



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

Judgment No. 2020-UNAT-1069

Melanne Civic
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appellant)

JUDGMENT

Before: Judge Martha Halfeld, Presiding
Judge Sabine Knierim
Judge Dimitrios Raikos

Case No.: 2020-1371

Date: 30 October 2020

Registrar: Weicheng Lin

Counsel for Ms. Civic: Dorota Banaszewska, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE MARTHA HALFELD, PRESIDING.

1. The Secretary-General of the United Nations has appealed against Judgment No. UNDT/2019/188 by which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) partially granted an application filed by Ms. Melanne Civic, a former staff member of the United Nations Mission in Liberia (UNMIL), awarding compensation for non-pecuniary damages.
2. In turn, Ms. Civic has cross-appealed against the UNDT Judgment, to the extent that it dismissed her claim of compensation for pecuniary damage (loss of opportunity).
3. On appeal, the United Nations Appeals Tribunal (Appeals Tribunal) dismisses both appeal and cross-appeal and affirms the UNDT decision.

Facts and Procedure

4. Ms. Civic joined UNMIL in 2015 as D-1 Senior Advisor to the Special Representative of the Secretary-General (SRSG) and the Deputy Special Representative of the Secretary-General (DSRSG)/Rule of Law (ROL). The DSRSG/ROL was her supervisor and First Reporting Officer (FRO).
5. On 1 July 2016, UNMIL established the Rule of Law and Security Institutions Support Service (ROLSISS) to streamline its activities in security sector reform, judicial affairs/justice and corrections. Ms. Civic's functional title became Principal Rule of Law Officer, D-1, and head of ROLSISS.
6. On 23 December 2016, the Security Council renewed UNMIL's mandate for a final period until 30 March 2018 and altered the focus of the Mission's mandates. On 19 January 2017, the Under-Secretary-General for Peacekeeping Operations instructed UNMIL in a code cable that "staffing structure, reporting lines and personnel numbers should be adjusted to reflect an appropriate structure for the implementation of this new mandate".
7. In January 2017, the DSRSG/ROL cancelled Ms. Civic's completed e-PAS for the 2015/2016 performance period in Inspira. This was the only performance document she had at the time. Additionally, he failed to complete her 2016/2017 e-PAS.

8. On 13 February 2017, the DSRSG/ROL informed Ms. Civic that in accordance with the instructions of the Code Cable, ROLSISS would be disbanded. On 25 March 2017, the DSRSG/ROL instructed Ms. Civic to dismantle ROLSISS by 31 March 2017 and to transfer responsibility for certain components of ROLSISS directly to the DSRSG/ROL's office and responsibility for certain other components to the United Nations Police. Ms. Civic was removed as the head of ROLSISS on 31 March 2017; her appointment, however, was extended to the end of the budget cycle at 30 June 2017.

9. Between 25 March and 10 April 2017, there was communication between Ms. Civic and the DSRSG/ROL as to the best way to utilize her expertise between April and June 2017. This communication ceased following her complaint of retaliation against the DSRSG/ROL to the United Nations Ethics Office (Ethics Office) on 3 April 2017 and her 7 April 2017 request for management evaluation of the DSRSG/ROL's 25 March 2017 decision. The impugned decision was upheld after review by the Management Evaluation Unit.

10. On 1 May 2017, the Ethics Office informed Ms. Civic that she had established a *prima facie* case of retaliation. The Ethics Office referred the complaint to the Office of Internal Oversight Services (OIOS) for investigation. On 16 May 2017, the Ethics Office informed the Secretary-General that it had found a *prima facie* case of retaliation and recommended that the Administration undertake remedial actions for Ms. Civic. In this context, the Administration was directed to: (i) facilitate the extension of Ms. Civic's appointment pending completion of the OIOS investigation; and (ii) identify a different FRO for her e-PAS completion and for Ms. Civic to be assigned to a different reporting line. Subsequently, the Controller approved the creation of a general temporary assistance funded position at the D-1 level to allow Ms. Civic's appointment to be extended four times from 1 July 2017 to 30 April 2018. Her reporting line was changed and her new FRO, the UNMIL SRSG, completed her 2016/2017 e-PAS on 17 November 2017 and her 2017/2018 e-PAS on 7 April 2018.

11. On 24 May 2017, Ms. Civic filed an application with the UNDT contesting her "constructive dismissal" due to the DSRSG/ROL's decision to "deprive her of all her core functions". The Secretary-General in his reply argued that the application was moot because Ms. Civic had received the relief she had requested, i.e., the Organization had ensured extension of her appointment until she took up another employment.

12. On 1 May 2018, Ms. Civic was separated from service after she had informed the Ethics Office that she had found employment elsewhere.

13. On 16 May 2019, while Ms. Civic's case was still pending before the UNDT, the Assistant Secretary-General for Human Resources informed her that OIOS had concluded its investigation into her complaint and had determined that the DSRSG/ROL had engaged in retaliatory acts against Ms. Civic because: a. He removed her from supervising the Legal Policy Reform Section and the witness protection Quick Impact Project with the aim of punishing, intimidating or injuring her for reporting prohibited conduct on 21 November 2015; b. He disbanded the Rule of Law and Security Support Section and took steps towards alienating her at least partly with the aim of punishing, intimidating or injuring her for reporting prohibited conduct on 21 November 2015; and c. He failed to complete her 2016-2017 performance document with the aim of punishing, intimidating or injuring her for her protected activities.

14. On 15 July 2019, following the admission of this additional evidence into the record, the Secretary-General supplemented his pleadings and argued that her claim was moot, since Ms. Civic had received the requested remedy. Ms. Civic then added a request for compensation for pecuniary and moral damages.

15. The UNDT held a hearing between 7 and 10 October 2019 to hear oral evidence on the issue of compensation. In support of Ms. Civic's case, evidence was given: by Ms. Civic; the then Deputy Director of Mission Support (DDMS), UNMIL; a former Judicial Affairs Officer, UNMIL; and Ms. X who was also in the Rule of Law Pillar. In support of the Secretary-General's case, evidence was given by the then Director of the Field Personnel Division, Department of Field Support (D/FPD/DFS) and the then Director of Mission Support (DMS), UNMIL.

16. On 31 December 2019, the UNDT issued Judgment No. UNDT/2019/188.

17. With regard to material damages, the UNDT rejected Ms. Civic's claim that the irregularity of cancelling her e-PAS and the failure to promptly issue another one negatively affected her ability to find other employment within the service of the Organization. The UNDT found that Ms. Civic had not shown that, if not for the irregularity, she would have had a "significant chance" or "realistic prospect" of securing other employment with the

United Nations. In this respect, the UNDT agreed with the D/FPD/DFS and the DMS, that a hiring manager would place more importance on the Personal History Profile (PHP) and the relevance of that PHP for the qualifications for the job. As to the DDMS, the UNDT found that his testimony lacked persuasion since he appeared to have predominantly relied on his experience at the CRB, where indeed the e-PAS was a significant component of the review of personnel to be retained or downsized, which differed from the mechanisms in recruitment exercises; and his opinion seemed to be more relevant for practice in less senior recruitments and in more generic situations. Regarding recruitment for Director's positions, the UNDT agreed with the Secretary-General's witnesses that the scrutiny in such cases did not concern itself primarily with formalities such as e-PASes; rather, the primary concern was the merits criteria, with emphasis on specific experience and reference checks. As such, even if Ms. Civic had retained all the ROLSISS management function throughout 2017, and notwithstanding being formally qualified through placement on relevant rosters, her profile, with barely two years with the Organization, was in all likelihood not competitive enough in the recruitment exercises for the posts she had applied for. The UNDT found that the above was fully confirmed by the thirteen recruitments for positions that Ms. Civic had applied for, in none of which the lack of an e-PAS had arisen as an issue and in none of which Ms. Civic had disputed her non-selection.

18. Turning to Ms. Civic's claim for compensation for moral damages, the UNDT rejected as inaccurate Ms. Civic's contention that the OIOS investigative material and the Ethics Office's finding of retaliation were proof of injury. These documents demonstrated illegality of actions by the Administration, their improper intent, thus the cause of a potential injury; they however did not prove the result. On this basis, injury could only be presumed as a probable consequence to an average person placed in the same situation, which, however, would not be sufficient under Article 10(5)(b) of the UNDT Statute. The UNDT also found that the Secretary General misrepresented the Appeals Tribunal's jurisprudence in implying that it necessarily required expert evidence, such as medical or psychological expertise, when nowhere expert evidence was required as a matter of law. The UNDT noted that the Secretary-General did not request that expert evidence be called, that medical certificates (presumably in the possession of the Organization's medical services) be presented and discussed at the hearing, and he did not contest the credibility of witnesses who testified to Ms. Civic's psychological and physical condition. However, the UNDT found that expert evidence was not necessary because what Ms. Civic and the independent witnesses testified

about was not atypical under the circumstances, considering the magnitude of the breach with its harming nature, and the extent of the claim. On the basis of the testimony adduced, the UNDT was satisfied that, as a result of the impugned decisions, Ms. Civic experienced insult to her *dignitas*, humiliation before her colleagues, including subordinates, impossibility to fully utilize her qualifications, and insecurity of her job, which in turn led to disappointment, demoralization and anxiety, and a negative impact on her physical health. The UNDT awarded Ms. Civic six months' net base salary as compensation for the moral damages she had sustained.

19. On 26 February 2020, the Secretary General appealed the UNDT Judgment and on 30 April 2020, Ms. Civic filed her answer. That same day, Ms. Civic also filed a cross-appeal and the Secretary General filed his answer to the cross-appeal on 6 July 2020.

Submissions

The Secretary-General's Appeal

20. The Secretary-General claims that the UNDT erred in finding that the Organization did not make Ms. Civic whole with respect to the retaliatory actions that she had suffered.

21. In *Kallon*, the Appeals Tribunal recognized that harm to the *dignitas* creates harm that is parallel to pecuniary harm in that, when a staff member is maltreated, that staff member's personhood may, in extreme cases, be diminished. In that case, an administrative decision was found to have caused such harm to the staff member's dignity and the Administration decided to uphold the administrative decision, as if no harm had been done. Thus, the Appeals Tribunal held that the staff member was owed compensation for moral damages.

22. According to the Secretary-General, Secretary-General's Bulletin ST/SGB/2017/2/Rev. 1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) sets out the policy for addressing retaliatory acts by managers and provides the actions that the Secretary-General is obligated to undertake in cases of retaliation. In the present case, the Secretary-General adhered to the requirements of ST/SGB/2017/2/Rev. 1 by engaging with Ms. Civic in a speedy and deferential manner, by recognizing that she had been unjustly retaliated against by her supervisor, by taking concrete measures to place her out of harm's way in terms of protection from her former supervisor and

assigning her new tasks, and by reversing the threat of separation and keeping her in service even after the Mission's mandate had ended. In these actions, the Secretary-General acted exactly as the Appeals Tribunal had instructed he should have acted in *Kallon*.

23. Indeed, one of the witnesses on behalf of Ms. Civic, identified in the Judgment as Ms. X, testified that Ms. Civic's wellbeing improved after the protective measures had been put into place. Consequently, the UNDT was wrong to hold that the Secretary-General's response had not addressed the injury to Ms. Civic's dignity. The UNDT's holding would, effectively, create a "strict liability" regime in which injuries to the dignity of staff members cannot be subsequently remedied by the Organization consistent with the policy prescribed for such remedial action. The Appeals Tribunal should, therefore, reverse the Judgment and find that the Organization is not liable to Ms. Civic for moral damages.

24. For the Secretary-General, the UNDT erred in law by reversing the burden of proof and despite the lack of expert testimony or medical documentation, decided that absent affirmative objection by the Secretary-General, the uncorroborated medical claims asserted by Ms. Civic herself were sufficient to prove her case and to entitle her to moral damages. Contrary to the UNDT's holding, however, it was Ms. Civic's duty to provide supporting medical evidence for her claims, not the Secretary-General's duty to disprove these claims.

25. The Secretary-General requests that the Appeals Tribunal vacate the award of compensation for moral damages. Should the Appeals Tribunal find that an award of compensation for moral damages should be made in this case, he requests that the Appeals Tribunal award compensation only for moral harm that has been proved by corroborating evidence to have been suffered by Ms. Civic as a consequence of the retaliation.

Ms. Civic's Answer to the Secretary-General's Appeal

26. Ms. Civic contends that the UNDT correctly awarded compensation to Ms. Civic, in particular since she had not been made whole by the Secretary-General's measures to protect her from retaliation.

27. Ms. Civic claims that there were misrepresentations in the Secretary-General's appeal. Contrary to his contention, paragraph 40 of the UNDT Judgment discusses the issue of damage through loss of opportunity and not the Organization's response to prevent harm to Ms. Civic by putting protective measures in place. As correctly held by the UNDT in its

Judgment, 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, regardless of whether the Organization acted dutifully or not.

28. Moreover, contrary to the Secretary General's contention that the Organization quickly responded to the retaliatory measures against Ms. Civic, the Administration's implementation of the protective measures was anything else but quick or effective. It took the Administration almost two months to initiate an implementation of the first remedial action recommended by the Ethics Office and it was not until 17 November 2017 - six months after the Ethics Office's finding of retaliation and two years after the first retaliatory act - that Ms. Civic's new FRO completed her 2016/2017 e-PAS as recommended by the Ethics Office in May 2017.

29. Likewise, contrary to the Secretary-General's claim, based upon the witness testimony of Ms. X quoted in paragraph 50 of the UNDT Judgment, that Ms. Civic's wellbeing improved as a result of the implementation of the protective measures, a review of paragraph 50 reveals that Ms. X merely stated that it had been at the end of the Mission when Ms. Civic's wellbeing had improved and she had stopped crying. Ms. X did not put the improvement of Ms. Civic's wellbeing in any causal relationship with the remedial action by the Organization. Even assuming *arguendo* that Ms. Civic's wellbeing improved to a certain extent due to the Administration's action, the latter does not justify a far-reaching conclusion drawn by the Secretary-General that Ms. Civic "had been made whole by the Appellant's measures to protect her from retaliation".

30. For Ms. Civic, there is no merit in the Secretary General's allegation that the UNDT was wrong to hold that the Secretary-General's response had not addressed the injury to Ms. Civic's dignity since such holding would create a "strict liability" regime. The UNDT does not create any new liability regime that would be contrary to the Appeals Tribunal's jurisprudence. The UNDT merely refers to the necessity to evaluate the existence and extent of moral damage depending on the facts of each specific case. Such damage may persist or not notwithstanding the Organization's acting dutifully or not, depending on individual vulnerability and impact of the retaliatory measures on each particular staff member. The Organization's acting dutifully does not automatically nullify the moral harm inflicted upon staff members by retaliatory decisions.

31. The UNDT correctly evaluated the evidence when establishing that Ms. Civic's *dignitas* suffered; in particular the UNDT did not have to rely on "proper medical evidence" when establishing the existence and scope of moral damages.

32. Contrary to the Secretary-General's submissions, the UNDT was not wrong to hold that due to retaliatory measures Ms. Civic's *dignitas* had suffered and that this harm needed to be accordingly compensated. The UNDT based its findings on Ms. Civic's testimony corroborated by independent evidence of three witnesses whose testimony and credibility were never contested by the Secretary-General during the proceedings before the UNDT. In such circumstances, as correctly established by UNDT, any expert opinion was not necessary as superfluous.

33. There is no merit in the Secretary-General's contention that exclusively medical expert opinion and medical documentation can constitute an evidentiary basis for the UNDT's findings on Ms. Civic's physical and mental condition or link the latter to the retaliatory actions. In the Appeals Tribunal's jurisprudence there has never been an absolute requirement in principle or in the rules of evidence that would limit in cases of moral harm the means of evidence to a closed catalogue of expert opinion, let alone medical expert opinion. Indeed, the evidence provided by Ms. Civic before the UNDT in form of testimony of three independent credible witnesses who corroborated Ms. Civic's testimony not only fulfils but already exceeds the criteria set out in the jurisprudence.

34. The UNDT correctly evaluated and applied the burden of proof, in particular the UNDT did not reverse the burden of proof when awarding moral damages. Ms. Civic more than satisfactorily discharged the burden of proof placed upon her by the UNDT by furnishing independent evidence of three witnesses corroborating her own testimony. As established by the UNDT, the Secretary-General did not request that expert evidence be called, neither did he request medical certificates to be presented and discussed in the hearing and he does not contest the credibility of witnesses who testified to Ms. Civic's psychological and physical condition. This omission on the Secretary-General's part could not negatively impact the admissibility and evaluation of evidence furnished by Ms. Civic. The UNDT's statement above is, thus, not one on reversed burden of proof, but rather one on estoppel; in other words, if the Secretary-General had thought that Ms. Civic had not discharged the burden of proof placed upon her, he should have raised this issue in the course of the proceedings before the UNDT. Ms. Civic would have easily submitted the

requested additional evidence. Allowing the Secretary-General to raise this issue at the stage of appeal would infringe upon the principle of equality of arms.

35. The UNDT correctly assessed the amount of compensation awarded for non-pecuniary damage in light of the Appeals Tribunal's jurisprudence.

36. Ms. Civic requests that the Appeals Tribunal dismiss the appeal in its entirety.

Ms. Civic's Cross Appeal

37. The UNDT erred in law and fact in concluding that Ms. Civic was not entitled to compensation for loss of opportunity.

38. The UNDT erred in holding that Ms. Civic had not discharged the burden of proof that if not for the irregularity, she would have had a "significant chance" or "realistic prospect" of securing other employment with the United Nations.

39. The UNDT erred when it did not afford sufficient weight to the testimony of the DDMS, who testified on her behalf. It seems that the UNDT was not persuaded by his testimony due to an alleged "generalisation of his opinion" and his supposed lack of experience in "senior recruitments". However, nothing in the DDMS' testimony suggests that his experience was limited to "less senior recruitments" or only "generic situations". The DDMS testified that he had taken part in over 2000 recruitment exercises and, thus, he retained expertise in such matters. Instead of drawing accurate conclusions from a witness testimony that it itself evaluated as true, the UNDT chose to make an unsubstantiated assumption that the DDMS lacked experience in more senior recruitment procedures.

40. The UNDT erred in preferring the testimonies of the D/FPD/DFS and the DMS, who testified on behalf of the Secretary-General. Their hypothetical and incorrect opinion that allegedly the lack of an e-PAS was irrelevant for Ms. Civic's career prospects since "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" was adopted as its own by the UNDT, without further substantiation. The nature of the system itself contradicts this conclusion. Uploading staff member's employment details on to COSMOS is used to by-pass established recruitment and permits lateral reassignment of staff in downsizing missions. Such selection can be made before a job opening is advertised and occurs by a hiring manager reviewing an applicant's

PHP, performance report and roster membership. The consequence of the absence of performance documents was expressed in an e-mail sent from the Chief Career Support and HR Capacity Building Unit, FPD/DFS which stated that Ms. Civic would not be favourably assessed by missions because she did not have copies of performance reports. Although having acknowledged the above e-mail and its contents, the UNDT did not take any judicial notice and instead uncritically accepted the DMS' and the D/FPD/DFS' opinion on the alleged sufficiency and superiority of a PHP over an e-PAS.

41. The D/FPD/DFS' conclusion about the supposed irrelevance of lack of Ms. Civic's e-PAS results from an incorrect supposition. In evidence given by the D/FPD/DFS, reference was made to a presumption in the Inspira Hiring Manual for Managers, in which a staff member shall be deemed to have fully met the performance expectations during the preceding period when there is no performance record. However, such a practice does not cover circumstances where no valid e-PAS documents for any period exist and when the normal process is for the staff member to upload his/her two most recent performance documents. In the case of Ms. Civic, she was not even able to upload the 2015/2016 e-PAS as this document was cancelled and as testified, she was directed not to use it. Moreover, a procedure of lateral reassignment falls outside of the selection process and relied, as directed by the various Code Cables, upon a PHP, e-PAS and roster membership. The absence of one of these documents not only undermines the ability of a staff member to be fairly considered within the COSMOS platform, but essentially renders a staff member ineligible for lateral hiring. Therefore, the UNDT's conclusion, based on the D/FPD/DFS' and the DMS' testimony, is incorrect.

42. Finally, the UNDT's holding that Ms. Civic "with barely two years with the Organization, was in all likelihood not competitive enough in the recruitment exercises for the posts for which she had applied" constitutes a mere hypothesis. Hypothetically, the fact that Ms. Civic had gathered valuable professional experience before joining the United Nations (more than 18 years of progressively responsible experience) and worked for the Organization for two and a half years during the period at issue could also be seen as a great advantage by the hiring managers since she preserved a fresh outside perspective while having sufficient insight into the functioning of the Organization.

43. For 32 months Ms. Civic was deprived of any performance evaluation which significantly diminished her chances of being selected. Ms. Civic was applying at a time when the Secretary-General was promoting gender equity, she was a national of a country

underrepresented in the Organization's staffing percentages relative to its contributions, and she was seeking a lateral reassignment from a downsizing mission which would otherwise have made her a priority candidate. By not providing Ms. Civic with any performance evaluations for 32 months, the Organization denied her a level playing field to fairly compete for posts within COSMOS which resulted in a loss of opportunity. The UNDT erred in not taking judicial notice of these facts; had it done so, the Dispute Tribunal would have found that Ms. Civic as any other staff member had the right to have her candidacy fairly considered under general principles of international administrative law. It is not a question of whether a particular candidate was the best suited for any position but rather whether the candidate was fairly assessed pursuant to the rules of the Organization. In the case of Ms. Civic, by denying her an e-PAS, her rights as an internal candidate to be treated fairly were infringed. The lack of an e-PAS unfairly restricted the possibility for Ms. Civic to obtain an alternative position.

44. In Ms. Civic's case the quantum of damages should be calculated *ex aequo et bono*. Jurisprudence relating to probability, as expressed in *Bofill*¹ and *Chhikara*², is of insufficient assistance as these cases related to one specific selection exercise. The number of candidates and the extent of the possibility of selection were clearly defined. In the context of a Secretariat wide platform of lateral reassignment, the reliance placed on documentation uploaded onto COSMOS and considered by hiring managers, who have not yet advertised a post, is an extremely challenging environment within which to determine quantum. In the absence of being able to determine probability, a more generic principle of the requirement to treat staff members on an equal basis should be considered. To that extent, such a principle of equality and subsequently a right to equal treatment form part of Ms. Civic's essential terms and conditions of employment.

45. Ms. Civic requests that the Appeals Tribunal award her compensation for financial damage and, absent a basis for quantifying this loss of opportunity, requests the Tribunal calculate it *ex aequo et bono*.

¹ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174.

² *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723.

The Secretary-General's Answer to the Cross-Appeal

46. The UNDT correctly held that Ms. Civic was not entitled to compensation for loss of opportunity.

47. The UNDT correctly found that the absence of annual performance evaluations attached to Ms. Civic's job application files did not meaningfully diminish her chances of finding alternative positions following the abolition of her post.

48. The Secretary-General asserts that, contrary to Ms. Civic's contention, the UNDT's finding does not refer to the generalized nature of the DDMS' testimony as to the role of the annual performance evaluation in the selection process, but rather refers to the fact that the DDMS' testimony addressed selection processes in general rather than the specific circumstances under which Ms. Civic participated in selection processes. Namely her various applications were made in the context of several downsizing exercises in field missions in which hiring managers were obliged to give preference to staff members with permanent or continuing appointments and to consider length of service when considering the retention of staff members. Notably, and contrary to the DDMS' testimony, the testimony provided by the D/FPD/DFS and the DMS did not only address distinct circumstances that arise in recruitment in the context of the abolition of posts due to the downsizing of field missions, but addressed the specific selection exercises in which Ms. Civic had participated. The D/FPD/DFS' testimony, as provided in the Judgment, detailed the selection exercises in which Ms. Civic had participated, demonstrating with regard to each exercise her prospects in light of the Organization's obligations vis-à-vis its staff members and other candidates who competed for the positions. Similarly, the DMS testified to the efforts made specifically to aid Ms. Civic to find a new position in anticipation of UNMIL's closure and addressed specific communications with other missions that had considered her candidacy for job openings. It is also in this context that the UNDT's holding regarding her prospects of finding a new position in light of her short service period with the Organization needs to be examined.

49. The Appeals Tribunal has interpreted Staff Rule 9.6(e) to provide staff members with permanent or continuing appointments who encumber posts, which were abolished, or who were subject to post reduction with preferential or non-competitive advantage over staff members holding fixed-term appointments. Additionally, Staff Rule 9.6(e) obligates hiring managers to give preference to staff members who have been in the service of the

Organization for longer periods of time. Indeed, Ms. Civic's search for a new position was made in the midst of the downsizing and closure of several missions. She held a fixed-term appointment and had been in the service of the Organization for just over two years. Her length of service with the Organization is not typical of staff members at the D-1 level. Because of the seniority of D-1 staff members, many D-1 level staff members have been in the service of the Organization for many years, and often hold permanent or continuing appointments. In light of the advantages that Staff Rule 9.6(e) provides to staff members holding permanent or continuing appointments and the advantage that Staff Rule 9.6(e) provides to staff members who have been in the service of the Organization for a long time, the UNDT's holding that Ms. Civic's short term of service and fixed-term appointment disadvantaged her did not constitute "a mere hypothesis". The UNDT did not question Ms. Civic's skill or experience, but merely noted that in light of the obligations of the Organization to retain staff members in accordance with Staff Rule 9.6(e), the odds were not in favour of a D-1 level staff member on a fixed-term appointment with barely two years of service with the Organization finding a position when many field missions were being downsized. Consequently, the UNDT did not err in law or exceed its competence when it weighed the evidence before it and came to the conclusion that the absence of her annual performance review did not meaningfully contribute to her inability to find a new post within the Organization following the closure of UNMIL.

50. The Secretary-General requests that, should the Appeals Tribunal decide to award Ms. Civic compensation for lost opportunity, it should do so based on evidence of the harm caused to Ms. Civic.

51. According to the Secretary-General, Article 10(5)(b) of the UNDT Statute and Article 9(1)(b) of the Appeals Tribunal Statute provide that the UNDT may only award compensation for harm, supported by evidence. The Appeals Tribunal has interpreted these provisions to mean that the compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. The Appeals Tribunal had held that such calculation should comprise of two elements: the nature of the irregularity; and the chance that the staff member would have had to be promoted or selected had the correct procedure been followed. The Appeals Tribunal also held that when chances for appointment are too low, the damage may be negligible and attempts to determine compensation may be too speculative. Ms. Civic urges the

Appeals Tribunal to ignore these precedents and to award damages *ex aequo et bono*, arguing the exact amount of damages cannot be quantified because the absence of an e-pas in her job application files negatively affected her opportunity to be hired to multiple posts to which she applied. However, Ms. Civic had applied to a finite number of positions. Consequently, if she wishes to be compensated for allegedly not being selected for the positions to which she applied, she needs to demonstrate that her chances of being selected, if her file had included annual performance reviews, were not speculative but above 10 per cent, in accordance with the Appeals Tribunal jurisprudence. Instead of providing evidence that would enable the Tribunal to determine the quantum of lost opportunity, Ms. Civic is asking for generalized compensation, without providing evidence of the material harm she had allegedly suffered. Consequently, even if the Appeals Tribunal determines that the UNDT erred in holding that Ms. Civic should not be awarded compensation for loss of opportunity, the Appeals Tribunal should find that she is not eligible for compensation as she has not provided evidence of the harm she had allegedly suffered.

52. The Secretary General requests that the Appeals Tribunal dismiss the cross-appeal in its entirety.

Considerations

53. In light of the matters raised in the appeal (moral damage) and the cross-appeal (material damage), the Appeals Tribunal will first deal with the latter and then with the former.

Loss of opportunity (financial damages)

54. In her cross-appeal, Ms. Civic claims that the UNDT erred in fact and in law when it found that the irregularity of cancelling her e-PAS and the failure by the Organization to promptly issue another one did not affect her chances of finding other employment within it. She also requests that the Appeals Tribunal award compensation for financial damage to be calculated *ex aequo et bono*, since there was no other basis for quantifying it.

55. On the basis of the conclusions of the OIOS investigation report, the Ethics Office found, *inter alia*, that Ms. Civic had engaged from July 2015 until March 2017 in four protected activities, relating to having sent reports to various UNMIL management offices and OIOS and having participated in interviews with both OIOS and the UNMIL Conduct

and Discipline Team.³ According to the same report, her FRO at the time had engaged in retaliatory acts against Ms. Civic, namely:⁴

- a. He removed her from supervising the Legal Policy Reform Section and the witness protection Quick Impact Project with the aim of punishing, intimidating or injuring her for reporting prohibited conduct on 21 November 2015;
- b. He disbanded the Rule of Law and Security Support Section and took steps towards alienating her at least partly with the aim of punishing, intimidating or injuring her for reporting prohibited conduct on 21 November 2015; and
- c. He failed to complete her 2016-2017 performance document with the aim of punishing, intimidating or injuring her for her protected activities.

56. Based on these findings, the Office of Human Resources decided to initiate a disciplinary process against the FRO. Since he had separated from the Organization effective 1 April 2018 and was not willing to participate in the process, a note of the Ethics Office's findings was placed on his official status file.

57. Ms. Civic claims in her initial application and also in her cross-appeal that the fact of not having an e-PAS adversely affected her chances of finding other employment within the Organization despite her application for various posts, which is why she was eventually separated from the Organization on 1 May 2018. She refers to the evidence produced by the former DDMS, who had served in this capacity between January 2016 and May 2017, as well as to the content of an e-mail sent by the Chief Career Support and HR Capacity Building Unit, FPD/DFS.

58. Ms. Civic did not bring this e-mail itself to the record (but rather a short extract of it contained in her own closing submissions before the UNDT, produced as an annex to her cross-appeal), therefore preventing the Tribunal from assessing the entire scope of the communication. Apart from this, what is clear from the statement that Ms. Civic "will not be favourably assessed by missions because she does not have copies of performance reports" is that it has to be interpreted in the context of what had been previously said in the same phrase that "this won't stop us from clearing her on COSMOS". This suggests that other kinds of assessment or other ways of offsetting the lack of the e-PAS would be available for hiring managers.

³ Letter from the Assistant Secretary-General for Human Resources to Ms. Civic, dated 16 May 2019.

⁴ Impugned Judgment, para. 19 (internal footnote omitted).

59. This conclusion is not in total disagreement with the testimony of the former DDMS, who informed that the e-PAS *could* perhaps be consulted, if the hiring manager wished to check what was there about the person, before shortlisting or in cases where the few remaining candidates were similar.⁵ In other words, although the e-PAS remains a significant reference in terms of assessment of a candidate's previous performance, it is not strictly necessary in all cases.

60. What was lacking in the evidence produced on behalf of Ms. Civic was therefore, rather than a *general* and *abstract* assertion of what could possibly have been necessary, a precise demonstration of a *specific* and *concrete* need of the missing e-PAS for any of the positions she had applied for. There is no such evidence and this is why her burden of proof was considered by the UNDT not to have been fully discharged.⁶ On the other hand, the Secretary-General provided the UNDT with *specific*, *concrete* and thus *sufficient* evidence that i) the posts Ms. Civic had applied for had their openings cancelled or had been upgraded or abolished, due to budget constraints; or ii) Ms. Civic had been considered and found not suitable for them. In any event, her PHP had been shared and "her e-PAS was not a concern".⁷ The UNDT thus correctly interpreted the evidence on behalf of Ms. Civic together with other pieces of evidence on the record.

61. Moreover, with regard to applications for other posts, the former Director of FPD/DFS during the hearing held before the UNDT alluded to a drawdown in MINUJUSTH as a reason for not recruiting Ms. Civic. The testimony also mentioned that UNAMI's and UNSOM's assessment of Ms. Civic considered her not suitable or found that she lacked the required experience on the basis of her PHP. In addition, DPKO, NY, rejected her application due to a lack of command of a second official language. For other posts, Ms. Civic was deemed to be not suitable, owing to not having submitted an assessment test or not having passed the written assessment.⁸ Both the former D/FPD/DFS and the former DMS, UNMIL signaled that Ms. Civic could not find another post at the time not because of the lack of an e-PAS, but rather because peacekeeping operations were experiencing a cutback in budget and she was not considered suitable for the available positions.⁹

⁵ Impugned Judgment, para. 30, under the heading "Evidence examined at the hearing".

⁶ Impugned Judgment, para. 41.

⁷ Impugned Judgment, para. 34, testimony provided by the former Director of FPD/DFS.

⁸ Impugned Judgment, para. 35, under the heading "Evidence examined at the hearing".

⁹ Impugned Judgment, paras. 35, 36 and 37, under the heading "Evidence examined at the hearing".

62. It is true that, having joined UNMIL in 2015, Ms. Civic had limited experience within the Organization and was without any evidence of her performance appraisal for a significant amount of time. However, while it is undisputed that Ms. Civic's 2015-2016 e-PAS had been cancelled in January 2017 and her 2016-2017 e-PAS had not been completed for the respective period, it is also true that from November 2017 onwards, Ms. Civic was again in possession of an e-PAS.¹⁰ Also, from as early as March 2017, FPD approached UNMIK, UNAMA, MINUSMA and UNMISS for a personal endorsement of Ms. Civic's candidacies, in order to facilitate a possible new assignment, following Ms. Civic's applications for positions in these missions.¹¹ Incidentally, the lack of the e-PAS did not impede her from being invited to take tests or being assessed by means of her PHP.¹²

63. In this regard, the evidence produced before the UNDT demonstrated that, although e-PASes of candidates to a post can be looked at during the selection exercise for a lateral recruitment, in the present case, they were not determinant for the ultimate selection. There were other means of acceding to information about Ms. Civic's performance and qualification for the post. The PHP was witnessed in the records to have more importance compared to e-PAS assessments.¹³

64. In light of the foregoing, the Appeals Tribunal hence finds that, despite the fact that Ms. Civic held a fixed-term appointment and did not have priority over staff members holding continuing or permanent appointments, the Administration acknowledged the regrettable mistake by her superior, as well as provided her with some remedy to compensate for the illegality she had been subject to (different FRO, completion of her e-PAS albeit late, new reporting line and endorsement to her applications for different positions).

¹⁰ Following Ms. Civic's April 2017 complaint of retaliation, the Ethics Office recommended in May 2017 that FPD/DFS identify a different FRO to complete Ms. Civic's e-PAS, as well as assign her to a different reporting line (impugned Judgment, para. 16). The 32-month period mentioned in the cross-appeal seems therefore to consider the entire time Ms. Civic had served with the Organization, rather than just the period of the irregularity.

¹¹ Impugned Judgment, paras. 34 and 38, under the heading "Evidence examined at the hearing".

¹² Impugned Judgment, para. 35.

¹³ Impugned Judgment, para. 32. Rather than looking at the e-PASes, "the main criterion that a hiring manager would look at would be the PHP and the relevance of that PHP for the qualification for the job" (impugned Judgment, para. 41).

65. Despite all the efforts, some positions for which she had applied were ultimately no longer available (partially because peacekeeping experienced a decline in budget and in the number of missions¹⁴) or she was deemed not to fulfill the requirements for others, either because she did not possess the required experience or skills, or because she did not pass the written test, but never due to issues related to her e-PAS, the inexistence of which was compensated for by other documents or personal endorsements.

66. It follows that the UNDT did not err when it found that the irregularity of cancelling Ms. Civic's e-PAS and the failure to promptly issue another one, although regrettable, did not suffice to demonstrate a significant chance or a realistic prospect of her retaining another position within the Organization. The irregularity, having been inconsequential for the purposes of Ms. Civic's selection for any of the posts she applied for, does not allow for any compensation for pecuniary damages.

67. The cross-appeal fails.

Moral damages (non-pecuniary damages)

68. In his appeal, the Secretary-General asserts that the UNDT erred in awarding compensation for moral damages and, should the Appeals Tribunal find that award of compensation should nonetheless be maintained, he requests that the award be restricted to harm proved by corroborating evidence as a consequence of the retaliation suffered by Ms. Civic.

69. The Secretary-General further contends that the measures put in place following Ms. Civic's complaint fulfilled the function of remedying the harm caused by the retaliation and that the UNDT was wrong to hold that the quick and thorough response had not addressed the injury to Ms. Civic's dignity.

70. The administrative response to the retaliation consisted of removing the DSRSG/ROL from Ms. Civic's chain of supervision, in order to avoid further retaliation, as well as engaging her in other work, ensuring the renewal of her appointment pending conclusion of the OIOS report and placing a note in the offender's official status file, since he had separated from the

¹⁴ Impugned Judgment, para. 36.

Organization and was no longer subject to be held accountable for the retaliation. As discussed above, the Organization also took some measures to compensate for the lack of the e-PAS.

71. The Appeals Tribunal acknowledges that the Organization responded with some kind of protection, *after the issuance of the Ethics Office's recommendation*, in order to avoid *further* harm to Ms. Civic in light of the illegality which she had been subjected to. The opportunity for the Organization to identify and correct its own mistakes is among the most efficient ways to address wrongdoings within its internal functioning. Of course, the protection of the potential victim has to be done at the same time that due process of law is respected with regard to the potential offender's rights. In addition, it has to be timely. In the present case, the speedy and effective measures taken by the Administration were commensurate enough to explain why no compensation for loss of opportunity has been awarded.

72. However, despite the fact that the UNDT dismissed the claim for compensation for pecuniary damages, it awarded compensation for non-pecuniary damages. By doing so, it referred to the moral and *preceding* harm Ms. Civic had suffered until these measures were implemented and while she was still under the undisputed harmful working conditions, as ultimately described in the OIOS report. The award hence relates mostly to the hazardous situation Ms. Civic had experienced in the *past*, before such measures were put in place, rather than to the *future*, after those measures were taken. As correctly found by the UNDT: "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."¹⁵

73. It could obviously be argued that the Administration had not been made aware of the situation before the formal complaint was investigated and reported and therefore could not have acted to protect Ms. Civic. Nonetheless, when Ms. Civic first reported prohibited conduct, as early as November 2015, the Administration should have taken preliminary measures in order to protect her against retaliation, in accordance with the applicable legal framework.¹⁶ This could have involved, *inter alia*, the same protective measures eventually

¹⁵ Impugned Judgment, para. 22.

¹⁶ See Section 8.3 of the ST/SGB/2017/2/Rev.1.

adopted by the Administration in July 2017, but at a considerably earlier stage.¹⁷ By failing to take such action earlier and thus exposing Ms. Civic to harmful working conditions for a considerable amount of time, the Administration failed in its duty of care and compensation shall be awarded to alleviate the harm, provided that it is supported by evidence.¹⁸ The Secretary-General's contention that the UNDT created a "strict liability" completely misrepresents the UNDT's reasoning and is hence dismissed.

74. The issue is now to determine whether the UNDT erred when it found that there was justification for an award of compensation for non-pecuniary damage. In this respect, the Secretary-General contends that the UNDT incorrectly shifted the burden of proof, when it found that the evidence produced by Ms. Civic was sufficient to prove her case, despite not being corroborated by medical documentation or expertise. The Secretary-General claims that it was Ms. Civic's burden to provide supporting medical evidence for her claim, not the Secretary-General's to disprove it.

75. On this matter, the UNDT found that the Secretary-General did not request the calling for expert evidence, which was incidentally not necessary, since the descriptions provided by Ms. Civic and the witnesses of what they had directly observed were "fully consistent with what is commonly recognized as of behavioural and physical manifestations of serious and protracted distress". For the UNDT, "what the Applicant and the independent witnesses testified about was not atypical under the circumstances, considering the magnitude of the breach with its harming nature, and the extent of the claim. Indeed, in the face of this independent evidence, calling an expert would unnecessarily increase the cost of the proceedings."¹⁹

76. The Appeals Tribunal firstly notes that, contrary to the Secretary-General's assertion, it is crystal clear that the UNDT Judgment did not shift the burden of proof.²⁰ What it merely did was to acknowledge that the descriptions provided by the witnesses were compatible with what would normally occur to an average person, should she or he be exposed to the same

¹⁷ Impugned Judgment, paras. 17, 19a and 19b. The completion of the e-PAS took additional time, having only been finalised in November 2017.

¹⁸ Article 10(5)(b) of the UNDT Statute. Article 9(1)(b) of the Appeals Tribunal Statute.

¹⁹ Impugned Judgment, para. 56.

²⁰ The UNDT was unambiguous in this regard. See para. 23 of the Judgment: "An applicant bears the burden of proving harm stemming directly from the Administration's illegal act or omission" (quoting *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20 and *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309).

illegal situation. Once acknowledging this typicity, it would have been incumbent upon the opposing party to provide counterevidence. This did not occur, since the Secretary-General did not request expertise to be called. Therefore, the UNDT found that Ms. Civic had discharged herself of her burden.

77. Furthermore, when it comes to compensation for such harm, the current state of the Appeals Tribunal's jurisprudence is that corroborating evidence, other than the staff member's testimony, is needed to support the claim.²¹ Contrary to what the Secretary-General states, there is no requirement that this corroborating evidence be of medical nature, since moral harm can be proved by other means (expert or otherwise), as clearly settled in our jurisprudence.²² If the moral damage originating from an illegality goes beyond the scope of an ordinary disagreement or some ordinary psychological suffering, leading rather to an illness affecting the staff member's mental or physical health in an acute or chronic manner, then there might be an aggravating circumstance which, once evidenced and depending on the events of the case, could have a considerable impact on the amount of the compensation.

78. Having established the standard of evidence required to prove non-pecuniary damage, the Appeals Tribunal will now turn to the issue of whether the UNDT erred when it found that there was enough evidence for such an award in the present case. Among the facts described by the witnesses who had directly worked with Ms. Civic in ROLSISS, the UNDT reported Ms. Civic not being respected by her leadership, or being sidelined, circumvented and ignored, in a "passive aggressive approach" within a "very weird" situation. Moreover, there is evidence which shows that while she appeared happy, interested and engaged with her work at the beginning, as the illegal situation progressed, she seemed profoundly unhappy, cried most of the time and had to take sick leave several times for various causes. In addition, she seemed deflated, taken by a general disillusion about the Organization itself. Only towards the end of the Mission (whose closure was due to take place by 30 June 2018) did Ms. Civic's wellbeing improve.²³ The Appeals Tribunal concludes that this might well

²¹ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, particularly Judge Knierim's concurring opinion; *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764. See also *Herbert Robinson v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1040, para. 33 and *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 69.

²² *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, particularly Judge Knierim's concurring opinion, para. 4; *Langue v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, para. 18.

²³ Impugned Judgment, paras. 50-53.

have resulted from the implementation of the protective measures, from July 2017 onwards, although there is no direct evidence of this causal relationship. Although this improvement may impact on the amount of compensation, it does not eliminate the Organization's liability deriving from the moral harm which had already been caused by the illegality.

79. The UNDT was thus correct when it was satisfied that, *on the basis of the testimony adduced before it*, as a result of the illegal decisions of the Administration, Ms. Civic experienced “insult to her *dignitas*, humiliation before her colleagues, including subordinates, impossibility to fully utilise her qualifications, and insecurity of her job. This led to disappointment, demoralization and anxiety, and had a negative impact on her physical health. These constitute compensable non-pecuniary damage.”²⁴ Nothing on the record undermines this finding. Moreover, as stated, there is no need for medical expertise to conclude that continuous anxiety can be harmful for one's health. The UNDT reasonably weighed the evidence before reaching its findings and the Appeals Tribunal will not interfere with its conclusion in the present case. The amount of compensation awarded is compatible with the jurisprudence, given the context in which the illegality took place and its detrimental effects on Ms. Civic's state of mind, *dignitas* and personhood.

80. The appeal must fail.

²⁴ Impugned Judgment, para. 56.

Judgment

81. The appeal and cross-appeal are dismissed and Judgment No. UNDT/2019/188 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 18th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar