



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/003/R1

Judgment No.: UNDT/2020/110

Date: 3 July 2020

Original: English

**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

AMINEDDINE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Nusrat Chagtai, AAS/ALD/OHR, UN Secretariat

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

## **Introduction and Procedural History**

1. At the time of filing the application, the Applicant served as a Field Language Assistant with the United Nations Truce Supervision Organization (“UNTSO”). He holds a fixed-term appointment at the G-4 level. He challenges certain decisions made in the selection exercise for United Interim Force in Lebanon (UNIFIL) Job Opening (“JO”) 87864 (Information Technology Assistant – G5) and the fact that he was not selected.

2. Initially, the Applicant challenged his non-selection for two other positions he had applied for in 2016, namely UNIFIL (JO) 2016/38 and 2016/026. In October 2017, the Applicant applied for the aforementioned JO 87684 which remains the sole subject matter currently before the Tribunal. His applications for all three job openings were unsuccessful. The non-selection decisions for these vacancies were communicated to the Applicant on 19 December 2017 and 27 April 2018 respectively.

3. He challenged his non-selection for these three posts by writing to the Management Evaluation Unit (“MEU”). The MEU found that his applications for JOs 2016/38 and 2016/026 were time-barred and therefore not receivable, and his application for JO 87684 had received full and fair consideration with no indication of procedural irregularity or unfair treatment.

4. On 20 February 2019, the Applicant challenged the selection decision in respect of all three vacancies in the instant application before the United Nations Dispute Tribunal (“UNDT”).

5. The UNDT dismissed the Applicant’s claims in respect of all three posts on grounds of receivability in Judgment No. UNDT/2019/043.

6. The Applicant appealed the first instance judgment. The United Nations Appeals Tribunal (“UNAT/Appeals Tribunal”) concurred with the UNDT that the

application is not receivable in respect of the 2016 JOs because the Applicant did not request management evaluation in good time. He was late.

7. In respect of JO 87684, the Appeals Tribunal found that the Applicant's request for management evaluation was timely. The Dispute Tribunal should have given due regard, the Appeals Tribunal held, to the "exceptional circumstances" it had found existed when it granted his motion for extension of time i.e. that the Applicant was self-represented and may not be conversant with the technical procedural requirements of formal litigation.<sup>1</sup>

8. The case was remanded to the UNDT for adjudication in relation to JO 87684 only. However, there were two outstanding motions by the Applicant that had been filed at a time when his challenge to all three non-selection decisions was before the Tribunal. The case was assigned to the instant Judge in April 2020. By Order No. 068 (NBI/2020) issued on 14 April 2020, and varied by email on 24 April 2020, the Respondent was required to file his submissions on the merits of the application in respect of JO 87684 by 4 May 2020. In so doing, they were required to address whether the two pending motions that had to do with JOs 2016/026 and 2016/038 should now be withdrawn by the party that submitted the motions or dismissed by the Court.

9. The parties were required to file a joint submission on agreed facts and issues by 18 May 2020. The Respondent's submission on the merits was duly filed. However, the parties made separate filings on facts and issues. They agreed on only two issues to be determined. In attempting to frame the issues in his 18 May 2020 filing, the Applicant – who is self-represented - did not properly articulate the issues arising on his own initial application. He overlooked or failed to properly set out the more important of the issues for adjudication. More specifically, the Applicant's submission omitted to address the claim in his application that, despite his written requests, UNIFIL recruitment did not provide him with the names of the assessors on

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<sup>1</sup> 2019-UNAT-962.

the interview panel prior to his interview. The Applicant instead focused on issues of discrimination that were not germane to the initial concerns raised in the application.

10. The issues to be determined were therefore identified by the Tribunal in accordance with the Appeals Tribunal's consistent jurisprudence that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review."<sup>2</sup>

11. In cases where the job selection process is challenged UNAT has held as follows:

The selection process conducted by an interview panel can be rescinded under rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection shall be upheld.

We also hold that there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.<sup>3</sup>

12. On 26 May 2020, the Tribunal issued Order No. 098 (NBI/2020) listing the issues for adjudication in this matter as follows:

a. Whether as alleged at paragraph one of part V. of the application, the Respondent failed to respond to the applicant's request to be provided with the names of the "assessors"/panel members before the interview on 19 and 20 February 2018.

b. If there was no response, did this prevent the Applicant from

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<sup>2</sup> *Fasanella* 2017-UNAT-765, para. 20.

<sup>3</sup> *Rolland* 2011-UNAT-122, para 4 and 5.

protesting the participation of a Mr. Williams, against whom the Applicant had a pending case?

c. Whether the Applicant received full and fair consideration for the position? In particular, the Tribunal will inquire into whether there is basis for considering that the Applicant ought not to have been interviewed by Mr. Williams?

d. Whether the Applicant suffered harm as a result of the contested decision?

13. The parties were directed to file closing submissions on these issues. In response to the Order directing the filing of submissions, the Applicant filed only documentary evidence on 5 June 2020. It was in the form of extracts of articles from the internet on the subject matter of discrimination on sectarian grounds against certain locals in the hiring process at UNIFIL. He also submitted medical reports.

14. On 18 June 2020, the Applicant was to have filed a final submission. However, at that time a document including motions seeking extensions of time, permission to file translations and an oral hearing of witnesses was filed in Arabic. Additional supporting documents, including photographs alleged to depict a member of the interview committee with a successful candidate at some time prior to interview were attached to the 18 June 2020 filing.

15. The Respondent filed closing submissions on 12 June 2020. As the Tribunal found that the closing submissions failed to sufficiently address the identified issues, the Respondent was directed, on 16 June 2020, to file supplemental submissions on the following:

a. Applicant's 18 May 2020 Response to Order 068 - the Penultimate paragraph where the Applicant says "My case is identical to the case of Ms. Regina Asariotis Judgment No. 2015-UNAT-496."

b. Paragraphs 11(a) and (b) of Order No. 098 (NBI/2020) dated 26 May 2020.

## **Facts**

16. On 26 October 2017, the UNIFIL Regional Information and Communications Technology Section (“RICTS”) issued a JO for a G-5 Information Technology (“IT”) Assistant (“JO 87684”/“the position”). The Applicant applied for the position. The Applicant was shortlisted for a written assessment, which he passed, and was invited for a competency-based interview.

17. The Applicant had written prior to the interview, requesting to be provided with the names of the assessors who would comprise the interview panel.<sup>4</sup> In his email sent on 15 February 2018, he said “kindly send me the names of the assessors as promised as a guarantee to insure transparency of this multi-step process, which we were assured that it was going to insure accountability at every step.”

18. However, there appears to have been no response as highlighted in the email he sent on 21 February 2018 after the interview.

19. The Applicant contends that the Chair of the interview panel, Mr. Williams, denied him an opportunity to raise concerns and voice his protests about more than one biased member of the panel before the start of the competency-based interview.

20. The competency-based interviews were conducted on 19 and 20 February 2018 by a panel. According to the Respondent, the Panel was chaired by an RICTS Information Systems Officer (FS-6) and included an RICTS IT Assistant (FS-5) and an Associate Environmental Engineer from the Environmental Unit (NO-B) (Panel). An *ex-officio* from UNIFIL Human Resources (“HR”) and a note-taker were also present during the interview.

21. The Panel assessed the candidates against the competencies of Professionalism, Client Orientation and Technological Awareness. The Panel rated

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<sup>4</sup> Emails dated 15 and 21 February 2018, Annex 4 to the Application.

the Applicant as partially meeting the requirements for the competency of Client Orientation.

22. On 28 March 2018, the Chief/RICTS informed the UNIFIL Chief Human Resources Officer (“CHRO”) that the Panel recommended eight candidates to the Mission Review Panel for selection for the position. The Applicant was not recommended.

23. On 10 April 2018, the Mission Review Panel endorsed the recommendation. On 23 April 2018, the Head of Mission approved the selection of two of the recommended candidates and approved the rostering of the remaining six recommended candidates. On 27 April 2018, UNIFIL HR informed the Applicant of his non-selection for the position (“contested decision”).

24. The Applicant was eventually promoted to the G-5 level on 1 November 2019.

### **Submissions**

25. Although the Applicant did not file closing submissions, he had made certain submissions in his application. Specific concern was raised by the Applicant regarding the role of Mr. Williams not just as an assessor but as the Chair of the Panel. He contends that Mr. Williams ought not to have interviewed him because he was at that time due to defend his position in a pending UNDT case filed by the Applicant concerning an earlier job posting, JO 2016/024. Mr. Williams also features prominently in the Applicant’s fight, including written complaints, against perceived discrimination in hiring.

26. The Applicant alleges that Mr. Williams prevented him from ventilating his concerns on the day of the interview. He says he was also prevented from speaking about other panel members who he said aired unfavourable views about him publicly in relation to a Staff Union election campaign he had launched.

27. Among the candidates interviewed by the Panel, according to the Applicant, were supervisees of the panel members. He said that “FPD DFS Facsimile of 30/01/017 with reference: UNHQ-FPD-Fax-1-20179387 must be reviewed to discover the carefully concealed discrimination”. The Applicant alleges there was also “institutional bias” and discrimination on religious grounds. He suggested that the comments and deliberations of the assessors can be examined for evidence of bias.

28. In his statement of facts and issues filed on 18 May 2020, pursuant to Order No. 068 (NBI/2020) the Applicant reiterated his concerns about discrimination and bias. Mention was made of the Chair’s refusal to allow him to raise these issues before the interview. He contended that his case is identical to the case of *Asariotis*.

29. In that case, the Applicant, Ms. Asariotis, was invited for an interview. Some days before attending, she drew the attention of the Human Resources Management Section (“HRMS”), UNCTAD, to the fact that she had been interviewed several times for the post in question and that there were ongoing proceedings before the UNDT with regard to her challenge to a prior selection process for the post. She did not specifically request names of the assessors but her need for this information was evident as she wrote as follows:

[I]n view of the fact that formal proceedings in relation to an earlier selection process for the same post and involving the same hiring manager are still ongoing, I hope you understand that I am somewhat concerned about being interviewed by a panel with substantially the same composition.

30. UNAT observed<sup>5</sup> that:

Those communications put the Administration on inquiry as to, in the words of the UNDT, “the significance that [Ms. Asariotis] attached to the panel’s composition”. This enquiry arose against the background where Ms. Asariotis had launched a legal challenge to a prior selection process concerning the same post.

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<sup>5</sup> Paragraphs 25-29 of the Judgment.



31. UNAT upheld the UNDT's finding that the communications in that case

show that although the Applicant drew the Administration's attention to the fact that she did not wish to be interviewed by the same panel members who had interviewed her previously for the same post, the names of the panel members were never formally communicated to her, as such depriving her of the possibility to contest the composition of the panel.

32. UNAT concluded that:

[H]ad Ms. Asariotis been informed of the composition of the panel in advance of her interview, she would have requested the replacement of the panel members.

The UNDT correctly held that the failures of the Administration in this regard vitiated the entirety of the process.

33. The Respondent's principal contentions as initially submitted may be summarized as follows:

- a. The Applicant has not identified any breach of applicable procedures. The contested decision was in accordance with UNIFIL's Guidelines for the Selection of Locally Recruited Staff Members ("Guidelines"), which are consistent with the procedure for staff selection under ST/AI/2010/3 (Staff Selection System).
- b. The Applicant received full and fair consideration. The Report and the Worksheet record the answers which the Applicant provided to the Panel. The Applicant does not dispute that the Worksheet and the Report correctly reflect his answer to the question on Client Orientation. The Report and the Worksheet show that the Panel rated the Applicant as only partially meeting the competency of Client Orientation because he did not meet the majority of the positive indicators.
- c. The Panel considered that the Applicant met the indicators of: (1) keeps a client informed of progress or setbacks; and (2) monitors ongoing developments inside and outside the clients' environment to keep informed

and anticipate problems. There is nothing in the Applicant's answer which suggests that he met any of the other positive indicators. As the Applicant did not meet the majority of the positive indicators for the competency of Client Orientation, the Panel did not recommend him to the Mission Review Panel for selection.

- d. There were no procedural irregularities or indications of ill motive. The Guidelines did not require that UNIFIL disclose the names of the Panel members to candidates prior to the interview and UNIFIL did not do so for any of the candidates.
- e. Panel member Mr. David Williams informed Counsel for the Respondent that when he interviewed the Applicant for the position, he was not aware that the Applicant had another case before the Dispute Tribunal involving UNIFIL.
- f. Even if Mr. Williams had been aware of the Applicant's pending case, the case was not against Mr. Williams as alleged. He was merely one of the interview panel members in the selection process challenged in that earlier case. The Applicant has not demonstrated any prejudice as a result of Mr. Williams being on the Panel for the selection exercise, which is the subject of these proceedings.

34. In a supplemental submission filed on 16 June 2020, the Respondent conceded that he did not respond to the Applicant's emails of 15 and 21 February 2018.

35. The Respondent maintains that even so, the Applicant could have raised these concerns prior to the interview but did not do so.

36. As it relates to the Applicant's contention that the current case is comparable to that of the Applicant in *Asariotis*, the Respondent's supplemental submission is as follows:

First, Asariotis confirmed that there is no obligation to inform job applicants of the names of assessment panel members prior to an interview, and the failure to do so does not constitute a procedural irregularity. Second, Asariotis turned on whether it was reasonable for the Dispute Tribunal to find that the selection process was unfair where Ms. Asariotis had expressly objected to the participation of the hiring manager on the assessment panel after she had received a judgment in her favour regarding a prior selection exercise for the same position involving the same hiring manager, and at least two of the same panel members who would serve on the panel for the selection exercise in question. None of those facts exist here. Case No. UNDT/NBI/2017/013 concerned a different position, the Hiring Manager in this case was not an assessment panel member for that selection exercise or for the one that is the subject of these proceedings. Finally, no judgment was issued in Case No. UNDT/NBI/2017/013 until 24 February 2020. The Dispute Tribunal dismissed the case.

The Applicant has not met his burden to produce clear and convincing evidence of any irregularity, bias, or ill-motive. Mr. David Williams's participation on two assessment panels for two different positions for which the Applicant and many others applied, does not rebut the presumption of regularity.

## **Consideration**

### *The Motions*

37. There has been no submission by the Applicant denying that his two motions filed in March 2019 related only to JOs 2016/026 and 2016/038 that no longer form part of the subject matter of this case. Accordingly, it is determined that the two motions are no longer relevant and they are hereby dismissed.

### *The Selection Process*

38. Online blogs on discrimination in hiring practices at UNIFIL put into evidence by the Applicant indicate that there may have been cause for concern generally over the period 2006 to 2014 and up to the time of the 2018 interview. He also referred to reports by the Office of internal Oversight Services (OIOS) on the problem. The said reports were not attached but their existence and the fact discrimination in UNIFIL hiring may have been an issue of concern have not been

denied by the Respondent. The problem of alleged discrimination is explained in a 20 August 2014 online article included with the Applicant's filed documents. It explained that for the people of Naquora,

Their biggest worry is the high level of unemployment among the town's young people who, about two months ago, blocked the international highway and set fire to tyres in protest at what they called the injustice to which they are subjected by UNIFIL over the issue of employment. They feel a constant sense of wrong, believing that they are discriminated against in favour of other villages. They feel that recruitment is dominated by favouritism and nepotism, in most cases at their expense. They cannot ignore the fact that approximately 75 percent of UNIFIL's Lebanese staff (numbering around 700) come from a particular sect.

39. However, there is no mention of the Applicant himself or the assessors alleged to have been biased in any of the online blogs he submitted. The Tribunal finds that the Applicant has failed to substantiate the allegation that there was actual discrimination specifically directed against him in the JO 87864 selection process based on religion or ethnicity. He has however provided, by way of these blogs, information to substantiate that he had cause to believe that without proper checks and balances his own pending interview may have been tainted with bias based on discrimination against his own sect.

40. The Applicant's case challenges at its core the alleged failure of the Respondent to implement promised checks and balances to ensure transparency in the interview process, thereby allowing him to raise timely concerns about potential bias. The Respondent failed to present a plausible, or indeed *any*, basis for the non-response to the Applicant's proactive inquiry as to the names of the assessors. Notably, the Applicant in his email dated 15 February 2018 indicated that he had been promised during a pre-interview presentation that the names of the assessors would be provided. It would have been proper, under the circumstances, for the Respondent to either dispute the fact of the promise or provide the requested information. The Respondent's silence can only draw an inference, and in fact a finding, of impropriety.

41. Had proper attention been paid to the Applicant's request, the implications of the alleged promise and any issue of potential bias of concern to the Applicant could have been aired and addressed. The Applicant, as a self-represented non-native English speaker, may not have expressed his concerns as fully or as well as the applicant in *Asariotis* did in requesting the names of assessors. It is clear though, that his concerns were based on similar issues of potential bias. If anything, his belief in his entitlement to receive the names was based on a stronger basis than that of Ms. Asariotis. He said he had been promised the names.

42. The Applicant contends that this promise gave him legitimate expectation that he could properly wait to receive the names before raising concerns of prejudice and bias on the part of Mr. Williams and other members of the Panel.

43. If the Applicant had received the assessors' names, he would have had the opportunity to raise his concerns as to potential bias before the day of the interview. These concerns primarily related to the involvement of Mr. Williams in a prior recruitment process for JO 2016/024 and a case arising from it, UNDT/NBI/2017/013, then pending before UNDT. The fact that the said case was dismissed on grounds of receivability in February 2020 does not mean that the Applicant may not have had sound basis for his concerns at the time of his interview for JO 87684 in 2018. Mr. Williams's involvement in the selection exercise for JO 2016/024 did not mean that Mr. Williams was automatically conflicted,<sup>6</sup> but this was a matter that the Respondent failed to address prior to the interview, despite the Applicant's requests.

44. The supplemental submission by the Respondent that "there were two other Panel members and an *ex-officio*, against whom no ill-motive or bias is alleged" is not correct. The application expressly raised concerns about potential sectarian discrimination, that the assessors may have had a supervisory relationship with other

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<sup>6</sup> See as cited by the Respondent -*Wilson* 2019-UNAT-961, para. 23 (regarding "built-in safeguard mechanism to keep any individual bias and preformulated opinion from influencing the selection exercise").

candidates and that the assessors expressed negative views regarding the Applicant's UNIFIL Staff Union election campaign; these could have been properly addressed had the Respondent dealt appropriately with the Applicant's pre-interview requests.

45. There is a dispute between the parties as to whether the Applicant tried to raise his concerns about bias on the day of the interview. It is fair to say that this dispute would not have arisen if the Respondent had responded to the Applicant's first email. Providing him with the assessors' names, as had been promised, would have resulted in the Applicant's concerns being properly aired and addressed. It is also fair to say that the Applicant would not have had to write the second email had his first email been acknowledged and a response given. The Tribunal finds that the circumstances as described on the record lends itself to the reasonable inference that he would not have written the second email had he been allowed to raise his concerns at the time of interview.

46. The Tribunal finds that the Applicant cannot be said to have been fully and fairly considered for the position. The impugned decision cannot therefore be upheld.

#### *Remedies*

47. Rescission of the challenged decision is not an appropriate remedy based on the time that has elapsed, the fact that other candidates served in the position and the Applicant has since been promoted to an equivalent position. Accordingly, there must be compensation as an alternative to the rescission of the contested administrative decision.

48. The Respondent's submission on the calculation of compensation is that the Applicant would be entitled, under art. 10.5(b) of the UNDT Statute, only to a percentage of the difference between his net base salary at the time of the contested decision, and the amount he would have received had he been selected for the position. Since there were eight other candidates who passed the written assessment and there were two positions, the Applicant had a one in 4.5 chance of being selected. Any compensation for loss of income would therefore be 22% of the difference

between his net base salary at the time of the contested decision, and the amount he would have received had he been selected, up to a maximum period of two years.

49. However, since 1 July 2019, the Applicant has been in receipt of special post allowance (“SPA”) at the G-5 level and effective 1 November 2019, was promoted to the G-5 level. Thus, any award of compensation for loss of income should therefore be offset by the Applicant’s income since 1 July 2019, when he started to receive SPA at the G-5 level. Accordingly, the Applicant would only be entitled to compensation for the period May 2018 to 1 July 2019.

50. The Applicant also seeks compensation for harm. In determining whether an unlawful administrative decision caused harm to an applicant, the Appeals Tribunal explained as follows in *Kebede* 2018-UNAT-274:

20. It is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question.

22. Our jurisprudence holds that, generally speaking, a staff member’s testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5)(b) of the UNDT Statute. The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred. Much will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis.

51. According to the Respondent, the Applicant is not entitled to moral damages as he has not submitted any evidence of alleged moral harm resulting from the contested decision. The Respondent contends that despite claiming in January 2019 he would submit medical reports in support of his claim for moral damages, the Applicant has submitted nothing. This is not correct, as medical reports were

submitted with the June 2020 filing by the Applicant pursuant to permission granted by the Tribunal in Order No. 098 issued on 26 May 2020.

52. In a medical report dated 3 June 2020, Dr. Chahine Ghossaini certified that she had been attending to the Applicant in June 2018. This would have been a few months after the challenged interview and decision. The Doctor indicated that medical tests confirmed his diagnoses of vitiligo, weight fluctuation, sudden pains, cracking joints and gum inflammation were caused by shock and stress. Her report recorded that the Applicant had informed her that the stress he suffered was psychological due to discrimination and curtailment of professional advancement at UNIFIL. Dr. Ghossaini certified that the Applicant was following parallel dental and ophthalmological treatment at the same time. Dr Bassam El-Hassanieh's Oral and Dental Surgery report of 3 June 2020 confirmed that the Applicant suffered inflamed gums due to stress. Dr Fadia K. Mahmoud, Ophthalmologist certified that the Applicant had been afflicted with short-sightedness since March 2018. This supported the position, as had been reported to Dr. Ghossaini, that the Applicant sustained sudden visual impairment because of his continuous studying of legal texts and judicial rulings during the period in question. The Respondent has not disputed the validity of the medical evidence submitted by the Applicant.

53. It is my finding that with the medical report of Dr. Ghossaini, supported by the reports of the other two doctors, the Applicant has proven his claim that he suffered stress and resulting medical ailments due to the challenged decision.

### **Conclusion**

54. The Application succeeds.

55. The Applicant is to be paid compensation *in lieu* of rescission of the challenged decision in the amount of 13 months of 22% of the difference between his net base salary at the time of the contested decision, and the amount he would have received had he been selected for the position.



56. The Applicant is to be further compensated for harm in the amount of one month's net base salary at the grade he encumbered at the time of the contested decision as compensation for stress and the resulting medical ailments for which he was treated.

*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 3<sup>rd</sup> day of July 2020

Entered in the Register on this 3<sup>rd</sup> day of July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi