

**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CIVIC

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Daniel Trup, OSLA

**Counsel for the Respondent:**

Steven Dietrich, AAS/ALD/OHR



positions



14. Between 25 March and 10 April 2017, there was communication between the Applicant and Mr. Vrey as to the best way to utilize her expertise between April and June 2017.<sup>16</sup> This communication ceased following the Applicant's complaint of retaliation against Mr. Vrey to the United Nations Ethics Office (UNEO) on 3 April 2017 and, on 7 April 2017, her request for management evaluation of Mr. Vrey's 25 March 2017 decision. The impugned decision was upheld after review by the Management Evaluation Unit.<sup>17</sup>

15. On 1 May 2017, the UNEO informed the Applicant that she had established a prima facie case of retaliation. The UNEO referred the complaint to the Office of Internal Oversight Services (OIOS) for investigation.<sup>18</sup>

16. On 16 May 2017, the UNEO informed the Secretary-General that it had found a prima facie case of retaliation and recommended that the administration undertake remedial actions for the Applicant.<sup>19</sup> In this context, FPD/DFS was directed to: (i) facilitate the extension of the Applicant's appointment pending completion of the OIOS investigation; and (ii) identify a different FRO for the Applicant's e-PAS completion and for the Applicant to be assigned to a different reporting line.<sup>20</sup>

/F1 12.0 Tf 0.0 0.0 0.0 rg 0.0 0.0 0.0 0.0 On 19/05/2017, FPD/DFS sought the Commission's (217-2156)3(6)49(U)4(N)1(E)9(O)3(I)42(I)27(O)...



will not examine or make any findings on the issue of liability for retaliation. Consequently, the Tribunal's review is limited to the issue of compensation.

22. The Counsel for the Respondent posits that the Organization's responsibility towards its employees in situations where retaliation has occurred is set out in ST/SGB//2017/2/Rev1. According to Counsel, the Dispute Tribunal may find the Organization liable for a failure to meet its obligation under ST/SGB/2017/2/Rev.1. Absent such a finding, the Tribunal may not award damages against the Organization. This proposition is incorrect. To require that the right to obtain compensation be effective upon the Organization wronging the staff member twice, i.e., first, by a retaliatory decision and, second, through a lack of a proper response under ST/SGB/2017/2/Rev.1, discloses lack of understanding of the mechanisms under both the Tribunal's Statute and ST/SGB/2017/2/Rev.1. The matter is not about whether the Organization discharged its duties toward an applicant who suffered from a retaliatory administrative decision; rather, the matter is about whether there would be any lasting financial and moral damage resulting from that retaliatory decision. Such damage may persist or not notwithstanding the Organization's acting dutifully or not; it depends on the facts of the case.

23. In accordance with the General Assembly's amendment to art. 10.5(b) of the UNDT Statute,<sup>27</sup> compensation may only be awarded for harm if it is supported by evidence. An applicant bears the burden of proving harm stemming directly from the Administration's illegal act or omission.<sup>28</sup> Illegality of the impugned decision being admitted by the Respondent; the Tribunal will now turn to discuss the remaining elements.

## **ISSUES**

Is the Applicant entitled to compensation for financial damage?

Applicant's case

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<sup>27</sup> A/RES/69/203.

<sup>28</sup> Kebede2018-UNAT-874, para. 20; Asariotis2013-UNAT-309.

24. The Applicant submits that she should be awarded compensation for loss of opportunity because she was not fairly considered for posts within COSMOS. The lack of an e-PAS denied her a level playing field in competing for posts. The Administration is responsible for this through Mr. Vrey's actions.<sup>29</sup>

25. The Applicant requests that, absent a basis for quantifying this loss of opportunity, the Tribunal calculate it *ex aequo et bono*<sup>30</sup>

#### Respondent's case

26. The Respondent's case is that the Applicant is not entitled to compensation for loss of opportunity because she has not provided evidence of any economic harm.

27. The Respondent asserts

performance evaluation for 2016/2017 and erasing the previous one, for the 2015/2016 cycle. The performance evaluation was a critical document when being considered for posts and she was informed by the COSMOS personnel and HR that without an e-PAS, she would not be favorably assessed by missions.<sup>33</sup> She was disadvantaged because she did not have one for many months. So, even though she was in the system, she was effectively and functionally disqualified. She draws the Tribunal's attention to the fact that her performance evaluation for 2016/2017 was completed in November 2017, seven months after its due date, and by a different First Reporting Officer, after the damage to her employment opportunities had already been done. The cancelled e-PAS was never retrieved or replaced, although she admits that she may have retained a hard copy of it. She applied for approximately 50 positions during the period but did not receive any offers. Eventually, she separated from service on 1 May 2018 because there was no place for her in UNMIL and no possibility of an external transfer.<sup>34</sup>

29. Mr. Erich Ball testified on behalf of the Applicant. Mr. Ball served with UNMIL from 25 January 2016 to 15 May 2017 as the Deputy Director of Mission Support. In his career, he has participated in more than 2000 recruitment exercises where he was on the CRB or the chairperson or a panel member. Mr. Ball had a conversation with the Applicant regarding her e-PAS. The cancellation of an e-performance document is not commonly done and he did not see any reason for canceling the Applicant's e-PAS pass the mid-point review.

30. In Mr. Ball's opinion, lack of an e-PAS was a significant impediment given that the Applicant wanted to have a future with the United Nations. In a situation where there are 300-400 applicants for a post, they are shortlisted and reviewed, and once the shortlist is down to a few candidates who are similar, the hiring managers perhaps go back and look at e-PASes to see what is said there about the person and then put those with better e-PASes on the shortlist. If a staff member doesn't have an e-PAS, it immediately cuts them out of the shortlisting process. Later in the process, after testing and interviews, if there are a few applicants who are similar, e-PASes may be used as tie-breaker. Not having an e-

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<sup>33</sup> Applicant's oral evidence on 7 October 2019, email from HR Join bundle p.29.

<sup>34</sup> Applicant's oral evidence on 7 October 2019.

PAS makes it difficult to prove what you have done as a staff member. Also, without an e-PAS, the Applicant stood a greater chance of being downsized.

31. Ms. Kapilahsrami testified on behalf of the Respondent in the capacity of a former Director of FPD, who participated in a high-level meeting committed to deciding interim measures following the *prima facie* finding of retaliation. Her evidence was that there were two issues: extension of appointment pending completion of the investigation and different reporting lines. By then the impugned decision was irreversible because the whole rule of law (RoL) mandate of UNMIL was being eliminated, in accordance with the Security Council

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MINUSMA did not respond, however, the Applicant's profile had been shared with the Head of Mission directly.<sup>42</sup> At UMISS there were two posts: Principal Security Advisor and Chief of Service. Ms. Kapilahsrami's team emailed the mission to alert them that the Applicant had applied to the positions. There was already a recommendation for Chief of Service that was pending with the ASG. The Principal Security Advisor post was a recruitment being run by UNDSS in NY. The Applicant was rejected after screening, based on her PHP.<sup>43</sup>

35. As concerns applications for other posts, Ms. Kapilahsrami commented on documentary evidence as follows: MINUJUSTH was going through a drawdown and adopted a strategy not to use lateral transfer but to fill all the positions through competitive review.<sup>44</sup> UNAMI found the Applicant not suitable for the post of Chief, Political Affairs for want of required experience, an assessment done on the basis of the PHP alone, before the placement on COSMOS.<sup>45</sup> Similarly, the Applicant's application for the post of Principal Political Affairs Officer in DPKO, NY, was rejected by the Inspira career portal based on information supplied in the PHP regarding her command of a second official language.<sup>46</sup> The Applicant was deemed not suitable for Senior Sector Security Advisor in Yemen because she did not submit a General Assessment Test.<sup>47</sup> Regarding Chief of Service, Human Rights at UNSOM, the Applicant was on the long list but was deemed not to have the desirable work experience that was used to create the short list for the interview.<sup>48</sup> As concerns DFS P-5 Senior Programme Officer, the Applicant did not pass the written assessment. The assessment date was 9 March 2017, which means that although the Applicant had no e-PAS in the system at the time, she had been invited to take the test.<sup>49</sup> As concerns DPA P-5 Senior Political Affairs Officer, the transmittal memo to the CRB for this post and the Inspira screen shot demonstrate that the Applicant scored below the required minimum in the written test. The test date is 13 August

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<sup>42</sup> Joint bundle, p. 88-91. TJ ET90 0.0 0.0 T Q q2.16 0.0 s3 Tm 14N288.16 Tm] TJ E . 414.36 -,0 0.0 rg 0.9998 06

<sup>43</sup> Joint bundle, p.199-200.

<sup>44</sup> Joint bundle, pp 61-69. ~~69-72~~ (b) 283. (c) B00 D10 E.04150.72.03204 Tm9(1)-7(e)15(,)11( )-11(pp)23( )-11(61)

2018, where the Applicant had no e-PAS in the system, and yet she had been invited to take the test.<sup>50</sup>

36. Altogether, according to Ms. Kapilahsrami, the difficulty in placing the

having been selected on a competitive basis. The question of performance reports would surface after suitability has been assessed. This is shown by the fact that the Applicant was invited for interviews and tests, which meant she was not screened out as such just because she had no performance report.

39. In Mr. Penklis' opinion, the Applicant was unable to secure another assignment because: UNMIL was not the only mission downsizing and at the D-1 level there are few posts with a lot of candidates competing who have significant experience.

### Considerations

40. There is no dispute regarding the fact that the Applicant did not suffer financial harm as her fixed term appointment was kept up well beyond the life of ROLSISS and even beyond the closure of UNMIL. The dispute is about the claimed damage through the loss of opportunity. In this respect, it is established jurisprudence that such damage is compensable.<sup>52</sup> The question is whether the Applicant has shown that, if not for the irregularity, she would have had a "significant chance"<sup>53</sup> or "realistic prospect" of securing other employment with the United Nations.

41. In this respect, the Tribunal finds that the burden of proving such significant chance or realistic prospect was not discharged. The Tribunal agrees fully with Ms. Kapilahsrami and Mr. Penklis, that the main criterion that a hiring manager would look at would be the PHP and the relevance of that PHP for the qualifications for the job. It also agrees that most e-PASes in the Organization have overall ratings of "successfully meets" or "frequently exceeds performance expectations", therefore, more importance is placed on PHPs. What the witnesses testified about transpires also from cases before the Tribunal – of which the Tribunal informed the parties - in non-promotion and non-selection disputes.

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<sup>52</sup> ILOAT Judgment nos. 17-19 and 21, 1955; Judgment of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, ICJ Reports 1956.

<sup>53</sup> Vangelova2011-UNAT-172, para 19; Bofill 2011-UNAT-174, para 28; Chhikara2017-UNAT-

42.

44. In conclusion, while the irregularity of cancelling the Applicant's e-PAS and the failure to promptly issue another one is obvious and regrettable, the Applicant is not entitled to compensation for moral damage. The Applicant would have otherwise had a reasonable chance or realistic prospect of retaining another employment with the Organization.

**Should the Applicant be awarded compensation for moral damage?**

Submissions

45. The Applicant seeks moral damages of six months' net base salary.

the SRSG to be part of these interviews. Her contracts were being extended **post facto** pending the OIOS investigation. This resulted in her being blocked from accessing the UNMIL compound, the computer system, etc.

48. She became acutely depressed with physical manifestations, including hair loss and chronic headaches. She was diagnosed with an autoimmune condition that was correlated with stress. The doctor prescribed antidepressant medications for her. She cried several times in the presence of colleagues due to the marginalization she was experiencing. The depression and abject sadness put a strain on her relationship with her life partner of 20 years. She feels bad that she was marginalized, retaliated against and forced out of a United Nations career because she reported misconduct. She feels this injustice every day.

49. Ms. X gave evidence based on her observations during the period when she worked in ROLSISS. The working relationship she observed between Mr. Vrey and the Applicant was “very dry”. Mr. Vrey was difficult to deal with and sometimes he was rude to people, including the Applicant, during meetings. She witnessed Mr. Vrey being aggressive/intimidating towards the Applicant. She noticed the applicant wasn’t well and asked her if she needed help/support but the Applicant was initially very reluctant to talk about it. Later, she opened up and confided that she was unwell because Mr. Vrey had: cut her out of the decision-making process (ng )-70(pr)-7(o)-20(c)3(e)3(s)8.0 0.0 0.0ica0.0 0.0 rg 0.21q BT /4p16(n)7210(c)3(e)

Case No. UNDT/NBI/2017/049

Judgment No. UNDT/2019/188

programs, and her subordinates were being given direct orders by Mr. Very, eventually she lost her mandate. His sense was that her new portfolio wasn't designed to be substantive or a core function. It seemed to be a way to maintain employment pending an ongoing investigation.

52. According to Mr. Hansen, t

exact science and such identification will necessarily depend on the facts of each case. With this respect, the jurisprudence of UNAT requires corroborating evidence, expert or otherwise, in addition to the testimony of an applicant to sustain a claim for moral damages.<sup>56</sup>

55. In this regard, the Tribunal notes that submissions from both parties go slightly off point. On the one hand, the Applicant's contention that the

otherwise)” standard.<sup>62</sup> Nowhere, however, is expert evidence required as a matter of law.

56. In the case at bar, the Respondent did not request that expert evidence be called, neither did he request medical certificates (

59. This amount shall be paid within 60