively benefits the grant of which depends or does not depend on direct financial participation by the persons protected or their employer or on a qualifying period of occupational activity.

83. The United Nations decided to adopt a calculation scheme which followed the first option of the above-mentioned standards as reflected in arts. 27 and 28(d) of UNJSPF Regulations only with regard to the highest levels of staff members - D-2 top step and/or UN officials (ASG and USG levels or their equivalent, which appeared to respect the principle of equality and equity at the time of the adoption of the relevant rules and regulations. However, the Tribunal considers that the situation of a long serving career staff member at the D-2 level, top step, being elected Secretary-General or appointed at the level of ASG or USG, and then retiring from

such a position, was never taken into consideration, and therefore was never covered by this calculation scheme in an equal and equitable manner.

84. The Tribunal considers that, while staff rule 3.1 establishes the general mandatory rule that all staff members with 6 months or longer appointments must participate in the UNJSPF, the rule provides no exceptions to allow a complete and effective implementation of the its last part: "provided that participation is not excluded by their letters of appointment". Over the years, the Organization failed to adopt additional provisions to clearly identify, either in the Staff Regulations and Rules or in the UNJSPF Regulations, the situations when a staff member or a United Nations official or their equivalent level, including the Secretary-General, USGs and ASGs, can be exempted from participating in the UNJSPF, despite the fact that the possibility of exclusion from the applicability of staff rule 3.1 is mentioned not only by this staff rule, but also in art. 21 of the former UNJSPF Regulations (adopted in 2003), and in art. 21 of the current UNJSPF Regulations (adopted in January 2007) with an identical content. As results from Supplementary Article B of the 2003 and 2007 UNJSPF Regulations, these provisions are applicable not only to staff members, but also to United Nations officials, including the senior officials (Secretary-General, USGs and ASGs), on full or part-time employment.

85. In the absence of any such provisions, it results that the Administration did not fulfill its obligations to fully inform staff members and United Nations Officials (including senior officials such as the Secretary-General, USGs and ASGs) or other officials at their equivalent level, of the possibility to be exempted from participating in the UNJSPF.

86. In this sense, the Tribunal notes that both Applicants are the first two long-serving staff members with permanent or continuing appointments at the D-2 level, already enrolled in the UNJSPF when appointed at the ASG and USG levels, who reached the mandatory retirement age while occupying USG positions. It results that the Applicants contributed continuously to the pension fund both as staff members at the D-2 level and as senior officials or the organization, without being informed or

made aware before signing their letters of appointment that, since they had already reached the maximum cap level of their retirement benefit at the time of their appointment as ASGs, they may be exempted from contributing to the pension fund or some alternative solutions may be applicable to them. The Applicants were not able to discuss with the Administration these important contractual aspects unique and unprecedented in nature, namely if they were to pay a future higher contribution to the pension fund corresponding to their increased salaries as senior officials or if they were to maintain the previous level of contribution corresponding to D-2 top level, or even to discontinue completely their contribution to the pension fund during their mandates as ASGs. No such information was made available to the Applicants when they were appointed at the USG level. Both Applicants testified before the Tribunal that they were informed about the content and the legal effects of art. 28 of UNJSPF Regulations on their retirement benefit only before their separation from the Organization and not before or at the time of their appointments. Further Ms. Kane stated in this regard that "being at the USG level she was in a small group of people who all know each other. People in this group simply did not have the knowledge of this issue. Other high levels in her group were also unware."

The Administrative Tribunal of the International Labour Organization ("ILO") Judgment No. 2768 (2009) stated that: "The principle of good faith and the concomitant duty of care demand that international organizations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform employees in advance of any action that may imperil their rights or harm their rightful interests […] .This duty of care is greater in a rather opaque or particularly complex legal situation" .

87. In addition, the Tribunal considers relevant for the present case the UNAdT Judgment no. 1495, *Annan* (2009) in relation to an application filed by an applicant who first entered the service of the Organization in 1965 and participated in the UNJSPF from June 1966 through December 1996, with a break in service from 20 November 1974 to November 1975. As results from the facts of the case leading

to the above-mentioned UNAdT judgment, on 31 December 1996, the applicant's appointment as a staff member ended when he was elected as Secretary-General. He served in this capacity from January 1997 to January 2007. Due to this unprecedented situation, on 9 January 1997 the UNJSPF created an "Aide-mémoire" setting out the possible courses of action with respect to pension benefits, taking into account the then Secretary-General's unique situation, namely, his prior participation in the UNJSPF as a staff member. On 14 January 1997, the then Secretary of the UNJSPF Board addressed an unsigned letter to the Special Assistant to the then Secretary-General emphasizing that, due to some "perceived inconsistency" and concerns of possible "double-dipping", the best option for the then Secretary-General would be to voluntarily suspend payment of any Pension Fund benefit during his term as Secretary-General, without "nullifying any part of his UNJSPF benefit entitlements and options".

88. On 28 January 1997, the then Secretary-General completed the UNJSPF's "payment of benefits" form covering the period of his prior participation in the UNJSPF as a staff member. He selected the option of "one third lump sum, or $ _, if less than one third, or your contributions with interest, if greater, and the balance as an early retirement benefit" under the heading of "Early Retirement Benefit For Participants Who Have Reached Age 55, But Have Not Reached The Normal Retirement Age (Article 29)". Furthermore, in the payment instructions section, he requested that "payment of [his] periodic benefit be suspended during the period of [his] service as UN Secretary-General". In June 2006, the former Secretary-General, made a request for payment of accumulated periodic payments for the period January 1997 to December 2006. The request, initially refused by the UNJSPF Board Standing Committee, was granted by the UNAdT.

89. The Tribunal considers that the Applicants in the present case were respectively appointed in 2004 and 2002 at the ASG level without a break in service, after being long-serving staff members.

90. At that time, 2002 and 2004, the Organization was aware already since 1997 (when the first senior United Nations official, the Secretary-General, was elected also after being a long-serving staff member) that in such exceptional cases, it was necessary, at the beginning of the new appointments of such senior officials, to clarify the terms and conditions of their service in relation to the right to pension, namely, the level of their contributions, and their options for the retirement benefit, including the early retirement benefit once they contributed at least 25 years to the pensions fund or reached the age of 55 as staff members and the applicability of art. 28(d) and 40 of UNJSPF Regulations to their individual situation. Such relevant information and correlative options, which were discussed by the then Secretary-General and UNJSPF Board at the beginning of the former's mandate in 1997, were not of public knowledge and therefore, remained unknown to the Applicants, since such discussions were private and took place sometime before their appointments. Moreover, the Administration and/or the UNJSPF Board, which were both aware of this relevant precedent, did not present any of these options to the Applicants. These options were not fully and timely provided to the Applicants before or after their appointment nor when they reached the age of 55, so that they could have had opted to benefit from scheme similar to that proposed to the former Secretary-General, namely to separate from the Organization as a result of an early retirement as staff members with 25 years of contributory service, to request the suspension of the payment of their periodic benefits during their mandates and at the end of their mandates, to receive the payment of the accumulated period payments pursuant to art.40 of the UNJSPF Regulations.

The Tribunal considers that the Applicants' situation was complex and opaque and ought to have been addressed in the same way at was the case of the former Secretary-General. In the Applicants' case, the UNSJPF Board did not issue any memorandum, nor a did it adopt any legal mechanism after 1997, when the first case arose of a senior official transitioned to the position of Secretary-General from a position of long-serving staff member. It was clear to the Organization that such a situation was not fully covered by the legal framework. However, no measures were

adopted at least after 2009, following UNAdT Judgment No.1495 (2009). The Applicants were not able, due to the lack of information, to ask for additional clarifications and/or to request that the then Secretary-General grant them at least an exception from staff rules 6.1 and 3.18.

91. The Tribunal notes that in their letter addressed to the Secretary-General on 26 May 2016, the Applicants expressly indicated that they did not contest the way their pensions were calculated pursuant to art. 28 of the UNJSPF Regulations based on the existing cap on the benefit for staff at the ASG and USG level, but the fact that their conditions of service related to their pension at the ASG and USG levels were not included in any of their letters of appointment, and that the Organization failed to respect the principles of good faith and fair dealing since they were not informed of the content of art. 28 of the UNJSPF Regulations when they transitioned from the status of staff members at the top echelon of the D-2 level with continuing appointments to the status of United Nations senior officials at the ASG and USG levels. This lack of information deprived them of the alternative career options with the consequence of paying additional contributions which were not reflected in their pension benefits and, as a matter of equity, they requested compensatory damages. The Applicants also mentioned:

> … Given the dual regressive features of long service such as ours, some mitigation of the effects of these factors also is warranted. There is an inherent anomaly in the treatment given to career staff and to those who are newly appointed at the ASG/USG levels and who are not subject to the effects of a cap. Had we received a separate pension for our 13 and 10 years of service at the ASG/USG levels, we would have earned payments equivalent to some $40,000 annually. That at least would help to offset the considerable additional contributions we were required to make, as well as double the amount the Organization contributed.

> … Had we been entitled to a withdrawal settlement for these additional contributions, it would have represented several hundred thousand dollars. We realize that due to the constraints of the Pension Fund Regulations, these modalities were likely not feasible. Nevertheless, by failing to provide a full picture of' what our service entailed, we feel we were unfairly disempowered from making career choices in our best interest. As a matter of justice and equity we therefore request you to provide a representative amount of compensation for our losses.

92. Having reviewed the content of the contested decision, the Tribunal notes that the conclusion that the Applicants had the responsibility to look into their respective situation and, if necessary ask advice, is incorrect as results from the above considerations. Further, the Tribunal considers that this argument was the only one reflecting the reasons of the Applicants' 26 May 2016 letter to the Secretary-General, since the rest of the reasons presented in the Secretary-General's response of 7 July 2016 related to the correct calculation method and the resulting pension benefits, aspects which were not contested by the Applicants.

93. Further the Tribunal observes that the contested decision does not clarify if the Secretary-General considered it to be within his discretion, pursuant to staff rule 12.3, to grant any exception from staff regulation 6.1 and, if such an exception would have been inconsistent with other staff rules or prejudicial to the interests of any other staff members or group of staff members.

94. The Tribunal considers that the contested decision, namely, the rejection by the then Secretary-General 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 ASG and USG levels is unlawful because it was taken by the then Secretary-General without being informed

of and without giving full consideration to all the legal aspects and the particular circumstances mentioned above.

95. In the light of the above considerations, the Tribunal concludes that the Organization breached its obligation of duty and care by failing to fully and timely inform and the Applicants of their fundamental right to be fully and timely informed of their conditions of service as pertain to their contributions and related retirement benefits when offered each of their appointments at the ASG and USG levels Consequently the application is to be granted and the contested decision is to be rescinded.

96. As an alternative to the rescission of the contested decision which relates to the contractual terms and conditions of each of the Applicants' appointments at the ASG and USG levels, pursuant to art. 10.5 (a) of the Statute, the Respondent may elect to pay a three months net base salary compensation to each Applicant.

Relief

97. The Statute of the Dispute Tribunal states, as relevant:

> **Article 10**
>
> 5. 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.

98. The Tribunal considers that art. 10.5 of its Statute includes two types of legal remedies:

a. Article 10.5(a) refers to rescission of the contested decision and/or specific performance and to a compensation that the Respondent may elect to pay as an alternative to rescinding the decision and/or to the specific performance as ordered by the Tribunal. The compensation, which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission of the contested decision and/or the specific performance ordered and payment of the compensation as established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression "[t]he Dispute Tribunal shall … determine an amount of compensation"; and

b. Article 10.5(b) refers to a compensation.

99. The Tribunal considers that the compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5 (b) of the Statute.

100. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two types of compensation is that each of them separately "shall normally not exceed the equivalent of two years net base salary of the

applicant", namely four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

101. When the Tribunal considers an appeal against an administrative decision, the Tribunal can decide to:

a. Confirm the decision; or

b. Rescind unlawful decision and set an amount of alternative compensation; or

c. Rescind the decision, and, in disciplinary cases, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the law, the applied unlawful sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10.5(b).

102. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

103. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same

position s/he would have been had the Organization complied with its contractual obligations.

104. The Tribunal notes that the Applicants requested as relief for the consequences of the breach of the duty care compensation in the amount of two years net base pay as monetary and moral damages.

105. The Tribunal notes that Ms. Haq testified that "there was no disclosure to forego contributing to the pension fund as an ASG/USG level […]". She stated that she paid nearly USD200.000 towards pension that did not benefit her. She further testified that she was "distressed, ha[d] heart problems [and] she felt disappointed in being treated this way by an Organization she served for so long".

106. Ms. Kane testified that "[she] paid nearly USD300.000 over the course of 13 years", and that "she expressed her upset and outrage with other high level officials. Being at USG level [she] was in a small group of people who all know each other. People in this group simply did not have the knowledge of this issue. [She] found out Ms. Haq had recently retired with the same issues. [...] [She] received a letter from USG/DM that says [they] should have known better and read the rules. This response was insulting having been a member of the cabinet of UN and see[s] this issue just set aside. Other high levels in [her] group were also unware. [The Applicants] both felt victimized by the system that [what was happening to them] was not equitable and fair".

107. While noting the recent change in United Nations Appeals Tribunal jurisprudence regarding the required evidence for compensation for moral damages as reflected in the judgments of July 2018 such as *Thimothy* (2018-UNAT-847), the Tribunal underlines that the hearing took place on 28 June 2017. At the time, the applicable UNAT jurisprudence regarding the standard of evidence establishing that the applicant's testimony was sufficient evidence for an award of compensation for moral damages was followed by this Tribunal in the present case.

108. The Tribunal considers that the Applicants are entitled to receive moral damages for the distress caused to them and considers that the present judgment together with the sum of USD10,000 for each Applicant represents a reasonable compensation for the moral damages resulted from the breach of the Applicants' fundamental right to be fully and timely informed of the their conditions of service related to their right to pension -contributions and related retirement benefits and to be offered alternative options/remedies for each of their appointments at the ASG and USG levels.

109. Regarding the Applicants' request for material damages, consisting of an equitable compensation equivalent to the "effective loss of their own contributions to the UNJSPF, which could have been avoided through the disclosure and appropriate alternative contractual arrangements", in light of the above considerations, the Tribunal considers that the Applicants are entitled, pursuant art. 10.5(a) to receive a reasonable compensation for the financial loss resulted from the breach of their right to be right to be fully and timely informed of the their conditions of service related to their right to pension -contributions and related retirement benefits and to be offered alternative options/remedies for each of their appointments at the ASG and USG levels. Consequently, this request is to be granted.

110. In this sense, the Tribunal notes as relevant the findings of ILOAT Judgment No. 2403 (2005) stating:

> It is not in doubt that an international organization is under an obligation to take proper measures to protect its staff members from physical injury occurring in the course of their employment. The same is true with respect to loss of or damage to their personal property. As a matter of principle, the same must be true of financial loss suffered in the course of their employment. Particularly is that so where, as here, the loss is directly associated with compulsory participation in a fund established by the organization and managed in accordance with rules which limit the participants' rights with respect to the fund.

111. It is the Tribunal's view that, on an exceptional basis, taking into consideration the particular complex and unique circumstances of the present matter, which should have been discussed and agreed *ab initio* between the then Secretary-General and each Applicant with the support of the UNJSF Board, the amount of a fair and reasonable compensation for each Applicant in relation to their financial loss should be established by the Secretary-General, based on the legal determinations of the present judgment, which recognizes the Applicants' right to such compensation, together with the fact that the Applicants decided not to contest the quantum of their pensions. The Secretary-General will have the opportunity to exercise his authority and discretion to establish the amount for compensation for the Applicants' financial losses in light of the analyzed legal aspects unknown at the initial stage in July 2016 and the conclusions of the present judgment and, if considered appropriate, after consultations with the Applicants. Therefore, the amount of the compensation for material damages for each Applicant resulted from the breach of their fundamental right to be informed of their contractual terms in relation to their right to pension at the ASG and USG levels, which is a fundamental and essential human right, is to be established by the Secretary-General within 90 days of the date of this judgment.

Conclusion

112. In light of the foregoing, the Tribunal DECIDES:

a. The application is granted in part and the contested decision, namely the rejection by the Secretary-General 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 ASG and USG levels, is rescinded.

b. As an alternative to the rescission of the contested decision, the Respondent may elect to pay a three months net-base salary compensation to each Applicant.

c. The Respondent is to pay to each Applicant the amount of USD10,000 which, together with the present judgment, is considered to be a reasonable compensation for moral damages resulted from the breach of the Applicants' fundamental right to be fully and timely informed of the their conditions of service related to their right to pension (contributions and related retirement benefits) when offered each of their appointments at the ASG and USG levels, respectively.

d. The above shall be paid within 60 days from the date this judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5 percent shall be added to the US Prime Rate until the date of payment.

e. The amount of a fair and reasonable compensation for material damages resulted 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 is to be established for each Applicant by the Secretary-General within 90 days of the date of this judgment.

Observations

113. The Tribunal is of the view that, in order for the Organization to be able to fulfill its obligation to officially provide timely and accurate information regarding all the contractual terms and conditions of service, including in relation to their right to pension, which is an essential and fundamental human right, and to prevent future litigation, some immediate steps should be taken by the Administration, together with the UNJSPF Board, to improve and/or correct the existing practice, as identified below:

a. To start including clear contractual terms regarding the staff members' contributions to the UNJSPF and their retirement benefits, including if and when a cap to the retirement benefit is applicable to the staff member and the individual options available in this regard, in any letter of appointment, regardless the type of appointment, and to attach copies of the Staff Regulations and Rules and of the UNJSPF Regulations to the letter of appointment in order for any staff member to be fully informed before signing it.

b. To identify and officially inform in writing all the current participants – staff members with a five years or longer contributory service, regardless of their type of appointment, by providing an individual calculation of the level of their retirement benefit and withdrawal benefit pursuant to arts. 28-30 and 31(b)(ii) at the end of every year.

c. To identify and inform officially in writing all the current participants, staff members with less than five years of contributory service, regardless of their type of appointment, by providing an individual calculation at the end of every year of the total of their own contributions to the pension fund under art. 31(b)(i) of the UNJSPF Regulations.

d. To identify and officially inform in writing all the current participants, including senior officials (Secretary-General, USG and ASG) and their equivalent, with a five years or longer contributory service, by providing an individual calculation at the end of every year of the level of their retirement benefit and withdrawal benefit pursuant to arts. 28, 30 and 31(b)(ii) of the UNJSPF Regulations; they are also to be provided with additional information/explanation and alternative options pursuant to arts. 21, 28(d) and 40 of UNJSPF Regulations and, in the light of the UNAdT Judgment No. 1495 (2009), and the present judgment. While commending the Organization for introducing an innovative tool such as the "Estimation" on the UNJSPF online portal, which can be accessed by all participants, the Tribunal underlines that this online application cannot legally substitute the

Organization's obligation to officially provide the relevant information and/or explanations mentioned above.

e. To adopt as soon as possible, after informing the General Assembly, additional legal provisions as follows:

> 1) To complete staff regulation 6.1 and art. 21 of the UNJSPF Regulations by establishing the situations/conditions when staff members and/or senior officials or their equivalent may be exempted from becoming participants of the UNJSPF and the situations when a participant may request the suspension and/or termination of his or her participation;
>
> 2) To review and amend accordingly the provisions of staff rule 3.18 regarding the calculation of contributions, while reviewing the pensionable remuneration as presented in the Report of the International Civil Service Commission for 2017 (paras.81-83);
>
> 3) To review and amend art. 40 of the UNJSPF Regulations as recommended in UNAdT Judgment No. 1495 (2009).

114. The Tribunal observes that the necessity of adopting such provisions results also from staff rule 12.3, which, while recognizing the authority and discretion of the Secretary-General to make such exceptions agreed by the staff member(s) directly affected, also establishes the requirement for any such exception(s) not to be inconsistent with any staff regulation or other decision of the General Assembly. The Staff Regulations and/or other decisions are in general implemented by the Secretary-General through the Staff Rules. Consequently, the absence of clear staff rules related to the situations in which staff members with 6 months or longer appointments can be exempted from participating in the pension fund affects not only the fulfilment of the Organization's obligation to inform and the staff members corelative right to be informed of their contractual rights, but also the ability of the Secretary-General to

grant such exceptions in accordance with the Staff Regulations or other decisions of the General Assembly.

115. The Tribunal trusts that the Secretary-General may wish to exercise his authority and discretion pursuant to staff rule 12.3, if necessary, until new provisions are adopted, to grant exceptions in similar situations after reviewing the particular circumstances of every claimant.

(Signed)

Judge Alessandra Greceanu

Dated this 5th day of October 2018

Entered in the Register on this 5th day of October 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York