UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/079
Judgment No.: UNDT/2019/124
Date: 5 July 2019
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

GUEBEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 13 October 2017, the Applicant a former staff member with the United Nations Assistance to the Khmer Rouge Trial ("UNAKRT"), filed an application with the Tribunal contesting the decision not to grant him a permanent appointment, following judgment *Gueben et al.* 2016-UNAT-692 in his favour.

Procedure before the Tribunal

2. On 15 November 2017, the Respondent filed his reply to the application.

3. On 14 May 2019, a Case Management Discussion ("CMD") was conducted with the participation of Counsel for the Applicant and Counsel for the Respondent. At the CMD, the parties agreed to a judgment being rendered on the papers, without an oral hearing.

4. Also, at the CMD, the parties were granted leave to file additional submissions on the relevance of Judgment *McIlwraith et al.* UNDT/2019/022 for the present case. The parties filed their observations separately on 24 May 2019.

Facts

5. The Applicant joined the former International Criminal Tribunal for the former Yugoslavia ("ICTY") in November 1999. He worked in ICTY as a Translator/Meeting Interpreter/Linguist Advisor until February 2008. He then joined UNAKRT as a Translator/Interpreter and, in February 2009, he assumed the position of a Reviser in English and French at the P-4 level.

6. In 2001, the Cambodian authorities established the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), to try serious crimes committed during the Khmer Rouge regime in 1975-1979. UNAKRT is an international component of ECCC, created to assist in this endeavour pursuant to an agreement between the United Nations and the Government of Cambodia, that entered into force in 2005. UNAKRT was established as a technical assistance project administered by the Capacity Development Office ("CDO"), Department of Economic and Social Affairs ("DESA").

7. In 2009, the Organization undertook a one-time Secretariat-wide comprehensive exercise, by which eligible staff members under the Staff Rules in force until 30 June 2009 were considered for conversion of their contracts to permanent appointments. In this context, the Secretary-General's bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) was promulgated on 23 June 2009.

8. On 29 January 2010, guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines") were further approved by the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"). The Under-Secretary-General ("USG") for Management transmitted the Guidelines on 16 February 2010 to all "Heads of Department and Office", requesting them to conduct a review of individual staff members in their department or office, to make a preliminary determination on eligibility and, subsequently, to submit recommendations to the ASG/OHRM on the suitability for conversion of staff members found preliminarily eligible.

9. Having sought to be considered for conversion, the Applicant received, on 4 June 2010, a letter informing him that, for the purpose of the conversion exercise launched, "[u]pon preliminary review, it appear[ed] that [he] could be considered as having met the eligibility requirements".

10. Upon completion of the review, and noting the recommendations "from the substantive Department and the respective Human Resources Office", as well as the fact "that UNAKRT was a downsizing entity", the Central Review Body ("CRB") recommended that, in the interest of the Organization and of the operational realities of UNAKRT, the Applicant not be deemed suitable for conversion and not be granted a permanent appointment.

11. On 31 January 2012, the Applicant received a letter from the Chief, Human Resources Management, DESA, advising him that:

> [F]ollowing the decision of the [ASG/OHRM] pursuant to ST/SGB/2009/10, you will not be granted a permanent appointment.
>
> This decision was taken after a review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly that UNAKRT is a downsizing entity.

12. On 30 March 2012, the Applicant requested management evaluation of the 31 January 2012 decision. On 14 May 2012, the Management Evaluation Unit ("MEU") informed the Applicant that the Secretary-General had decided to uphold the contested decision.

13. On 11 June 2012, the Applicant, along with seven other UNAKRT staff members who had also been denied conversion to permanent appointments in the same exercise, filed separate applications before the Tribunal.

14. The Tribunal ruled upon the above-mentioned eight applications by Judgment *Tredici et al.* UNDT/2014/114 of 26 August 2014, whereby it "rescind[ed] the decision of the ASG/OHRM and remand[ed] the UNAKRT conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each applicant", and awarded the equivalent of EUR3,000 in non-pecuniary damages. Said Judgment, which was not appealed, noted that both parties had "accepted the *ratio decidendi*" of the decisions that the Appeals Tribunal had rendered shortly before with respect to staff of the ICTY—having mentioned *Malmström et al.* 2013-UNAT-357 in particular—and stated that "[t]he pertinent facts and the legal issues in the present case [were] on all fours with the ICTY cases". Furthermore, in reaching the outcome quoted above, the Tribunal explicitly relied on "the guidelines set out by the Appeals Tribunal in the matter of *Malmström* 2013-UNAT-357".

15. By letter dated 24 November 2014, the Applicant was informed that, after reconsideration, the Officer-in-Charge, ASG/OHRM, had decided not to grant him retroactive conversion of his fixed-term appointment to a permanent one. The letter stated that the Applicant fulfilled three out of the four required criteria and that he

did not meet the fourth criterion, namely, that the granting of a permanent appointment be in accordance with the interest of the Organization. The letter indicated the reasons why the last criterion was not considered to be met, namely:

> I have also considered that though you may have transferable skills, your appointment was limited to service with the DESA/UNAKRT. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of UNAKRT's mandate, and the limitation of your appointment to service with DESA/UNAKRT, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational realities of the Organization. Therefore, you have not satisfied the fourth criterion.

16. On 18 December 2014, the Applicant requested management evaluation of the 24 November 2014 decision, which was upheld by the USG for Management on 23 February 2015.

17. On 4 March 2015, the Applicant, along with six other UNAKRT staff members who had also been denied conversion to permanent appointments after the reconsideration, filed separate applications before the Tribunal.

18. On 11 March 2016, the Applicant was separated from service upon his resignation.

19. The Tribunal ruled upon the seven applications by Judgment *Gueben et al.* UNDT/2016/026 of 29 March 2016. The Tribunal held that the contested decisions denying each of the *Gueben et al.* applicants–including the Applicant– a conversion of their fixed-term appointments to permanent ones were unlawful, primarily because they had not been given proper and individual consideration in light of their proficiencies, qualifications, competencies, conduct and transferrable skills, and those decisions were "based on the finite mandate of UNAKRT alone, to the exclusion of all other relevant factors".

20. The Tribunal considered that the Administration had failed to abide by its Judgment *Tredici et al.* and the Appeals Tribunal's instructions in *Malmström et al.* 2013-UNAT-357. The Tribunal rescinded the contested decisions and remanded the matter to the ASG/OHRM for "retroactive individualised consideration of the [*Gueben et al.*'s applicants] suitability for conversion of their appointments to a permanent one" in conformity with the instructions given in the Appeals Tribunal's Judgment of *Malmström et al.,* among others. The Tribunal further awarded moral damages in the sum of EUR3,000 to each of *Gueben et al.* applicant. Judgment *Gueben et al.* UNDT/2016/026 was appealed before the Appeals Tribunal.

21. In its Judgment *Gueben et al.* 2016-UNAT-692 dated 28 October 2016, the Appeals Tribunal affirmed judgment UNDT/2016/026 except for the award of moral damages, which was vacated.

22. By letter dated 17 March 2017 from the Acting Assistant Secretary-General for Human Resources Management ("AASG/OHRM"), the Applicant was informed of the decision not to grant him a permanent appointment after the reconsideration of his suitability.

23. On 12 May 2017, the Applicant requested management evaluation of the decision not to grant him a permanent appointment.

24. By letter dated 17 July 2017, the USG for Management replied to the Applicant's request for management evaluation. The contested decision was upheld.

25. On 13 October 2017, the Applicant filed the present application before the Tribunal.

Parties' submissions

26. The Applicant's principal contentions are:

a. He separated from service on 11 March 2016 as a consequence of the job insecurity caused by the failure of the Administration to grant him a permanent appointment;

b. In his letter of 17 March 2017, the AASG/OHRM indicated that the reason for not finding the Applicant suitable for conversion to permanent appointment was that he "did not consider it likely that [the Applicant's] services would be required by the Organization beyond the needs for [his] services at the UNAKRT". However, this criterion is absent from the rules;

c. The new suitability requirement introduced in the Applicant's case is discriminatory and contrary to the Appeals Tribunal's ruling that the Administration may not rely on an employing entity's finite mandate for refusing permanent appointment;

d. All non-language international professional staff members within UNAKRT received permanent appointments following the most recent judgment of the Appeals Tribunal. Those permanent appointments included a restriction of service to UNAKRT. Therefore, had the Applicant been granted a permanent appointment, it would have been subject to the same restriction;

e. The AASG/OHRM has not taken into account the interests of the UNAKRT. The Applicant's post is maintained until the end of 2019 and may well be required until 2023 or 2024. A benefit accrues from maintaining qualified and experienced staff on posts until the closure of UNAKRT;

f. The AASG/OHRM indicated in his 17 March 2017 letter that "French translators, interpreters and revisers must also have an excellent knowledge of at least two other official languages". However, such a requirement is not contained in any promulgated rule. Furthermore, the Applicant has a specialization in law that would allow him an exception to the requirement of a third language, and he also has an intermediate/advanced level of Spanish;

g. The application of the mobility requirement is unlawful. The Applicant has the correct language combination coupled with his specialization in law. As a consequence, there were and are posts in the broader Secretariat for which he would be suitable. It is discriminatory to deny him a permanent appointment while granting one to non-language professionals;

h. In contrast to the findings in *McIlwraith et al.* UNDT/2019/022, the Applicant's combination of legal knowledge and proficiency in English and French give him the skills required for a language post; and

i. The Applicant requests the Tribunal to order the Administration to grant him a permanent appointment or to be granted compensation for the failure to grant him such appointment in the form of a termination indemnity. He also requests moral damages for the "blatant infringement of his rights and career uncertainty caused by the decision".

27. The Respondent's principal contentions are:

a. The contested decision fully implements Judgment *Gueben et al.* 2016-UNAT-692. The AASG/OHRM reconsidered the Applicant for a permanent appointment in accordance with the directions contained therein and the applicable legal framework;

b. There is no causal link between the contested decision and the Applicant's resignation. He submitted his resignation on 7 January 2016, more than one year prior to the contested decision. The reasons proffered by the Applicant for his resignation are unrelated to the contested decision;

c. The Applicant's views as to the current and future need for his former post are irrelevant;

d. In reconsidering the Applicant's request for conversion to a permanent appointment, the AASG/OHRM considered all relevant factors, including qualifications, competencies, conduct, experience, transferable skills, individual terms of appointment and organizational interests. He also had regard to the likelihood that exceptions to the established policies and rules should or would be granted;

e. The AASG/OHRM concluded that the Applicant was not suitable for conversion to a permanent appointment because he had not passed the required LCE, a prerequisite for the employment of language staff in the Secretariat, and did not possess the sufficient skills in other UN official language outside of French and English;

f. The Applicant's situation is different to the non-language professional staff members as they possess skills that are common to the broader Secretariat, and are not subject to the distinct requirements of language positions in the Secretariat;

g. The Applicant does not identify any material error of fact. The Applicant did not pass the LCE in January 2012 and therefore he does not meet that prerequisite for ongoing language positions. His argument that his intermediate/advance level of Spanish may have allowed him to participate in the LCE is incorrect. The requirement for additional languages is "excellent knowledge" not intermediate/advanced. While an exception was introduced to the language requirements for the LCE in 2013 and 2015, it did not help the Applicant because he was unsuccessful in passing the LCE in both instances;

h. The Applicant's case is not distinguishable from the professional language applicants in *McIlwraith et al.* UNDT/2019/022; and

i. The Applicant is not entitled to an order for conversion to a permanent appointment or to a termination indemnity. The Applicant's resignation renders such a claim moot. Further, the Applicant presented no evidence to support his claim for moral damages. The Respondent requests the Tribunal to dismiss the application.

Consideration

28. In the present case, the Tribunal recalls that the initial decision taken by the Administration in relation to the refusal to grant the Applicant a permanent appointment was taken on 31 January 2012. The Applicant contested this decision before this Tribunal and the Appeals Tribunal. Following the outcome of a judicial

appeal and a reconsideration exercise, the Applicant was informed of a second decision of 17 March 2017 denying him a permanent appointment. This is the decision under judicial review.

29. After having carefully examined the evidence on file and the arguments raised by the parties, the Tribunal has identified the following legal issues:

a. Whether the decision taken by the AASG/OHRM not to grant the Applicant a permanent appointment is lawful, i.e., in conformity with the directions given by the Appeals Tribunal in *Gueben et. al* 2016-UNAT-692*;*

b. Whether the Applicant is entitled to be paid a termination indemnity; and

c. Whether the Applicant is entitled to moral damages.

Was the decision not to grant the Applicant a permanent appointment lawful?

30. The starting point for the Tribunal's review of the legality of the contested decision is the consideration of the Appeals Tribunal in its Judgment *Gueben et al.* 2016-UNAT-692, which remanded the decisions on the conversion of the *Gueben et al.* applicants' fixed-term appointments, including that of the Applicant, to the ASG/OHRM for reconsideration.

31. The Appeals Tribunal prescribed the following in *Gueben et al.* 2016-UNAT-692 (at para. 48) with respect to the reconsideration exercise that had to be undertaken by the ASG/OHRM upon remand:

> Upon remand, we expect the Administration to strictly adhere to our directives in the Appeals Tribunal Judgment and to our further instructions herein, where we explicitly instruct the ASG/OHRM to consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of their application for conversion to a permanent appointment and not to give predominance or such overwhelming weight to the consideration of the finite mandate of UNAKRT so as to fetter or limit the exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member.

32. It results from *Gueben et. al.* 2016-UNAT-692 that the main guidelines the Administration had to take into account, when considering whether to grant the *Gueben et. al.* applicants a permanent appointment, would be the following:

a. "UNAKRT staff members are entitled to 'full and fair' consideration of their respective qualifications, competencies and transferrable skills when determining their suitability for conversion to permanent appointments" (para. 45);

b. The "ASG/OHRM [shall] consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of their application for conversion to a permanent appointment" (para 48);

c. "The major reason [why] [the Appeals Tribunal] remand[ed] the cases was for the ASG/OHRM to specifically take into account each staff member's transferrable skills when considering his or her suitability for a permanent appointment" (para. 27);

d. The limitation of the staff member's appointments to service with UNAKRT does not preclude them from being granted permanent appointments. The Administration could elect to grant UNAKRT staff members permanent contracts not limited to service with UNAKRT and would then be free to reassign them without impediment (para. 30);

e. The ASG/OHRM is "entitled to take into consideration [UNAKRT's] finite mandate and downsizing situation … in reaching a determination on the conversion of its staff" (para 43). However, it shall not give predominance or overwhelming weight to the consideration of UNKART's finite mandate so as to fetter or limit the exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member" (paras. 44 and 48); and

f. "[T]he Administration is entitled to consider 'all the interests of the Organization' under Section 2 of ST/SGB/2009/10, when considering the staff member's suitability for permanent appointments" (para. 45). Likewise, the "operational realities of the [Organization]" may also be legitimately considered, in accordance with General Assembly resolution 51/226 (para. 43).

33. Having said the above, the focus of the Tribunal's review is to ascertain whether the decision not to grant the Applicant a permanent appointment after the Administration's reconsideration of his suitability was made in conformity with the above-directions given by the Appeals Tribunal.

34. The Applicant was informed of the contested decision by letter dated 17 March 2017 from the AASG/OHRM. The letter provides, in relevant part, as follows:

> In light of your qualifications and background, we have reviewed the needs of the Organization in September 2011 for translation, interpretation and revision services and observe that whereas there are a number of ongoing positions for translators/interpreters/revisers in English and French, a pre-requisite for the employment of language staff in the Secretariat is that they pass the Language Competitive Examination (LCE). As at January 2012, you had not passed the LCE. In addition, French translators, interpreters and revisers must also have an excellent knowledge of at least two other official languages, as tested by the relevant United Nations competitive examination, one of which must be the working language of the Headquarters' Duty Station. Your main language is French and you are fluent in English. However, you are not proficient in any other UN official language.
>
> Taking into account your individual background, qualifications and skills, we do not consider it likely that your services would be required by the Organization beyond the needs for your services at the UNAKRT and for this reason, I do not consider that your individual qualifications and skills make you suitable for conversion to permanent appointment.

35. The Applicant raised the following four main arguments to challenge the lawfulness of the decision taken by the AASG/OHRM, not to grant him a permanent appointment:

a. The Administration took into consideration a criterion that is not contemplated in the rules, namely the likelihood that the Applicant's services may be required beyond the needs of UNAKRT;

b. The above-mentioned criterion is discriminatory and contrary to the Appeals Tribunal's ruling that the Administration may not rely on an employing entity's finite mandate for refusing a permanent appointment;

c. The consideration of passing the LCE as an additional requirement to grant the Applicant a permanent appointment is not contemplated in the staff rules either and it is discriminatory; and

d. He has a specialization in law that would allow him an exception to the requirements of a third language and he also has an intermediate/advanced level of Spanish.

36. Having reviewed the evidence in the present case, the Tribunal is satisfied that the Organization followed the instructions provided by the Appeals Tribunal in *Gueben et. al.* 2016-UNAT-692, and properly considered the Applicant's suitability for a permanent appointment in the reconsideration exercise that led to the contested decision of 17 March 2017.

37. According to the evidence on file, the Administration assessed the Applicant's qualifications, competencies and transferable skills while taking into account the overall interests of the Organization.

38. Considering that UNKART is a downsizing entity, the Tribunal finds it reasonable for the Administration to evaluate the Applicant's transferable skills in the context of the requirements for language professional staff within the Secretariat. It is not discriminatory to include such considerations in the overall assessment of language professionals compared to non-language professionals.

39. The Administration considered that the employment of language staff in the Secretariat is dependent on the LCE examination and that the Applicant had not passed such examination. It also considered that French translators, interpreters and revisers in the Secretariat must have an excellent knowledge of at least two other official languages, as tested by the relevant United Nations competitive examination and that the Applicant did not meet this criterion either.

40. First, the Applicant recognises that the LCE examination is a condition *sine qua non* to be eligible for language posts within the Secretariat and that he does not meet such requirement. The evidence on file shows that the Applicant was invited to take the LCE exam in 2013 and 2015 but he was unsuccessful in passing it. As a consequence, he did not have the proper qualification to be considered for language posts within the Secretariat.

41. In *McIlwraith et al.* UNDT/2019/022, the Tribunal reviewed the reconsideration exercise of the suitability of several language professional staff at the former ICTY for permanent appointments. The Applicant's situation is similar to their situation in respect of the requirement to pass the LCE. At para. 85 of *McIlwraith et al.,* the Tribunal ruled that:

> The Applicant states that some of her experience as translator was ignored in the contested decision. Even if her assertions are correct, this does not change the outcome as the reason why she was not granted a permanent appointment is that she had not passed the LCE, which is a pre-requisite for the employment of Professional language staff in the Secretariat. The factual errors she alleges have no bearing on this finding.

42. The Tribunal does not see any reason to depart from the above findings. Indeed, the fact that the Applicant did not pass the LCE was a proper consideration in assessing his suitability for a permanent appointment.

43. Second, the Applicant contends that the requirement for excellent knowledge of a third language is not contained in any rule and seems to be a practice of the Organization. The Tribunal is of the view that an administrative practise can be considered as a reliable ground to anchor an administrative decision, provided that said practise is neither manifestly illegal nor abusive, that it persists over time and

it is consistent, uniform and commonly accepted by the majority of the stakeholders.

44. The Applicant also claims that an exception to the requirement for excellent knowledge of a third language should have been made in his case because of his specialization in law. This argument cannot be accepted for two reasons: firstly, exceptions to administrative practises must be interpreted restrictively and any deviation must be reasonably grounded; secondly, exceptions to this requirement have only been made when a candidate holds a university degree in law or has relevant experience.

45. In this regard, the Tribunal refers to a generic job opening for a "2015 LCE - French Associate Translator /Précis-Writers, P-2/P-3" vacancy that clearly states, in relevant part, the following:

> As an exception, for applicants who do not have a third language but hold a university degree in law … the requirement of an additional official language may be waived by the Boards of Examiners.

46. It is clear that a specialization in law is not equivalent to a university degree in law. Therefore, the Applicant cannot claim that his specialization should have been considered to grant him an exception to the requirement of excellent knowledge of a third language.

47. Third, the Applicant claims that his intermediate/advanced level of Spanish should have been taken into consideration. In this regard, the Tribunal notes that the Administration requires an excellent knowledge of a third official language of the United Nations and that the Applicant's level of Spanish was not sufficient to comply with such requirement.

48. Last but not least, the Applicant argues that he is being discriminated in comparison with non-language professional staff members.

49. The Tribunal recalls that non-discrimination and equality of rights are two important legal principles that need to be properly understood, bearing in mind the circumstances of each case.

50. The force of the assumption that "alike should be alike" whilst things which are "unlike should be treated unlike" explains much of the normative appeal of the principle of equality, but it still needs to be understood in a factual context. Indeed, a discriminatory practise only arises when two similar situations are treated differently without any reasonable justification for such a distinction.

51. In the present case, the Tribunal is of the view that there is no evidence of a discriminatory treatment of the Applicant vis-à-vis non language staff. The Applicant's situation is not equivalent to the situation of non-language professional staff because the latter possess skills that are common to the broader Secretariat and are not subject to the same requirements as language professional staff.

52. The Tribunal is of the view that the different nature of their functions justifies different recruitment requirements and, as a consequence, the Tribunal has not identified any discriminatory treatment in the Applicant's consideration for a permanent appointment on the part of the Organization.

53. In light of the above, the Tribunal finds that the decision not to grant the Applicant a permanent appointment, following the reconsideration exercise, is lawful.

Is the Applicant entitled to be paid a termination indemnity?

54. The Applicant requests compensation in the form of payment of a termination indemnity for the failure of the Administration to grant him a permanent appointment.

55. Having found that the decision not to grant him a permanent appointment is lawful, there is no need, in principle, to examine his request for termination indemnity as an alternative compensation. However, for the sake of completeness the Tribunal will address the Applicant's claim in this regard.

56. In accordance with staff rule 9.6, termination is defined as follows:

> (a) A termination within the meaning of the Staff Regulations and Rules is a separation from service initiated by the Secretary General.
>
> (b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

57. Concerning the payment of a termination indemnity, staff regulation 9.3(c) provides as follows:

> If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Rules.

58. The evidence in the present case shows that the Applicant was separated from service on 11 March 2016 due to his resignation. His appointment was not terminated by the Secretary-General as per staff rule 9.6(a) and, as a consequence, he is not entitled to the payment of a termination indemnity within the meaning of staff regulation 9.3(c).

Is the Applicant entitled to be paid moral damages?

59. The Applicant also requests to be granted moral damages for the "blatant infringement of his rights and career uncertainty caused by the decision".

60. The Tribunal finds that the Applicant cannot be granted moral damages for two reasons. First, the issue of moral damages was already subject of a judicial decision in *Gueben et al.* UNDT/2016/026, whereby the Tribunal granted each of the *Gueben et al.* applicants an amount of EUR3,000 for moral damages. However, this award was vacated in appeal by the Appeals Tribunal in *Gueben et al.* 2016-UNAT-692. The issue of moral damages is thus *res judicata*.

61. This Tribunal has recently held in *Lamb* UNDT/2019/092 that:

> The principle of *res judicata* applies to an issue that has been definitely settled by a judicial decision. In the United Nations' internal justice system, once the Appeals Tribunal issues a judgment settling an issue, it is *res judicata*, which means that 'it [is] no longer subject to appeal and [can]not be raised again, either in the Dispute Tribunal or in the Appeals Tribunal' (*Chaaban* 2015-UNAT-554). The Appeals Tribunal has also held that '[t]here must be an end to litigation and the stability of the judicial process requires that final judgments by an appellate court be set aside only on limited grounds and for the gravest of reasons' (*Shanks* 2010-UNAT-026bis).

62. The second reason relates to the fact that the Applicant has not presented any evidence that he has suffered compensable harm. Article 10(5) of this Tribunal's Statute provides, in relevant part, that:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> …
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

63. According to the latest jurisprudence of the Appeals Tribunal, the Applicant needs to provide evidence of harm to support an award of compensation (see *Rehman* 2018-UNAT-882). In *Rehman*, the Appeals Tribunal held as follows:

> The law on compensation for harm, as decided by the majority of the Appeals Tribunal in *Kallon*, a decision which is binding on the UNDT, is that 'a staff member's testimony alone is not sufficient to present evidence supporting harm under Article (…)10(5)(b) of the UNDT Statute (footnote omitted). Therefore, the testimony of an applicant in such circumstances needs the corroboration of independent evidence to support the contention that harm has occurred (footnote omitted).
>
> The Appeals Tribunal's decision in *Kallon* follows the amendment of the statutory law governing an award of compensation. In 2014, Article 10(5)*(b)* of the UNDT Statute and Article 9(1)*(b)* of the Appeals Tribunal Statute were amended by General Assembly

> resolution 69/203. They now provide, in relevant part, that the Dispute Tribunal and Appeals Tribunal may award compensation for harm only if such harm is 'supported by evidence' (footnote omitted). It is therefore incumbent on a claimant to submit specific evidence to sustain an award of moral damages (footnote omitted).
>
> This is the current law on compensation for harm and it is the law which the UNDT must apply when it is contemplating such an award.

64. In the present case, there is no evidence of harm to support an award of compensation apart from the Applicant's own claims. Therefore, his request in this respect must accordingly be rejected.

Conclusion

65. In view of the foregoing, the Tribunal DECIDES:

The Application is rejected in its entirety.

(*Signed*)

Judge Teresa Bravo

Dated this 5th day of July 2019

Entered in the Register on this 5th day of July 2019

(*Signed*)

René M. Vargas M., Registrar, Geneva