Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ARANGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Evelyn Kamau, OSLA

Counsel for the Respondent:
Elizabeth Brown, UNHCR
Francisco Navarro, UNHCR

Introduction

1. The Applicant challenges his non-selection for a United Nations High Commissioner for Refugees ("UNHCR") Temporary Appointment ("TA"), P-3 Resettlement Officer position in Brasilia, Brazil ("the Position"). The Respondent argues that the application has no merit and that it be dismissed. The Tribunal grants the application.

Facts and Procedure

2. The Applicant commenced service with UNHCR on 15 March 2014 as an Associate Protection Officer based in Genale (Dollo Ado), Ethiopia, on a P-2 fixed term appointment through the Entry-Level Humanitarian Program ("EHP").[1] He was separated from service on 14 March 2015 on the ground that there were no suitable positions to extend his contract.

3. On 4 July 2017, the Applicant was informed by Ms. Marisa Gómez, Policy Officer, Resettlement Service Division ("RSD") of International Protection, that they had reviewed his P11 and were interested in retaining him for a TA as a P-3 Resettlement Officer position in Brasilia. He confirmed his availability and interest.[2]

4. In an email dated 5 July 2017, Ms. Gómez informed the Applicant, copying the UNHCR Representative for Brazil, Ms. Isabel Marquez, that he had been selected for the TA P-3 Resettlement Officer post in Brasilia in the following terms:

> Thank so much for your reply and for confirming your interest in the position. So that we are clear-we would like to retain for [sic] this position so considered [sic] yourself selected!
>
> The request to proceed with your candidacy has been sent to the relevant colleagues in human resources, and I understand you should be contacted shortly.[3]

[1] Application, section VII (1) and reply, para. 9.
[2] Application, Annex E, page 5.
[3] Ibid., page 4.

5. On 14 July 2017, the Representative submitted a request for temporary staffing needs to the Division of Human Resources Management ("DHRM") in which the Applicant was identified as the proposed candidate and requested for him to be hired from 15 August 2017 to 15 February 2018. The request was endorsed by the Regional Bureau for the Americas.[4]

6. On 21 July 2017, DHRM colleagues dealing with temporary staffing needs forwarded the Applicant's name to other DHRM colleagues dealing with external candidates, for the next stage of processing, explaining that there was no internal candidate with the required profile and hence their handing over the request to them.

7. On 26 July 2017, the Senior Recruitment Officer, DHRM, informed the Representative that the Applicant had not been cleared for rehiring by the Head of Human Resources Staff Services ("HRSS"). No explanation was given as to why the Applicant was not cleared.

> Dear Isabel,
>
> I hope this message finds you well.
>
> We have been proceeding with your request by approaching the DHRM responsible Officer, as [the Applicant] used to be a UNHCR staff. We regret to inform you that the former colleague is not cleared for rehiring by the Head of HRSS. I shall come back with candidates from our Talent Pool asap. I just wanted to let you know that [the Applicant] cannot be considered. I do apologize for any inconvenience. You know that I am fully aware of the difficulties encountered in the Americas to find suitable candidates speaking Portuguese and Spanish or, at least, one of the two.
>
> With my very best regards,
>
> Eva[5]

8. On 9 August 2017, Ms. Marquez informed the Applicant that they were unable to select him for the position as they had received information from the DHRM that he had not been cleared to be re-hired.

[4] Applicant's closing submissions, para. 19.
[5] Respondent's Submission Pursuant to Order 219 (NBI/2019), Annex R-11.

9. On 26 September 2017, Ms. Elizabeth Brown, Senior Legal Affairs Officer, Legal Affairs Service, explained to the Applicant's Counsel the reasons for excluding him from the TA P-3 Resettlement Officer position in Brasilia as follows:

> … [Applicant] was previously hired by UNHCR under the Entry-Level Humanitarian Programme (EHP). After serving for two months in the deep field, a pre-existing medical condition came to light and he had to leave the duty station. He was subsequently subject to a medical constraint limiting his deployment to H, A, B and C duty stations only. This information is confidential and field offices, including Brasilia, do not have access to it. A copy of the memorandum by the Medical Section Board dated 27 January 2015 was nevertheless provided to [Applicant].
>
> UNHCR's Recruitment and Assignments Policy, HCP/2017/2, provides at paragraph 9 that delivering on UNHCR's mandate for persons of concern requires a workforce that is "committed to being present where persons of concern are, particularly in hardship, high-risk and non-family duty stations". Pursuant to paragraph 19 of the Policy, "UNHCR's International Professional staff members are required to rotate. Rotation is designed to meet corporate and operational needs, to provide opportunities for career development through exposure to different operations and functions, in respect of service in remote and hardship duty stations, including high-risk, as well as to ensure burden-sharing." In addition, paragraph 37 provides that staff members "serve at the discretion of the High Commissioner and are committed to the principle of rotation in the interest of persons of concern and organizational priorities".
>
> Therefore, re-recruiting [Applicant] to a position in the international professional category would, in our view, be inconsistent with several principles and standards in the Policy. While this may be disappointing for [Applicant], we count on his understanding.[6]

10. On 7 October 2017, the Applicant sought management evaluation of the decision to exclude him from the recruitment exercise for the TA P-3 Resettlement Officer position in Brasilia.[7]

[6] Application, Annex F.
[7] Application, Annex G.

Parties' submissions

Applicant

11. His initial selection by the Representative for the Position was in line with UNHCR's TA procedures including the "Streamlined Procedure for Short-Term Assignments and Deployment of Locally Recruited Staff on Mission". It was DHRM's improper use of a 2015 Medical Section Board ("MSB") determination that led to his subsequent non-selection.

12. Staff regulation 4.6 and UNHCR policy Inter-Office Memorandum ("IOM") FOM 36/2010/Corr. 2 (Administration of Temporary Appointments), require that successful candidates undergo a medical evaluation after selection but prior to being appointed, for purposes of medical clearance. Medical clearance is however not carried out by DHRM and is usually done after the offer letter has been sent to the successful candidate. Despite this requirement, the Respondent deliberately circumvented the procedure and is now purporting to rely on their disregard of procedure to argue that he was not given an offer letter and was thus not required to undergo medical assessment.

13. The process to be undertaken once a hiring manager selects an external candidate as the successful candidate is that: DHRM first determines whether reference checks are required; once that is done together with processing the final grade and step, an offer letter is prepared for signature by the Chief of the Talent Outreach and Acquisition Section ("TOAS"); the offer letter is then shared with the selected candidate; and once the offer is accepted, reference checks are finalized and medical clearance is undertaken. At no point prior to the issuing of the offer letter, are matters relating to medical clearance considered.

14. Despite this, DHRM instead of issuing the offer letter and thereafter permitting him to undergo medical clearance as per procedure, decided to rely on the medical assessment given in January 2015 to determine that he was not cleared for rehiring in 2017. By doing so, not only did the Respondent fail to follow the

established procedure, DHRM overstepped its mandate and purported to play the role of Medical Services.

15. In deciding to use his previous medical assessment, the Respondent relied on incorrect facts and improper reasons relating to the Applicant's previous employment with UNHCR in Dollo Ado in Ethiopia.

16. The Respondent keeps changing his reasons for cancelling his selection for the Brasilia position. The Respondent initially stated that the Applicant was not hired due to the medical constraint issued by MSB. The Respondent is now stating that it was also because of the Applicant's previous appointment with UNHCR which allegedly did not end well and that UNHCR had to prioritize other internal candidates over the Applicant. As shown before, there were no suitable internal candidates hence why he was considered, and Ms. Alfaro was only considered after the Applicant's selection had been cancelled.

17. The decision was inherently discriminatory. Since it is mandatory for selected candidates to undergo a medical evaluation for purposes of medical clearance, the Respondent's decision to rely on the January 2015 medical assessment instead of having him undergo a medical evaluation at the time of recruitment, had the impact of subjecting him to a different clearance procedure as compared to that which other potential candidates would have undergone.

18. The decision also appears to treat him differently due to the nature of the illness. Section 4 of ST/IC/1999/111 (Mental health - Medical and employee assistance facilities) reiterates the United Nations policy that all staff members should be treated equally, regardless of the reasons that may affect their health and requires a more open, supportive and effective approach to mental health. Following successful treatment in 2015, he was medically declared fit to return to work by UNHCR's MSB, was even employed by other organizations which partner with and deploy experts to UNHCR and he has indeed since been deployed to UNHCR.

Respondent

19. The Applicant has not suffered prejudice because he has no right to be re-employed or to be considered for re-employment with UNHCR.

20. The Applicant had the right to apply for positions in UNHCR as an internal candidate for a period of two years following his separation, that is, until 13 March 2017. Following that date, the Applicant's status is the same as that of a wholly external candidate.

21. The Applicant is confusing the right to submit an application to a position with the right to be considered for that position. Neither in his application, nor in his submissions of 27 December 2019 or 20 March 2020, has the Applicant identified any right to be re-employed or to be considered for re-employment with UNHCR based on his former terms of appointment. Indeed, such right does not exist under pertinent regulations and rules and all relevant administrative issuances. If the Applicant was not entitled to be re-employed or to be considered for re-employment with UNHCR, it follows that a decision not to re-employ him cannot be in breach of his rights.

22. The Applicant has not suffered prejudice because he had no right to be considered for the temporary assignment in Brasilia. Under UNHCR's regulatory framework, temporary assignments or appointments are granted without advertisement or competitive recruitment process. Rather, UNHCR may identify a suitable candidate and grant him or her a temporary assignment under certain conditions. That is what happened in this case. Ms. Gómez and the Representative approached the Applicant about his interest and availability for a temporary appointment. The Representative then submitted a request for temporary staffing needs in which the Applicant was the proposed candidate to meet the identified short-term requirements. At the time of the request, on 14 July 2017, there was no position as Resettlement Officer (P-3) in Brasilia, not even a temporary one. Such position was only created in September 2017 and advertised in October 2017.

23. While the Applicant asserts in the first paragraph of his final submissions that his candidature for the Brasilia P-3 Resettlement Officer (TA) position was not given full and fair consideration, the facts are that there was no position, no job opening advertised, no call for applications, no application by the Applicant, and no competitive recruitment process.

24. The regulatory framework thus affords UNHCR wide discretion to unilaterally consider candidates for temporary assignments or appointments. Being considered for a temporary assignment or appointment is not part of UNHCR staff members' terms of appointment. By the same token, the Applicant lacked a right, based on his former contract of employment, to be considered for a temporary appointment. It follows that the decision not to offer him a temporary appointment cannot be in breach of his rights.

25. The Applicant has failed to identify one single applicable rule that was breached. The procedure followed in the treatment of the Representative's request for temporary staffing needs, in which the Applicant was identified as the proposed candidate, was fully compliant with IOM No. 36/2010/Corr. 2 and the Standard Procedure.

26. The requirement that former staff members be cleared before being re-hired is a reasonable one. A hiring manager might not be aware of a former staff member's full record. For example, the Applicant misleadingly states in his curriculum vitae that he served with UNHCR in Dollo Ado from March 2014 to March 2015. As a matter of fact, he left Dollo Ado on 10 June 2014 and never went back.

27. Contrary to the Applicant's assertion, it is not the hiring manager who makes the final selection decision on a temporary assignment or appointment.

28. The Applicant submits that the Respondent failed to follow the established medical procedures provided by staff regulation 4.6 and IOM No. 36/2010/Corr. 2. The Applicant's submission is without merit because staff regulation 4.6 and IOM No. 36/2010/Corr. 2 did not apply to him.

29. The Applicant was never offered a temporary appointment and therefore UNHCR was under no obligation to have him undergo medical clearance procedures.

30. The Applicant characterizes the impugned decision as being solely based on the 2015 determination by the MSB in order to argue that UNHCR wrongly considered a medical assessment outside the context of medical clearance procedures. The Applicant was not cleared also on account of his less than stellar employment record with UNHCR. In August 2014, the Applicant refused to comply with instructions to return to his duty station, despite the assessment by the Department of Safety and Security, the memorandum by the Under-Secretary-General for Safety and Security, and the fact that his colleagues returned to Dollo Ado. UNHCR nevertheless accommodated the Applicant.

31. The Applicant was an external candidate with no right to be re-employed or to be considered for re-employment with UNHCR. The Applicant himself acknowledges that his record with UNHCR was not satisfactory, as he asks for an opportunity to redeem himself. The request for temporary staffing needs concerned functions for which other suitable candidates were or would become available shortly – including Ms. Alfaro, who was available from 1 July 2017 and other external candidates. In this context, UNHCR's decision not to offer the Applicant a temporary appointment was a legitimate exercise of administrative discretion.

32. The exchanges between the Applicant, Ms. Gómez and the Representative in July and August 2017 did not create any rights for the Applicant with respect to the temporary appointment in Brasilia because there was no contract or quasi-contract between the Applicant and UNHCR. Any commitment undertaken by Ms. Gómez and the Representative on behalf of UNHCR with respect to the Applicant's TA was unlawful and UNHCR had the right to correct it.

33. Paragraph 3.1 of IOM No. 36/2010/Corr. 2 is clear that the authority to grant a temporary appointment lies with the Director of DHRM. The Standard Procedure further provides that the Deputy Director of DHRM reviews and approves the request

for short-term staffing need and that for re-hire of former staff, the previous clearance from the Head of HRSS has to be sought.

34. Neither Ms. Gómez, who was a Resettlement Officer in the Division of International Protection, nor the Representative, as hiring manager, had the requisite authority to offer a TA to the Applicant. The only representation they could lawfully make to the Applicant is that the Representative would submit a request for temporary staffing needs identifying the Applicant as a suitable candidate. Any further commitment by Ms. Gómez or the Representative was *ultra vires* and therefore illegal.

35. The Administration is only estopped from correcting an illegal commitment or erroneous representation where the staff member has relied on the representation to his or her prejudice. This is not the Applicant's case. The Applicant did not resign from his job at the time, and he has not submitted evidence of any prejudice he suffered as a result of relying on the representation by Ms. Gómez or the Representative.

36. A promise made by an official who lacks the necessary authority to deliver on the promise may not create legitimate expectations. Neither Ms. Gómez nor the Representative could have known, before making the request for temporary staffing needs, whether there would be any internal candidates with preference over the Applicant. By the same token, the administrative issuances governing TAs and appointments are public documents, and the Applicant should have known that neither Ms. Gómez nor the Representative had the authority to promise a TA to him. Indeed, their emails specified that they would make a request. Therefore, the Applicant could not have legitimate expectations.

37. The Applicant's request for remedies is unfounded. The Applicant's rights were not violated, and he did not rely on any UNHCR representation to his detriment. Accordingly, there is no basis to award any remedies to the Applicant. All remedies sought by the Applicant should be rejected.

38. In this case the Applicant was considered for a six-month TA. Given that a TA does not carry any expectancy, legal or otherwise, of renewal, and that it shall not be converted to any other type of appointment in accordance with staff regulation 4.5(b), the Applicant's loss of opportunity cannot be in excess of six months. An assumption that the Applicant would have been granted the appointment, had an appointment been offered to him, is not warranted. In accordance with IOM-FOM 36/2010/Corr. 2 and the Standard Procedure, the Applicant's appointment would have been subject to medical clearance and satisfactory reference checks.

39. Any award of compensation for loss of opportunity should take into account the Applicant's earnings during the relevant period of time. In this respect, the Applicant has been employed uninterruptedly since 2016, and he has not submitted any evidence that he earned less as a result of not being offered the temporary appointment.

40. The Applicant's claim that he would have likely been selected for a fixed-term appointment position as Resettlement Officer (P-3) in Brasilia is equally unfounded. The Applicant did apply for that position when the job opening was advertised in October 2017. He was considered and found not to meet the minimum requirements. The Applicant did not raise issue with his non-selection.

41. The Applicant has failed to produce any evidence to substantiate his assertion that he is being unfairly and discriminatorily barred from employment with UNHCR. The Applicant did not challenge his non-selection to any of the positions for which he has allegedly applied since 2015, even though he was applying as an internal candidate until 14 March 2017 and had standing before the Dispute Tribunal. The Applicant did not seek management evaluation of those decisions, and they are not subject to judicial review in the ongoing proceedings.

42. The Applicant is not being discriminated because of his mental health. The fact that he was a member of the UNHCR affiliate workforce in Cairo from 1 January to 31 December 2017 is evidence that he has not been barred for employment with

UNHCR. In November 2018, the Applicant was shortlisted, invited to a test and interviewed for the position of Head of UNHCR Field Office in Toronto, Canada. Only five out of 41 candidates to the position made it to the final round of the selection process. The Applicant was one of them. This is evidence that he is not being unfairly treated or discriminatorily barred from employment.

43. As regards the Applicant's claim for moral damages, it is trite law that moral damages may not be awarded without specific evidence supporting the award.

44. The Applicant also seeks the expunging of the 15 January 2015 medical assessment from his file. There is no legal basis for this remedy. The medical assessment is not adverse material in the sense of ST/AI/292 (Filing of adverse material in personnel records). It was submitted by the Applicant while he was on certified sick leave and is part of the Applicant's medical records.

Considerations

Receivability

45. The issue before the Tribunal is whether failure by HRSS to clear the Applicant for re-hiring to the position violated the Applicant's rights. The Respondent argues that the Applicant has no standing in this Tribunal because he is a former staff member with no contract to base his arguments on. That his application is irreceivable. The Tribunal notes that the issue of receivability was resolved in Judgment No. UNDT/2020/004.

Merits

46. The Applicant has called upon the Tribunal to review the decision of the UNHCR Administration not to approve his candidature for a TA. In line with the United Nations Appeals Tribunal ("UNAT") jurisprudence, the starting point is the presumption that official functions have been regularly performed. This presumption is satisfied where management minimally show that the staff member's candidature

was given a fair and adequate consideration. Once management satisfies this initial requirement, the burden shifts to the Applicant to show through clear and convincing evidence that he was not given fair and adequate consideration.[8]

47. The record shows that on 4 July 2017, the Applicant was informed by RSD, UNHCR HQ that they had reviewed his P11 and were interested in retaining him for the Position in Brasilia. Terms of Reference for the Position were shared with him.[9] He expressed his interest in the position and confirmed his availability. On 5 July 2017, the RSD and the UNHCR Representative advised the Applicant to consider himself selected for the Position and to await to be contacted shortly.[10]

48. On 9 August 2017 the UNHCR Representative informed the Applicant that they were unable to select him for the Position as they had received information from DHRM that he had 'not been cleared by HRSS to be re-hired'. On 26 September 2017, the Applicant learnt that he was excluded from the recruitment exercise due to the 15 January 2015 medical assessment report and the 27 January 2015 MSB determination recommending that he was fit to work in H, A, B and C duty stations.[11] Brasilia is classified as an "A" Duty Station.[12]

49. The Applicant rightly argues that the UNHCR Administration's reliance on the MSB determination to reject his selection for the Position is among other factors discriminatory therefore his candidature was not given fair and adequate consideration.

50. The Tribunal is mindful of its role when reviewing a staff selection decision, which is well settled by UNAT jurisprudence that:

> Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal's selection decision for that of the

[8] *Mohamed* 2020-UNAT-985, para. 38 citing to *Lemonnier* 2017-UNAT-762, paras. 31 and 32.
[9] Applicant's closing submissions, Annex L.
[10] Ibid., Annex E.
[11] Ibid., Annex C.
[12] Ibid., Annex M.

> Administration. Rather, the Dispute Tribunal's role in reviewing an administrative decision regarding an appointment is to examine: "(1) whether the procedure laid down in the Staff regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration". The role of the UNDT is to "assess whether the applicable regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner".[13]

51. The Tribunal finds that the UNHCR Administration failed to act fairly by basing its decision on extraneous and discriminatory considerations.[14] It is trite that; "...[a]s a matter of fair process, there is no room for extraneous considerations such as bias, prejudice and discrimination".[15]

52. The UNHCR Administration was not entitled to unilaterally base its decision on a medical record without the Applicant's consent and an opportunity to make a representation or comment on it. This was a violation of ST/IC/1999/111 which provides that, the medical records of a staff member are completely confidential. They are kept in the Medical Service and are not released to the Administration or any other party without the consent of the staff member. In order to help ensure confidentiality, the medical clearances required for initial appointment, change of duty station or detail to mission service do not contain any information that would indicate that a staff member has or previously had a mental health condition or any other medical condition, and are designed only to indicate fitness to work in a certain occupation and/or at a given duty station or mission.[16]

53. Article 101 of the United Nations Charter states that the paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. The Respondent would have acted regularly if in its decision making it was guided by these principles. It was unlawful to base a decision

[13] *Mohamed, op. cit.*
[14] See generally *Lemonnier* UNAT-2017-762.
[15] *Finiss* UNAT-2014-397, para. 20.
[16] Paragraph 8.

regarding the Applicant's selection on extraneous factors that were not relevant under the circumstances of this matter especially in light of the clear and unchallenged medical recommendation that he was fit to work in Brasilia.

54. The Applicant has proved that the Respondent discriminated against him in barring him from employment based on his medical record. This decision was motivated by discrimination and prejudice and constitutes a violation of section 4 of ST/IC/1999/111 dealing with mental health and the United Nations policy "that all staff members should be treated equally, regardless of the reasons that may affect their health, and requires a more open, supportive and effective approach to mental health".[17]

55. The Respondent argues that after this decision, he discovered several irregularities that would have disqualified the Applicant for the position anyway. This argument is untenable because when determining an application such as the present, the Tribunal looks at the factors that were before the decision maker at the time of making the decision and not factors discovered after the decision is made, unless the Respondent can show that at the time of making the decision he had no way of discovering these facts. To this effect, UNAT has held that;[18]

> Whether a non-selected candidate can meet his burden to show that he did not receive full and fair consideration for a job opening depends for the most part on the evidence the Administration reviewed in making the non-selection decision.

56. The Tribunal finds and holds that the impugned decision was unlawful.

[17] Applicant's closing submissions, para. 57.
[18] *Lemonnier* 2017-UNAT-762, para. 38.

Reliefs

57. The Applicant seeks the following reliefs:

Rescission of the contested decision.

58. Article 10.5 (a) of the UNDT Statute provides that: As part of its decision, the Dispute Tribunal may only 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". The Tribunal has wide discretion in setting the amount of in lieu of compensation, however it must be guided by judicious principles which are outlined as follows:

> "The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case". "Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the 'in lieu compensation' to be fixed." Relevant considerations in setting compensation include, among others, the nature of the post formerly occupied (e.g., temporary, fixed-term, permanent), the remaining time to be served by a staff member on his or her appointment and their expectancy of renewal, or whether a case was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit"[19].

The wording of art. 10.5(a) makes it mandatory for the UNDT to set a compensatory sum in lieu of rescission or specific performance, however, UNAT has held that "a staff member may prevail or succeed on his claim without receiving an award of damages"[20] and "not every violation of a staff member's legal rights or due process

[19] *Krioutchkov* 2017 -UNAT- 712, para. 16.
[20] *Lemonnier, op. cit.,* para. 24.

rights will necessarily lead to an award of compensation. "Where the staff member does not show the procedural defect "had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences" or harm from the procedural defect, compensation should not be awarded".[21]

59. The circumstances of this application are that although the Applicant mitigated his loss by securing alternative employment throughout the contested period, the violation of his rights is what UNAT may describe as egregious[22] as it goes against the United Nations principles in selecting staff members under art. 101 of its Charter and it violates a fundamental human right of non-discrimination. Therefore, the Applicant is awarded compensation equivalent to the full six months' earnings that he could have earned on the Position.

Moral damages for the harm

60. Compensation may be ordered for harm after the existence of such harm is proved to the requisite standards as set out in *Kallon*[23] that;

> Compensation may only be awarded for harm, supported by evidence. The mere fact of administrative wrongdoing will not necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute. The party alleging moral injury (or any harm for that matter) carries the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non- patrimonial incidents of personality.

61. Sufficient evidence requires that the Applicant's testimony be "corroborated by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred".[24] The Applicant has not

[21] *Nyakossi* 2012-UNAT-254, para. 19.
[22] *Krioutchkov*, para. 16.
[23] 2017-UNAT-742.
[24] *Ross* 2019-UNAT-926, para. 57.

proved that he has suffered harm to his professional reputation. On the contrary, the Applicant has enjoyed a good record of employment ever since the contested decision was made.

Expunging of the 15 January 2015 medical assessment and the related determination of the Medical Section Board of 27 January 2015 from his personnel file.

62. The reliefs that this Tribunal may grant are outlined in art. 10 of its Statute. It does not have jurisdiction to make an order as prayed by the Applicant[25]. The Tribunal has found that the Head of HRSS used the medical record to block the Applicant's selection to the Position and that this was illegal use of the record. It is ordered that the medical record be used only for legitimate purposes as guided by the law, i.e. ST/IC/1999/111. In this regard it is directed that a copy of this Judgment be placed in the Applicant's personnel file.

That the Tribunal should direct the Respondent not to make reference to the 27 January 2015 determination made by the MSB in any future recruitments and for the Respondent to subject him to new medical assessments when considering him for future positions.

63. This request is taken care of by the order in para. 62 above.

Judgment

64. The Applicant has successfully rebutted the presumption of regularity and proved with clear and convincing evidence that his non-selection was based on improper motive. His application is granted and he is awarded compensation in the sum of six months' net earnings that he could have earned on the Position.

65. The Respondent is directed to place a copy of this Judgment in the Applicant's personnel file.

[25] See generally, *Bagot* 2017- UNAT-718, para 70.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 4th day of August 2020

Entered in the Register on this 4th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi