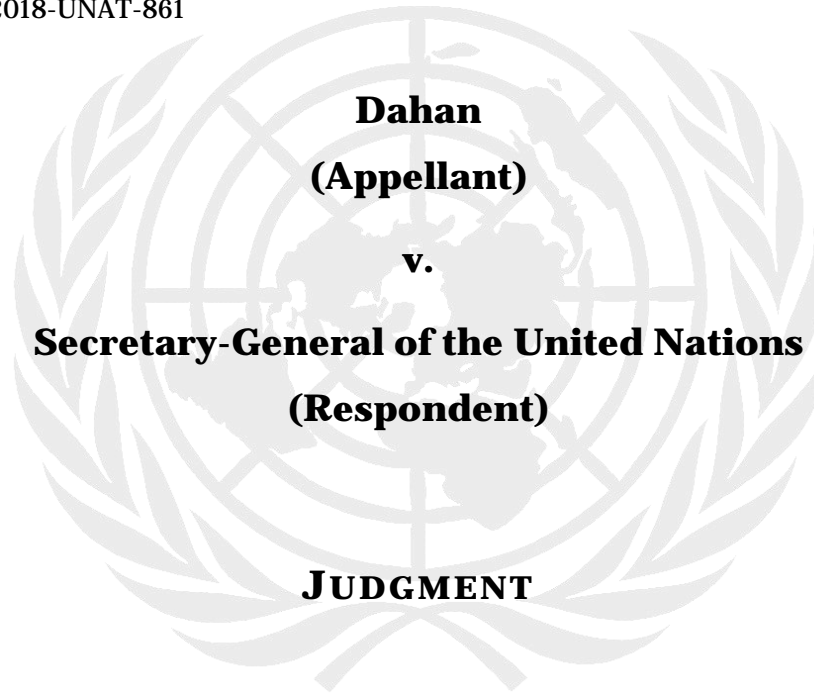




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-861



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Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2018-1157
Date:	29 June 2018
Registrar:	Weicheng Lin

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Counsel for Ms. Dahan:	Marisa MacLennan, OSLA
Counsel for Secretary-General:	Rupa Mitra

**JUDGE DEBORAH THOMAS-FELIX, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/002, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 11 January 2018, in the case of *Dahan v. Secretary-General of the United Nations*. Ms. Jöelle Dahan filed the appeal on 27 February 2018, and the Secretary-General filed an answer on 1 May 2018.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... In October 2000, the Applicant commenced employment with the United Nations as a French Court Reporter for the International Criminal Tribunal for Rwanda (ICTR). When she separated from service she held a Field Service (FS) position at level 5 step 10.

... There is no issue between the parties regarding the Applicant's satisfactory service and it is common ground that this case is concerned solely with her claim for compensation under Appendix D to the Staff Rules.

... Since 2004, the Applicant had complained to her supervisors that she was suffering back pains, which she believed was caused by the type of chair that she was required to use while performing her duties for the Organization. In particular, the following dates and events are relevant to a determination of the issues in the case:

... On 12 September 2008, the Applicant e-mailed her supervisor complaining of back pain and requesting the provision of an appropriate chair to perform her duties. This complaint was referred to the Court Management Section. In the absence of a positive response, the Applicant wrote again on 19 May 2010. She was advised that the matter had been referred to the ICTR Chief Medical Officer, Dr. MEH.

... As a result of several consultations, Dr. MEH concluded that the Applicant suffered injury to her back and on 7 October 2010, he wrote to Building Management Services requesting that the Applicant be provided with a suitable chair. It appears that there was further delay in implementing this request.

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<sup>1</sup> Impugned Judgment, paras. 5-12 (original emphasis).

... On 27 October 2010, Dr. NMU, at the ICTR clinic, prescribed six sessions of physiotherapy which provided the Applicant with temporary relief.

... In December 2010, Dr. MEH arranged for the Applicant to travel to Nairobi for a scan. The necessary arrangements did not appear to have been made thereby necessitating an unusually long wait for a physician to become available. The Applicant found this experience very painful and states that she lost faith in the ICTR clinic and requested a referral to a specialist. On 18 December 2010, the Applicant saw Dr. M[,] an orthopaedic surgeon at the Kilimanjaro Christian Medical Centre in Moshi. Dr. M concluded that the Applicant had a severe back injury and prescribed a high-backed chair to provide the necessary support to enable the Applicant to carry out her duties. Building Management Services, whose responsibility it was to provide a new chair, had not done so by April 2011. At this point the Applicant decided to take appropriate steps outside of the facilities provided by ICTR and travelled to her home country, France, seeking medical attention for her back condition.

... A medical certificate prepared by Dr. S at the Paris Montmartre Clinic, dated 13 April 2011, indicated that:

For some years [the Applicant] has been presenting with postural static back pain without neurological signs, and paraesthesia in the ulnar region of the upper limbs. The neurological examination is normal. The MRI scan performed in Nairobi shows multilevel disc protrusions.

These are problems of a musculo-skeletal nature requiring functional treatment and, above all, an ergonomically sound workstation.

... This was reported to the administration and finally, in December 2011, she was provided with a new chair to be used in her office. However, an appropriate chair was still not provided for her work in the courtroom. She continued to suffer back pain.

... In or about September/October 2011 through to early 2012 the Applicant had treatment including surgery for cancer. The resultant chemotherapy spread over several months and during this period the applicant was diagnosed with depression which she considers was due to her continuing health problems, the lack of support by the ICTR Administration and her concerns about her future career prospects.

... On 14 February 2013, the Applicant was examined again at the Kilimanjaro Christian Medical Centre and on 27 February 2013 she had a complete MRI scan at the Aga Khan University Hospital in Nairobi where Dr. KW confirmed the detailed diagnosis provided at the Kilimanjaro Christian Medical Centre. The Applicant considers that it was at this point

that she had a definitive diagnosis which prompted and enabled her to make a claim for compensation under Appendix D to the Staff Rules.

**THE ABCC CLAIM**

... On 27 March 2013, the Applicant filed her claim under Appendix D. She went into details regarding the various episodes relating to her back pain and stated that prior to 12 December 2012, she was not aware of the precise nature of the injury and had hoped that it would have been resolved by the provision of an appropriate chair. She submits that in the circumstances and notwithstanding the fact that she was suffering back pain for several years prior to that her claim was nevertheless within time since it was made within the requisite time beginning with a definitive diagnosis. She also submitted that the fact that she was suffering from cancer and undergoing medical treatment over an extended period inhibited her from filing a claim at an earlier stage.

... Having filed her claim on 27 March 2013, the Applicant's counsel made numerous follow up enquiries and was informed that the matter was under review. At no stage during this review, which the facts indicate took three years, was she asked for any explanation, clarification or further information.

... In July 2016, the Applicant was again diagnosed with cancer for which she is receiving treatment.

... ..

... On 21 July 2016, more than three years after she filed her claim, the Applicant received an e-mail informing her that the claim was denied because she had filed it past the deadline.

3. The ABCC minutes recording the decision read as follows:<sup>2</sup>

The Advisory Board on Compensation Claims.

Having considered at its 493rd meeting on 14 June 2016, the claim submitted by the above-referenced claimant for compensation under Appendix D to the Staff Rules for injuries (neck and back pain) sustained in connection with her use of inadequate work chairs during her employment with the ICTR from 2000 to 2012 in Arusha, Tanzania,

Having also considered the statement from the claimant and her OSLA representative's brief regarding the significant delay in claim submission, the emails documenting the claimant's complaints of back pain and requests for appropriate chairs to perform her work from 2008 and the corresponding response from her supervisor and the UNICTR Chief Medical Officer; and the medical reports that indicate that the claimant was aware of and treated for her medical condition from December 2010 (specifically, in 2010, had received a prescription for an ergonomic chair at work, a prescription for an MRI for back pain and another for physical therapy for back pain; therefore, at the latest in 2010,

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<sup>2</sup> Original emphases.

she was aware of or should have been aware of an injury/illness and filed her claim within four months), but did not submit a claim for compensation under Appendix D to the Staff Rules until 28 March 2013;

Recommends to the Secretary-General that due to the insufficient explanation for the delay in claim submission, the claimant's request to waive the provisions of Article 12 of Appendix D be denied, and the claim therefore be denied.

4. On 11 January 2018, the UNDT issued Judgment No. UNDT/2018/002. The UNDT found that Ms. Dahan's claim for compensation dated 27 March 2013 was untimely, since it was not submitted within the four-month time period provided for by Article 12 of Appendix D. The UNDT, however, concluded that the ABCC failed to properly exercise its discretion when considering whether, in accordance with Article 12 of Appendix D, exceptional circumstances warranted the acceptance of Ms. Dahan's untimely claim. In particular, the UNDT found that the ABCC failed to consider the detailed account of health problems experienced by Ms. Dahan and disregarded evidence and information that Ms. Dahan was undergoing treatment for cancer and depression which, according to her, impeded her ability to direct her attention to the claim for service-incurred injury.

5. The UNDT found that the ABCC also erred in refusing to waive the time limit on the ground of insufficient explanation for the delay rather than the applicable test of whether there were exceptional circumstances. The ABCC thereby erroneously limited the test of "exceptional circumstances" to applying solely to the reasons for delay and failed to properly exercise the discretion vested in it. The UNDT also noted that in responding to Ms. Dahan's enquiries about progress, she was told by the ABCC that the matter was under consideration, but there is no indication as to what, if anything, was the nature of such consideration which extended over a period of three years.

6. The UNDT rescinded the decision of the ABCC to deny Ms. Dahan's request for consideration of her claim for compensation under Appendix D to the Staff Rules and, subject to the concurrence by the Secretary-General, remanded the claim to the ABCC for proper consideration in accordance with Article 10(4) of the UNDT Statute.

### **Submissions**

#### **Ms. Dahan's Appeal**

7. The UNDT erred when it failed to address Ms. Dahan's request for moral damages. While a UNDT judgment need not address all arguments put forth by either party, it must address a specific request for relief. The UNDT therefore violated Ms. Dahan's right to a reasoned judgment. This also impacts her right to fully appeal the Judgment, since without a clear and reasoned judgment, she cannot fully contest the failure to award damages.

8. The UNDT further erred by failing to order in-lieu compensation. As the UNDT itself noted, for remand, it must have the concurrence of the Secretary-General, without which Ms. Dahan will be left in a limbo with a rescinded decision, but none to take its place. Similarly, Article 10(5) of the UNDT Statute states that when the UNDT orders rescission in cases of appointment, promotion or termination, it shall set an amount of compensation the Secretary-General may elect to pay as an alternative. This is to recognize that some specific performance may not be possible after the passage of time, or because of administrative or logistical aspects. The ordered rescission in Ms. Dahan's case is similar, because the remand is not automatic, but requires the concurrence of the Secretary-General. Therefore, the UNDT should have at least ordered compensation in the alternative.

9. Finally, Ms. Dahan submits that the failure to award moral damages is a legal error in and of itself. The UNDT found that the ABCC erred in two ways, and that Ms. Dahan's rights were adversely affected. It also noted that it took the ABCC more than three years to reach this unlawful decision, without contacting or asking Ms. Dahan for further information. Ms. Dahan put evidence before the UNDT that she had suffered tremendously because of the ill treatment by the Organization and has received a formal diagnosis of depression. These circumstances legally and factually warranted an award of moral damages, in line with the Appeals Tribunal's jurisprudence. Ms. Dahan asks this Tribunal to substitute its own judgment and award moral damages in place of the UNDT.

10. Ms. Dahan requests that the Appeals Tribunal award her six months' net base salary for the violation of her rights, her ill treatment by the Organization, and the excessive delay in the contested decision. She also requests that the Appeals Tribunal order in-lieu compensation, should the Secretary-General not concur with the judgment of remand by the UNDT. In this

respect, Ms. Dahan notes that the lost opportunity of a successful claim before the ABCC would be the value of any claimed expenses under Section 3.1 of Appendix D to the Staff Rules, as well as the lump sum for loss of function in her back pursuant to Section 3.6(a). Ms. Dahan requests the right to reserve further submissions on this figure, should the Appeals Tribunal wish to consider this relief, or request a hearing. In the alternative, she asks the Appeals Tribunal to award compensation in lieu of remand in the amount of two years' net base salary.

### **The Secretary-General's Answer**

11. The UNDT issued a properly reasoned judgment. Before the UNDT, Ms. Dahan made no attempt to tie any of her claims that she suffered harm to the contested decision. The only bases that Ms. Dahan articulated for her claim for moral damages related to allegations that had no relevance to the contested decision, such as the lack of professionalism and support from the attending doctors of the ICTR and the incessant delays by the Administration to address her demands for a proper chair which resulted in both a partial disability and a permanent loss of function in her back and ultimately depression. However, the depression could not have arisen as a result of the rejection of her Appendix D claim or because of the time period that elapsed before the rejection was issued, since Ms. Dahan was diagnosed with depression in 2012, before she filed her Appendix D claim.

12. Although the UNDT took note of the three-year period before the ABCC issued its decision, the UNDT did not find that Ms. Dahan's rights were violated specifically as a result of that timing. Rather, the UNDT only remarked that the ABCC had not indicated what it had been considering, or asked for additional information, during that time. There was thus no basis to award Ms. Dahan any damages because of either the ABCC's improper fettering of its own discretion or because of the time that elapsed before it issued the contested decision.

13. The UNDT also correctly ruled that whether or not Ms. Dahan's medical condition was attributable to the performance of official duties was not a matter for the UNDT but for the ABCC to decide, if or when it accepts and examines a claim. The UNDT correctly declined to pronounce on Ms. Dahan's assertion that exceptional circumstances existed in her case that justified her delay in filing her ABCC claim. Instead, it remanded the case to the ABCC, with the Secretary-General's concurrence, to properly apply the test for exceptional circumstances. Thus, the Judgment fully accorded with Article 11(1) of the UNDT Statute and was sufficient to dispose

of the application under consideration. Ms. Dahan has failed to demonstrate any error on the part of the UNDT in this regard.

14. The UNDT was not required to set an award of compensation in lieu of remand. The UNDT Statute does not require the UNDT to set an amount of compensation in lieu of rescission or specific performance in cases like the present one, where the matter is simply remanded, with the concurrence of the Secretary-General, for the institution or correction of a required procedure. Ms. Dahan has not pointed to any jurisprudence in which such alternative compensation was set. In any event, her claim in this regard is moot, in view of the fact that the Secretary-General concurs with the remand in question.

15. The Secretary-General requests that the Appeals Tribunal reject the appeal in its entirety.

### **Considerations**

16. Ms. Dahan appeals the UNDT Judgment on the following three grounds: (i) the UNDT should have set an award of compensation in lieu of remand to the ABCC; (ii) the UNDT erred in not awarding moral damages; and (iii) the UNDT erred in not addressing her claim for moral damages.

17. With respect to Ms. Dahan's first ground of appeal, we find no error in the UNDT Judgment. Under the UNDT Statute, it is only in cases of appointment, promotion or termination that the UNDT must 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 UNDT Statute does not require the UNDT to set an amount of compensation in lieu of rescission or specific performance like the present one, where the matter is simply remanded, subject to the concurrence of the Secretary-General. Furthermore, in view of the fact that the Secretary-General concurs with the remand in question, the claim has now become moot.

18. Turning to Ms. Dahan's second ground of appeal, we note that her claim for moral damages is based on two distinct grounds: the first being the alleged ill treatment she received from the Administration during her tenure at the ICTR; and the second being the three-year delay by the ABCC to render its report. While not explicitly stated in the appeal, it appears from the facts that Ms. Dahan's claim is based on allegations of gross negligence by the Organization.



19. First, as to the alleged ill treatment by the ICTR Administration, Ms. Dahan claimed before the UNDT that the “lack of professionalism from the attending doctors of ICTR and the incessant delays by the Administration to address [Ms. Dahan’s] demands for a proper chair resulted in both a partial disability and a permanent loss of function in [her] back, attributable to the performance of her duties”.

20. The Appeals Tribunal notes that Ms. Dahan filed her case under Appendix D to the Staff Rules. Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. Appendix D, which is a workers’ compensation system, is a no fault insurance or scheme whereby employers must cover occupational injury or illness. Employees do not have to prove employers’ negligence in order to obtain benefits.<sup>3</sup>

21. The ABCC is a technical body<sup>4</sup> and pursuant to Staff Rule 11.2(b), “[a] staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General ... is not required to request a management evaluation”. Ms. Dahan accordingly appealed the ABCC’s recommendation directly with the UNDT, without requesting management evaluation.

22. The Appeals Tribunal has previously established that a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.<sup>5</sup> Ms. Dahan was therefore required to submit her claim of gross negligence for management evaluation pursuant to Staff Rule 11.2(a) before proceeding with her application to the UNDT. In the present case, Ms. Dahan failed to submit a request for management evaluation on the matter of moral harm and, accordingly, her claim of gross negligence by the ICTR Administration was not receivable by the UNDT.

23. Turning to Ms. Dahan’s request for compensation based on the three-year delay by the ABCC to decide her case, we note that it is incumbent on a claimant to submit specific evidence to sustain an award of moral damages, as required by Article 10(5) (b) of the Statute.<sup>6</sup> Ms. Dahan contends that she had “suffered tremendously because of the ill treatment by the Organization

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<sup>3</sup> *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 25.

<sup>4</sup> *Baron v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-257, para. 6.

<sup>5</sup> *James v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-600, para. 25, citing *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 27.

<sup>6</sup> *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-714, para. 12, quoting, *inter alia*, *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638, para. 30.

and [had] received a formal diagnosis of depression” and provided medical reports to the UNDT in support of her claim. However, all medical reports presented at trial predate Ms. Dahan’s ABCC request. Ms. Dahan was diagnosed with depression in 2012, after being diagnosed with advanced cancer. Since both conditions arose *before* Ms. Dahan filed her claim with the ABCC on 27 March 2013, there is no evidence of a causal link between her conditions and the ABCC’s delay. Since Ms. Dahan has not demonstrated that the three-year delay had any impact on her physical or mental well-being, her claim for moral damages based on the ABCC’s delay in issuing its report must be rejected.

24. Finally, Ms. Dahan contends that the UNDT erred in failing to address her claim for moral damages. Ms. Dahan’s right to due process entitled her to a fair hearing and a fully reasoned judgment of her application. We hold that the UNDT’s omission to adjudge the whole of Ms. Dahan’s application was a violation of her due process rights and constituted a procedural error. However, the violation of Ms. Dahan’s due process rights did not, of itself, entitle her to an award of damages. Since Ms. Dahan had the recourse of appealing the UNDT Judgment to the Appeals Tribunal and, ultimately, was not entitled to receive an award of moral damages, we are satisfied that this error was not prejudicial to Ms. Dahan.

25. For the foregoing reasons, Ms. Dahan’s appeal fails.

26. However, we wish to note that this appeal highlights the troubling issue of the Administration’s delays in responding to staff and staff related issues. It is of paramount importance that the Administration addresses staff concerns with promptitude and adheres to the highest standards of care and due diligence. In light of the facts in this case and the significant delays experienced by Ms. Dahan, we order, *proprio motu*, that the case, as remanded by the UNDT to the ABCC, must be promptly considered by the ABCC and the Controller’s decision must be communicated to Ms. Dahan no later than three months from the release of this Judgment, failing which Ms. Dahan may file for execution of judgment with the Appeals Tribunal.

**Judgment**

27. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of June 2018 in New York, United States.

*(Signed)*

Judge Thomas-Felix,  
Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Halfeld

Entered in the Register on this 10<sup>th</sup> day of August 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar