UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-622

Aly *et al.*

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Rosalyn Chapman Judge Mary Faherty
Case No.:	2015-725
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Aly *et al.*:	François Loriot
Counsel for Secretary-General:	Simon Thomas

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/031, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 1 April 2015, in the matter of *Aly et al. v. Secretary-General of the United Nations*. The staff members,[1] hereafter Aly *et al.*, filed their appeal on 1 June 2015, and the Secretary-General filed his answer on 14 July 2015.

Facts and Procedure

2. The following facts are uncontested:[2]

> ... The Applicants worked for a number of years in the Distribution Section (formerly called the Publishing Section) in the Department for General Assembly and Conference Management ("DGACM"). Apparently, as a result of technological advances within the publishing industry, in 1990, the Organization began a series of job analyses that eventually led to a 1998 reorganization of the Publishing Section. The Applicants considered that the reorganization had led to an increase in their functions and responsibilities, without commensurate reclassification of their posts[.]
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> ... On 8 May 2004, the Applicants filed an appeal, under sec. 5 of ST/AI/1998/9 (System for the classification of posts), with the [Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM")] against "decisions announced by email on 4 March 2004 related to the audit and classification of their posts" [which] had not resulted in reclassification of the Applicants' posts[.]
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> ... On 9 September 2004, the Director for the Division of Organizational Development, OHRM ("D/DOD/OHRM") informed the Applicants of OHRM's conclusion that the procedures set out in ST/AI/1998/9 [...] had been fully observed in considering the classification of their posts. Citing sec. 5 of ST/AI/1998/9, the D/DOD/OHRM stated that if the Applicants wished to proceed under that provision, it would be necessary to show for each post that the classification standards were incorrectly applied resulting in classification of the posts at the wrong level[.]
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> ... The Applicants' cases were never submitted to the [New York General Service Classification Appeals Committee ("NYGSCAC")] for review[.]

[1] The present group of Appellants comprises 18 of the 24 members who filed the initial application before the Dispute Tribunal in September 2011. Four of the remaining staff members (Messrs. Ejaz, Elizabeth, Cherian and Cone of the Aly *et al.* group filed separate appeals, which were also under consideration during the 2016 spring session and are collectively addressed in Judgment No. 2016-UNAT-615.

[2] Impugned Judgment, paras. 3-20.

... On 22 June 2007, the Applicants filed a statement of appeal to the former Joint Appeals Board ("JAB") against the implied decision not to submit their appeals to the NYGSCAC for review[.]

... [... In paragraphs 36 and 37 of] JAB Report No. 2001 [the Panel held that] (emphasis in original):

> ... [it] *unanimously concluded* that [the] Appellants' due process rights had been violated by the Administration's failure to review their cases in a timely manner [and] *unanimously agreed* to recommend for the moral injury suffered, Appellants be granted three months net-base salary at the rate in effect as at end August 2008, i.e. the date of this report.
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> ... [it] *unanimously agreed* to recommend that [the] Appellants [re]submit their cases to the [NYGSCAC] as expeditiously as possible and no later than 90 days from the date of the Secretary-General's decision on the [JAB Report].

... [On] 6 November 2008, the Deputy Secretary-General informed the Applicants of the Secretary-General's decision to reject the JAB's first recommendation relating to compensation for moral injury and to accept the second recommendation that the Applicants [re]submit their cases to the NYGSCAC[.]

... The Applicants appealed the Secretary-General's decisions to the former United Nations Administrative Tribunal ... [and the] appeal was later transferred to the Dispute Tribunal [...].

... On 29 October 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/195 [First UNDT Judgment].[3] [...]

...

... The [Dispute] Tribunal concluded that the decision to remand the case to the NYGSCAC was reasonable and fair, awarded USD 20,000 to each of the Applicants for excessive delays and procedural non-compliance, and rejected the rest of the pleas [...]. [... T]he [Dispute] Tribunal ordered:

> a. The case to be remanded to the NYGSCAC for classification decisions on the proviso that each applicant submitted the case[] for review within sixty days of the date the Judgment became executable;
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> b. For all such cases submitted in accordance with the above order, the NYGSCAC shall render decision within 180 days of the date that the Judgment became executable; and

[3] *Aly et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/195.

> c. The Respondent to pay USD 20,000 to each of the Applicants within 60 days of the date the Judgment became executable.

... Neither of the parties appealed [Judgment No.] UNDT/2010/195.

... [On] 21 December 2010, the Chief, Human Resources Policy Service ("HRPS"), OHRM advised Counsel for the Applicants that the NYGSCAC was in the process of being reactivated and that the Applicants could [re]submit their cases for review through the Committee's Secretary.

... [On] 8 February 2011, Counsel for the Applicants wrote to the Secretary of the NYGSCAC requesting that their 8 May 2004 appeals for classification [...] be reviewed by the NYGSCAC in accordance with UNDT/2010/195 [and requested to be] informed of the CAC composition, procedures and of the new ST/IC reactivating the CAC [as well as to have] access to all documents which will be submitted to the CAC, and [informed that] they are all available to testify on their duties and responsibilities discharged for the period under consideration.

... [On] 16 February 2011, [...] the Administrative Law Section advised Counsel for the Applicants that Payroll Operations Unit had approved all payments related to [Judgment No.] UNDT/2010/195.

... [On] 4 March 2011 [...] the ASG/OHRM advised the Secretary-General of the Joint Negotiation Committee's decision to recommend Ms. VL as chairperson of the NYGSCAC[,] [...] submitted [...] the names of three staff members that OHRM recommended for appointment by the Secretary-General [and] advised the Secretary-General of the names of three staff members that, on 24 February 2011, the Staff Council had nominated for membership of the NYGSCAC.

... On 13 May 2011, the ASG/OHRM [informed] the Executive Office of the Secretary-General [...] that two of the staff members recommended by OHRM for membership of the NYGSCAC [could not ...] "participate in the deliberations of the Committee", and recommended two other staff members as replacements.

... [On] 27 May 2011, [...] the Office of the Deputy Secretary-General advised the ASG/OHRM (and others) that the Secretary-General had "approved" the requests of the ASG/OHRM in regard to the proposed members of the NYGSCAC.

... On 7 June 2011, the ASG/OHRM issued [Information Circular] ST/IC/2011/17 (Membership of the New York General Service Classification Appeals Committee)**.**

... On the same day, the chairperson of the NYGSCAC transmitted to the ASG/OHRM the NYGSCAC's analysis of the cases submitted by the Applicants. The memorandum stated:

> The Committee met on a number of occasions during May 2011 to consider the cases. ...
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> ...

> After undertaking a preliminary discussion on the circumstances of the cases, the documents available, and the structure of the review, the Committee proceeded with a factor-by-factor analysis of the existing job descriptions under appeal on their merits and separate from other issues within the UNDT judgment. In their evaluation, the Committee applied the General Service Job Classification Standards that were in effect at the time of the initial classification of the job descriptions.
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> ... The NYGSCAC did not conduct a review of the cases of three of the Applicants, finding that [since] a classification decision had not been made in respect of two of the Applicants' job descriptions [Mr. Ejaz and Mr. Elizabeth] [...] there was therefore no initial classification to review. In respect to the case of a third Applicant [Mr. Cherian], the NYGSCAC stated that "due to the fact that neither the staff member, OHRM or DGACM could [...] locate, []or confirm the existence of revised and completed job description, the Committee could not conduct a review of that case". The NYGSCAC found that the posts of the other [21] Applicants had been appropriately classified, and recommended upholding the initial classification decisions.
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> ... On 8 June 2011, the ASG/OHRM [...] approve[d] the NYGSCAC report.
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> ... [On] 9 June 2011, [...] the Compensation and Classification Section, OHRM advised Counsel for the Applicants that the NYGSCAC had completed the review of the appeal of the classification decisions ordered by the [Dispute] Tribunal [and a]ttached [...] the final approved copy of the report of the NYGSCAC.

3. On 6 September 2011, Aly *et al.* filed an application with the Dispute Tribunal contesting the post reclassification decision made by the ASG/OHRM on 8 June 2011, based on the NYGSCAC recommendations of 7 June 2011, challenging, in particular, the legality of the appointments to the NYGSCAC and its composition, as well as the resultant NYGSCAC report and its findings. By way of remedy, Aly *et al.* sought pecuniary and non-pecuniary damages, as well as legal costs for abuse of proceedings. They did not expressly request either rescission of the contested decision or remand of their case to the NYGSCAC for reconsideration.

4. On 1 April 2015, the Dispute Tribunal rendered Judgment No. UNDT/2015/031, which upheld the application, in part. As a preliminary matter, the UNDT noted that it would not consider the additional grounds of appeal that were improperly raised by Aly *et al.* in their closing submissions, without being granted leave to do so. In relation to the merits of the complaints, the UNDT found that the NYGSCAC review process was flawed in that:

a) the NYGSCAC began its deliberations before its members had been properly appointed under Section 7.3 of ST/AI/1998/9;[4]

b) there was no evidence that the Secretary-General had properly appointed the NYGSCAC chairperson and its members, as required by Section 7.3 of ST/AI/1998/9;[5]

c) Aly *et al.*'s right to be informed of the composition of the NYGSCAC in a timely manner was not respected, insofar as ST/IC/2011/17 was issued by the ASG/OHRM on 7 June 2011, the same day that the NYGSCAC issued its report;[6]

d) Aly *et al.*'s right to receive a copy of the report of the reviewing service and to file their comments before the NYGSCAC pursuant to Section 6.7 of ST/AI/1998/9 was breached;[7]

e) the NYGSCAC report was not based on the documents which were required to be filed by Aly *et al.* and OHRM pursuant to Section 6.7 of ST/AI/1998/9, but rather on documents which remained unknown to Aly *et al.*;[8]

f) none of the issues raised by Aly *et al.* were analyzed by the NYGSCAC and, the UNDT thus accepted Aly *et al.*'s contention that they were not accorded due process and found the NYGSCAC report to be unlawful;[9] and

g) the foregoing deficiencies were not identified or addressed by the ASG/OHRM in her final review, nor did she produce a final, reasoned decision.[10]

5. The Dispute Tribunal thus rescinded the ASG/OHRM decision of 8 June 2011, together with the NYGSCAC recommendations, and remanded Aly *et al.*'s appeal for a full and fair consideration of their grounds of appeal to the NYGSCAC, which was to make its recommendations to the ASG/OHRM for her final decision, and ordered that the entire process be completed within 90 days of the publication of the UNDT Judgment.[11]

[4] *Ibid.*, para. 56.
[5] *Ibid.*, para. 57.
[6] *Ibid.*, para. 53.
[7] *Ibid.*, para. 62.
[8] *Ibid.*, paras. 66-68.
[9] *Ibid.*, para. 74.
[10] *Ibid.*, paras. 77-78.
[11] *Ibid.*, para. 80.

6. The UNDT rejected Aly *et al.*'s requests for moral damages and compensation for excessive delays, finding that the claim for compensation for the period from 2000 until 2009 was *res judicata*, having been adjudicated in the first UNDT Judgment, and that there was no delay given that the NYGSCAC issued its recommendation concerning Aly *et al.*'s appeal within 180 days from 21 December 2010, as ordered in the first UNDT Judgment. It also rejected Aly *et al.*'s request for costs, on the basis that the order of rescission of the contested decision together with the remanding of the case for reconsideration was reasonable and sufficient compensation for the delays in the procedure.

Submissions

Aly *et al.*'s Appeal

7. The Appellants submit that the UNDT was correct to rescind the contested decision, but erred in law and procedure when it remanded Aly *et al.*'s case to the NYGSCAC for reconsideration. At no point during the four-year proceedings did the Secretary-General raise or propose remanding the Appellants' reclassification case to the NYGSCAC for a second time, under Rule 20 of the Dispute Tribunal's Rules of Procedure (UNDT Rules). None of the modalities for a second remand had ever been raised or discussed throughout the four-year proceedings, including how to address the claims of those staff members who had newly retired and passed away. The UNDT ignored the clear language of Article 20 of the UNDT Rules, as well as of the Appeals Tribunal's ruling in *Egglesfield* that a "remand" is "a discretion accorded to the Administration",[12] and not left to the whim of the UNDT judge.

8. The UNDT, at paragraph 80 of its Judgment, erroneously referred to the Appeals Tribunal's judgments in *Baig et al.*[13] and *Egglesfield* in order to deny the Appellants compensation for harm and hardship, although both of those judgments awarded "moral damages" to the respective appellants. Hence, neither judgment was authority for refusing to grant the Appellants compensation.

9. The UNDT, at paragraph 84 of its Judgment, did not explain by what rationale the second remand to the NYGSCAC would constitute "reasonable and sufficient relief to compensate the Applicants for the delays in procedure" and violations of due process.

[12] *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 27.
[13] *Baig et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

This implies that each instance of miscarriage of justice would be absolved by another remand of the same case, and without any compensation for the harm caused whereas, in reality, each appeal remanded to the NYGSCAC entails extensive preparatory time, substantial efforts and emotion, as well as legal costs and expenditures. The General Assembly has made no provision in the UNDT Statute for multiple remands, but only for one remand. Should the UNDT develop a practice of remanding the same matter multiple times in the internal justice system, the Respondent will be encouraged to use dilatory tactics, abusive proceedings and dubious pleas, conceal evidence and simply wait for the outcome of the first remand to prepare for a second remand.

10. In recognition of the costs, expenditures, hardship and inconvenience caused by remanding cases, the General Assembly provided in Article 10(4) of the UNDT Statute for the award of compensation up to three-month net base salary to an appellant whose case is remanded. The impugned UNDT Judgment gave a new meaning to "compensation" by requiring more expenditure from the Appellants. The UNDT failed to exercise its jurisdiction when it disregarded the purpose and spirit of the three-month net base salary compensation envisaged in Article 10(4) of the UNDT Statute, and remanded the case without consulting the parties or considering the consequences and costs for the Appellants.

11. Since 2000, the Respondent has engaged in dilatory tactics to delay the Appellants' reclassification at a higher level in order to avoid paying them the salary adjustments for discharging increased duties. Such tactics are contrary to all norms and standards promoted and endorsed by the United Nations, including the duty to properly and timely classify its posts, and to pay the commensurate salaries to staff members for work done.[14] The Respondent has successfully conducted a war of attrition against the Appellants, whereby the majority of the Appellants, as well as their supervisors, experts, senior officials and key witnesses consulted in the 1990s and in early 2000 who had confirmed the Appellants' claims for reclassification, have since retired or are deceased. If further tolerated, such dilatory tactics and abuse of proceedings can only undermine the credibility and viability of the internal justice system. Although the UNDT Judgment clearly points to a pattern of abusive proceedings, the UNDT did not sanction the Respondent.

[14] Citing *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees*, Judgment No. 2010-UNAT-030 and *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107.

12. As with other decade-long reclassification cases, this appeal falls in the category of exceptional circumstances covered by Article 10(5)(b) of the UNDT Statute, warranting compensation well beyond the two-year limit for each Appellant.

13. The NYGSCAC suffers from serious credibility issues and a crisis of confidence, which has left the Appellants in a state of distress and despair, without hope that the current defects can be redeemed during their United Nations career. As at the time of filing the appeal in 2015, many Appellants had written to the NYGSCAC Secretary asking her to recuse herself in view of the multiplicity of due process violations during her tenure at the NYGSCAC in 2011, which cast a shadow of partiality and create legitimate doubts as to her capacity to act impartially as the NYGSCAC Secretary. The backdrop of this crisis situation at the NYGSCAC explains the exceptional circumstances of this case and raises the question why the UNDT would remand the Appellants' reclassification appeals for a second time to a dysfunctional committee with a long judicial record of distorted, abusive and dilatory practices.

14. Accordingly, in lieu of yet another dress rehearsal at the NYGSCAC, the Appellants ask the Appeals Tribunal to order a complete overhaul and reform of the classification process and the NYGSCAC. In the meantime, in the absence of justice in the current classification process, the Appeals Tribunal is invited to award the Appellants compensation commensurate with their pecuniary losses and moral damages, as described in their closing submissions to the UNDT. As per the Appeals Tribunal's judgment in *Mmata*, compensation exceeding the cap of two years' net base salary is warranted under Article 10(5)(b) of the Appeals Tribunal Statute, as there is evidence of aggravating factors such as the Respondent's gross negligence and decade-long mismanagement of the case.[15]

15. The Appellants request that the Appeals Tribunal:

a) affirm the UNDT's rescission order but vacate the UNDT's order to remand their case to the NYGSCAC;

b) award each of them USD 50,000 as moral damages, or if the case is not remanded to the NYGSCAC, compensation in the sum of two years' net base salary, or an amount equivalent to the Appellant's unpaid salary reclassification increase

[15] *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

retroactive to the first of the month following receipt of the Appellant's classification request in October 2000;

c) award each of them compensation in the amount of one year's net base salary for non-pecuniary damages, including delay, loss of promotion and distress throughout 12 years of protracted negotiations;

d) order costs against the Secretary-General in the sum of USD 20,000 for abuse of process before the NYGSCAC and the UNDT; and

e) refer to the Secretary-General for accountability members of OHRM and the NYGSCAC, as well as the NYGSCAC Secretary, who were involved in the systematic violation of the Appellants' due process rights during the 2011 NYGSCAC proceedings.

The Secretary-General's Answer

16. The Appellants have not clearly articulated their grounds of appeal. Their appeals do not clearly identify the errors of fact, law, jurisdiction, procedure or competence which Aly *et al.* allege may justify overturning or modifying the UNDT Judgment on the basis of Article 2(1) of the Appeals Tribunal Statute. While the Appellants make several assertions of errors by the UNDT, none establishes that the UNDT made any error such as to warrant a reversal of its decision to order the rescission of the contested decision of 8 June 2011, and to remand it for reasoned consideration. Nor have the Appellants identified any new harm that they say results specifically from the UNDT's decision to remand the classification appeal, and thus they have not shown any prejudice as a result of the UNDT Judgment. Rather, Aly *et al.* seek to incorporate a long factual history and a petition to what they view as general unfairness, without regard to matters that have already been decided on in the course of these proceedings – which the UNDT correctly found to be *res judicata* – and compensation already awarded.

17. The Appeals Tribunal should reject the claim that the Judgment should be vacated. The UNDT properly exercised its authority to order a rescission and remand under Article 10(5)(a) of its Statute and in accordance with the jurisprudence of the Appeals Tribunal in *Baig et al.*, which held that "it is not the function of this Tribunal to stand in the shoes of the

ASG/OHRM and involve itself in the decision-making process reserved for the ASG/OHRM".[16] The UNDT's decision to order the rescission of the decision and to remand the matter to the ASG/OHRM also comports with the Appeals Tribunal's jurisprudence which has generally deferred to the "broad discretion of the UNDT in the management of cases".[17] Further, the rescission and remand ordered by the UNDT present the best opportunity for the matter to be fully, finally and fairly determined on its merits, as well as reserves the Appellants' right to challenge any appealable decision after the classification appeal process has been completed.

18. Remand to the ASG/OHRM further advantages the Appellants because neither the Appeals Tribunal nor the UNDT is well placed to conduct a review of the merits of 24 reclassification appeals, particularly when, as the UNDT found, the information available before the remand was ordered was insufficient for a proper decision to be taken, and all the more considering that the Appeals Tribunal does not have the requisite technical expertise. It would also be neither appropriate nor expeditious for the UNDT or the Appeals Tribunal to consider such matters *de novo*, particularly because the reclassifications are already being considered under the remanded process. Accordingly, the interests of justice and judicial economy would be served by the present appeal being dismissed.

19. In the alternative, should the Appeals Tribunal decide to vacate the UNDT Judgment and examine the merits of the matter, recalling that a Tribunal's role is limited to a "judicial review of the exercise of discretion by the competent decision maker", it should uphold the ASG/OHRM's decision of 8 June 2011 not to reclassify the posts, and reject the Appellants' request for the emoluments they would have received had they been reclassified retroactively from October 2000. The NYGSCAC considered at length the merits of the classification appeals in May and June 2011, and the review procedure was comprehensive and correct in substance, regardless of any procedural shortcoming. The record shows that the NYGSCAC carefully considered all of the materials before it and individually reviewed each Appellant's job description on a case-by-case basis, and on its own merits, analysing each based on the applicable classification standards. The Appellants have not identified any specific error made by the NYGSCAC in considering the merits of their requests for reclassification.

[16] *Baig et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 62.
[17] *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.

20. The contention by certain Appellants[18] that there was a high likelihood that the posts they occupied would be reclassified on the basis of "studies, reports and recommendations" is pure conjecture. There was no certainty that any Appellant would have been promoted even if his respective post had been reclassified. As each Appellant would have had to apply and compete against other qualified candidates for the reclassified post, and no material submissions regarding the merits of each Appellant's candidature were made, any compensation awarded on this basis would be speculative and thus contrary to the Appeals Tribunal's jurisprudence. Further, the Appellants did not mitigate their alleged loss, as they chose not to apply for the four reclassified posts announced in the Publishing Section in 2006, or to other posts.

21. In relation to damages, the UNDT correctly rejected the request for additional compensation for moral damages and for moral injury for the period from 2000 until 2009, on the basis that this was *res judicata*. Its finding should be upheld as the Appellants have already been paid compensation for losses until the date of the first UNDT Judgment issued in October 2010, which the Appellants did not appeal. As the process undertaken since then has been the result of compliance with the UNDT's lawful directions, it does not constitute delay. Further, the Appellants offered no persuasive evidence either before the UNDT or in their appeal to show that they suffered any moral injury since the first UNDT Judgment, nor did they establish how the claimed amount corresponds to any actual moral damages that they have suffered. The Appellants have failed to establish that the UNDT erred by not awarding them moral damages.

22. The Appellants' claim for USD 20,000 in costs should also be dismissed. It is unclear whether they allege the UNDT erred by declining to make such a finding, or request the Appeals Tribunal to make such a finding itself. However, the UNDT did not find any evidence of abuse of proceedings. The Appellants merely attempt to re-litigate the dismissal of their request for costs in the first UNDT Judgment, which they failed to appeal. Further, to the extent that costs are requested to "sanction the Respondent's pattern of abuse of procedure and dilatory proceedings", this would be punitive, and thus prohibited by both Tribunals' Statutes.

[18] Citing Appellants Ejaz, Elizabeth, Cherian and Cone. See *Ejaz et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-615.

23. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Preliminary matter – request for an oral hearing

24. The Appellants request an oral hearing in order that they may give evidence on financial harm and moral suffering, loss of salary increases since 2000, loss of promotion and the Respondent's disregard of official procedures. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute. Having regard to the submissions filed and the material on record we do not think it is necessary to receive further evidence on appeal. The application for an oral hearing is therefore denied.

Merits of the Appellants' claims

Applicable Law

25. Article 10 of the UNDT Statute provides, in part:

> 4. Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.
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> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
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> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

> (b) Compensation 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.
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> 6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.
>
> 7. The Dispute Tribunal shall not award exemplary or punitive damages.
>
> 8. The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

26. In ascertaining the most efficient manner in which to adjudicate this appeal involving a protracted classification review process spanning over 20 years, as well as how to remedy the situation, this Tribunal has carefully weighed all the facts, the applicable law and the arguments urged upon us.

27. On 6 September 2011, Aly *et al.* filed an application with the Dispute Tribunal contesting the post reclassification decision made by the ASG/OHRM on 8 June 2011, based on the NYGSCAC recommendations of 7 June 2011, in which they challenged, in particular, the legality of the appointments to the NYGSCAC and its composition, as well as the resultant NYGSCAC report and its findings. By way of remedy, the Appellants sought pecuniary and non-pecuniary damages, as well as legal costs in the sum of USD 20,000 for abuse of proceedings. They did not expressly request either rescission of the contested decision or remand of the case to the NYGSCAC for reconsideration.

28. The Dispute Tribunal found the contested decision flawed and rescinded the ASG/OHRM decision of 8 June 2011, together with the NYGSCAC recommendations, and ordered a remand of Aly *et al.*'s case for a full and fair consideration of their grounds of appeal to the NYGSCAC, which was to make its recommendations to the ASG/OHRM for her final decision. The Dispute Tribunal, however, dismissed their request for compensation and costs.

29. The Appellants seek rescission of the remand, or in lieu of a remand, compensation in the sum of two years' net base salary, one year's net base salary for moral damages, and costs of USD 20,000 against the Secretary-General for abuse of process at both the NYGSCAC and the UNDT.

30. Generally, the Appeals Tribunal defers to the broad discretion of the Dispute Tribunal in the management of its cases.[19] And the Appeals Tribunal has criticised the Dispute Tribunal for awarding damages when the Applicant has not requested it.[20] Similarly, the Appeals Tribunal defers to the discretion of the Dispute Tribunal to remand a case. While the Appeals Tribunal may reverse an award of damages in cases where a party has not made such a request, by parity of reasoning, it may likewise reverse the awards of damages of the Dispute Tribunal pursuant to its powers under Article 2(3) of our Statute.

31. The Appeals Tribunal has ruled that when a reclassification decision is found illegal and a remand is no longer available then compensation is owed by the Respondent:[21]

> Generally, when the Administration's decision is unlawful because the Administration, in making the decision, failed to properly exercise its discretion and to consider all requisite factors or criteria, the appropriate remedy would be to remand the matter to the Administration to consider anew all factors or criteria; it is not for the Tribunals to exercise the discretion accorded to the Administration. However, in the present case, remand is not available because Mr. Egglesfield has retired from service with the Organization.

32. In *Fuentes*, the Appeals Tribunal affirmed the Dispute Tribunal's order that the Secretary-General pay 24,500 Swiss Francs as compensation for the illegal decision not to reclassify her post.[22] The Dispute Tribunal noted that Ms. Fuentes had received no response to her appeal of the non-classification decision; that the Administration had failed to respect the procedures under ST/AI/1998/9; and that the decision not to reclassify her post was therefore illegal. The Dispute Tribunal held that since Ms. Fuentes had, in the meantime, been promoted, a remand could no longer offer a remedy to her position. The Appeals Tribunal approved the Dispute Tribunal's assessment of compensation:

> ... [I]f the administration had, without unreasonable delay, made a decision on the applicant's request, she would have had a good chance of being appointed to a G-5 level post by January 2004 and so of being paid at that level. The damages suffered by the applicant must be calculated as follows: the difference in salary received between the G-4 and G-5 levels during the period from 1 February 2004 to 1 December 2009, on which date she was actually promoted to the G-5 level, an amount of 49,000 Swiss francs; in this case, however, that compensation shall be divided by

[19] *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.
[20] *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009, para. 46.
[21] *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 27.
[22] *Fuentes v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-105, para. 32.

> two to reflect the fact that the damage suffered is only that of losing a good *chance* to receive the above-mentioned sum. The respondent is therefore ordered to pay the applicant the sum of 24,500 Swiss francs inclusive of interest.[23]

33. Similarly in *Chen*,[24] the staff member was denied equal pay for equal work for many years. Her immediate supervisors tried to remedy the situation, but ran into bureaucracy and lack of funds. The Appeals Tribunal affirmed the decision of the Dispute Tribunal that the failure to apply the same job description to the Appellant's post as applied to posts with the same job description deprived the Appellant of her rightful opportunity to be considered for promotion. It also affirmed the decision to award her compensation calculated as the difference in salary allowances and other entitlements between her P-3 level and the P-4 level to which she was entitled from the time of her request for classification in August 2006 to the time of her retirement in December 2010, including the equivalent of the loss in pension rights.

34. It is clear that the Appellants did not request a remand in their application. They rather contested the decision of the ASG/OHRM based on the recommendation of the NYGSCAC to maintain the classification of their posts following the remand of their case as per Judgment No. UNDT/2010/195 delivered on 29 October 2010. The remedy they were seeking was compensation in the sum of two years' net base salary or "an amount equivalent to the Appellant's unpaid salary reclassification increase *retroactive to the first of the month following receipt of the Appellant's classification request in October 2000*", in addition to compensation for non-pecuniary damages and costs.

35. Contrary to the submission by the Secretary-General that a remand presents the best opportunity for having the matter fully, finally and fairly determined on its merits, the Appeals Tribunal is of the view that a second remand is unviable and unfair, having regard to the fact that the protracted classification review process in this case was mainly due to the reluctance and failure of the Administration to follow its own Regulations, Rules and administrative issuances. Furthermore, 11 of the 18 Appellants have retired and a remand in such cases could not offer an effective remedy. In addition, the Appellants claim that all their supervisors, who were competent witnesses in 2010, have also retired or are deceased.

[23] *Fuentes v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/064, para. 51.
[24] *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107.

36. From the circumstances of this case, we are of the view that the Dispute Tribunal erred in failing to consider all the requisite factors, fair play and equity on the side of the Appellants who had been involved in a protracted classification review process, by remanding the case instead of awarding compensation, which would be the most effective remedy.

37. It is not, in substance, disputed that there were massive procedural violations on the part of the Administration causing delays in dealing with the legitimate requests of the Appellants for reclassification of their posts, which, under normal circumstances, should have ensured an equality of treatment and salaries of the Appellants' new complex duties arising from the reorganization of the Publishing Section of DGACM and the downsizing of staff. The Secretary-General has not presented any evidence that there were any differences between the jobs of the Appellants and those of the 12 other staff members whose posts were reclassified. Rather, there was evidence that the supervisors of these Appellants had through the years supported and endorsed the need for the reclassification of their posts and that the Appellants had received written assurances.

38. In our view, the delay and flawed processes cast a doubt on the readiness of the Administration to adequately and fairly consider, upon demand, the request for reclassification of the posts, which has been pending since 2004. Tolerating such a situation was a form of discrimination and humiliation.

39. There was the need to uphold and ensure equal pay for equal work and to restore staff confidence in the United Nations system and also to reflect the quality of their duties and responsibilities of their respective posts. The Appeals Tribunal recognises that the delay and the difference in treatment of the Appellants resulted in inappropriate inequalities and in a violation of the principle of equal pay for equal work, which we have emphasized in *Tabari*: "Denial of pay is a violation of the principle of 'equal pay for equal work' which is a right granted under Article 23(2) of the Universal Declaration of Human Rights, which stipulates: 'Everyone, without any discrimination, has the right to equal pay for equal work".[25] The delay also violates the prohibition of discrimination embodied in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

[25] *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030, para. 17.

40. The Appellants, over the past twenty years, have consistently stated they performed functions exceeding their original job descriptions and the Administration has not disputed that statement. We hold that the Appellants had a right to request reclassification when the duties and responsibilities of their posts changed substantially as a result of the restructuring within their office, pursuant to Section 1.1(b) of ST/AI/1998/9.

41. The classification system is promulgated under the Staff Regulations and Rules and it is part of the conditions of employment for all staff members as the rules are incorporated by reference into all United Nations employment contracts.

42. In reliance on Staff Regulation 2.1, the former United Nations Administrative Tribunal (Administrative Tribunal) consistently held that the classification of posts of staff members is part of their conditions of service,[26] and classification of a post is to be done according to its job description and failure to regularise the discrepancy between the level of classification and an employee's functions is a breach or a violation of a staff member's rights. The Administrative Tribunal Judgment No. 1113, *Janssen* (2003) on failure to implement a classification for budgetary reasons resulting in violation of the applicant's rights; the Administrative Tribunal Judgment No. 1136, *Sabet and Skeldon* (2003) on failure to carry classification to its conclusion in violation of the principles in Staff Regulation 2.1; and the Administrative Tribunal Judgment No. 1115, *Ruser* (2003) on failure to correct the discrepancy between the level of classification and the budget of the staff member's post are of relevant and persuasive authority.

43. The decision by the Dispute Tribunal that it did not have the competence to decide on the Appellants' request for compensation equivalent to the difference in salary, allowance and other entitlements between their current posts' levels and the next level is an error of law. The Dispute Tribunal is not required to undertake the reclassification process before awarding damages. Once there was a breach or a violation of the rights of the Appellants, they were entitled to compensation and not a remand.

44. The Dispute Tribunal has discretion under Article 10(5) of its Statute to award compensation where the circumstances, equity and justice of the case so demand. Article 10(5) empowers the Dispute Tribunal to rescind a contested administrative decision and to set an amount of compensation or both. The history of the case should have informed the Dispute Tribunal that another remand was not the appropriate remedy, and a more suitable

[26] Former Administrative Tribunal Judgment No. 388, *Moser* (1987), para. XIV.

remedy was required, which, in our opinion, is compensation. In fact, our jurisprudence so demands. As the Appeals Tribunal reiterated in *Chen*: "The Administration has an obligation to prevent such a violation. It did not and must pay the damages."[27]

45. The Appellants have been involved in a series of vain and fruitless attempts and recourses for the reclassification of their posts. We are not saying their posts would have been reclassified or they would have been promoted had the proper procedure been followed; we are saying that if the classification had been done, the Appellants would have had the opportunity to be considered for the reclassified posts. In our view, this is the only possible conclusion from the facts of the case. The failure to apply the same job classifications to the Appellants' posts as applied to posts with the same job descriptions deprived the Appellants of their rightful opportunity to be considered for the reclassified posts.

46. It is correct that there is no automatic right to promotion to an upgraded post, but in this case, the Appellants performed the functions of the positions and the Organization has had the benefit of their performances at a lesser salary than that of their counterparts working under the same job descriptions.

47. From the foregoing, we affirm the rescission by the Dispute Tribunal of the decision of the ASG/OHRM based on the recommendations of the NYGSCAC to maintain the classification of their posts.

48. We, however, reverse the UNDT order to remand the case back to the NYGSCAC for reconsideration, and award the Appellants compensation for the violation of their rights.

Compensation

49. Pursuant to Article 9 of our Statute, as amended by General Assembly resolution 69/203, the Appeals Tribunal may award compensation in appropriate cases for harm supported by evidence, which shall not normally exceed the equivalent of two years' net base salary of the appellant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm supported by evidence, and shall provide reasons for that decision.

[27] *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, para. 25.

50. The cap on compensation which shall normally not exceed the equivalent of two years' net base salary of the appellant does not apply where the violation of a staff member's rights is as egregious as in this case.[28] The facts and circumstances of this case are truly exceptional. This appeal raises fundamental issues of human rights concerning equal pay for equal work and prohibition of discrimination, which reflects negatively on the operations of the Administration in the reclassification process.

51. Article 9(3) of our Statute prohibits exemplary or punitive damages. We will therefore not go too far beyond the cap ceiling.

52. Accordingly, we award compensation equivalent to three years' net base salary to each of the Appellants.

53. In respect of the Appellants who are still staff, the compensation is to be calculated by each individual's salary in effect at the date of this Judgment.

54. In respect of those who have separated from service before the date of this Judgment, compensation is to be calculated by each individual's salary in effect at the date of separation.

Judgment

55. The appeal is allowed, and Judgment No. UNDT/2015/031 is affirmed, in part, and reversed, in part. More specifically the order of remand is reversed.

56. The Secretary-General is hereby ordered to pay M. Brown, C. Coriette, A. Gamit, L. Giordano, M. Kaufman, J. Saffir and A. Smith compensation for the violation of their rights equivalent to three years' net base salary, calculated by each individual's salary in effect at the date of this Judgment.

57. The Secretary-General is further ordered to pay A. Aly, J. Diaz, J. Golfarini, A. Hadera, E. Hassanin, S. Hto, S. Maung, T. McCall, J. Nemeth, R. Pava and R. Vocile compensation for the violation of their rights equivalent to three years' net base salary, calculated by each individual's salary in effect at the date of separation.

[28] *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433; *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

58. The compensation is to be paid within 60 days of the publication of this Judgment, failure of which would attract interest at five per cent in addition to the US Prime Rate.

59. All other claims are denied.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Adinyira, Presiding	Judge Chapman	Judge Faherty

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar