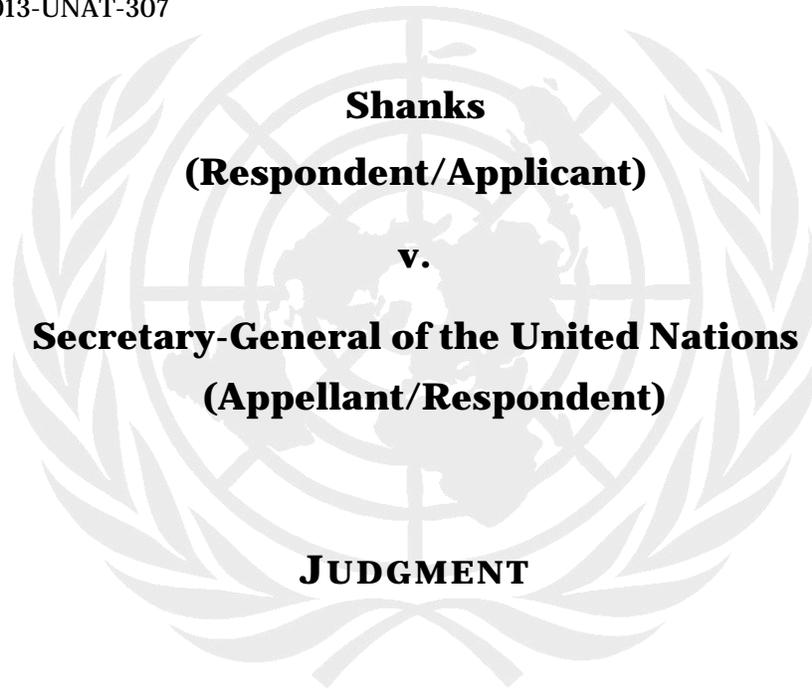




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-307



**Shanks  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Inés Weinberg de Roca Judge Rosalyn Chapman
Case No.:	2012-339
Date:	28 March 2013
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant:	Tracy L. Kiernan
Counsel for Appellant/Respondent:	Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgments No. UNDT/2011/209 and No. UNDT/2012/062, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 December 2011 and 3 May 2012, respectively, in the case of *Shanks v. Secretary-General of the United Nations*. The Secretary-General appealed on 29 June 2012, and Ms. Rebecca Shanks answered on 7 September 2012.

### **Facts and Procedure**

2. The facts established by the Dispute Tribunal in this case read as follows:<sup>1</sup>

... The following facts are taken from a joint statement of facts submitted by the parties before the hearing as well as evidence given at the substantive hearing by [Ms. Shanks] and her witness, Dr. Alex Moroz, the attending private physician who supervised her rehabilitation at the Rusk Institute of Rehabilitation Medicine, New York University, and by the three witnesses for the Respondent: Dr. Agnes Pasquier Castro, [United Nations Medical Services Division (MSD)]; Mr. Yiping Zhou, [Ms. Shanks'] supervisor and Director, Special Unit for South-South Cooperation (SSC), [United Nations Development Programme (UNDP)]; and Ms. Leonor Lee, then Human Resources Business Advisor, Office of Human Resources (OHR), UNDP.

... [Ms. Shanks] first joined the United Nations in June 1992 as an Administrative Assistant. Following several renewals and promotions, on 1 November 2003, she joined SSC at the G-6 level in the position of Administrative Associate in New York.

... On 27 September 2004, a taxi in which [Ms. Shanks] was travelling to work was hit by a United States Postal truck. [She] sustained serious injuries and was admitted to hospital. While there, [she] was visited by some colleagues from SSC who, under the instruction of the SSC Director, also handed her a Results and Competency Assessment (RCA) of her past performance at SSC for her signature. After taking advice, [Ms. Shanks] did not sign it as she was undergoing serious medical treatment. At the substantive hearing the Respondent accepted that, due to her acute condition, [Ms. Shanks] should never have been handed over the RCA at that time for her signature. The SSC Director, however, stated that her performance was praised in the RCA as one of the best in the Unit.

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<sup>1</sup> The following facts are taken from Judgment No. UNDT/2011/209, paragraphs 5–59.

... In December 2004, she was released from the hospital for home-care and in January 2005, began daily outpatient rehabilitation overseen by Dr. Moroz for 8 hours per day, decreasing progressively to 3.5 hours. After treatment from a number of treating therapists, from January to March 2006, she underwent a vocational programme at the Rusk Institute to assess her readiness to return to work, which included simulations of work situations relevant to [Ms. Shanks].

... From the date of the accident until 10 June 2005[, Ms. Shanks] was placed on sick leave with full pay. Upon exhaustion of her entitlement to sick leave with full pay, she was placed on sick leave with half pay combined with annual leave from 11 June 2005 until 8 December 2005, followed by sick leave with half pay from 9 December 2005 until 29 March 2006. Upon exhaustion of all her sick leave entitlements, [Ms. Shanks] was placed on special leave with half pay from 30 March 2006.

... [Ms. Shanks'] former supervisor, Mr. Zhou, the SSC Director, told the Tribunal that, during the entire period of her incapacity, her work duties and functions were redistributed among the existing staff of the SSC, particularly to another Administrative Associate. In effect, [Ms. Shanks'] position was kept open awaiting her return and not filled until 2009 when her position was combined with that of the Administrative Associate who in her absence had shared most of her tasks with other staff members and who later received a promotion to the P-3 level.

... Dr. Moroz gave regular medical certificates to the SSC Director and to MSD, including to Dr. Pasquier-Castro in support of extensions of [Ms. Shanks'] leave. Materially, he gave a follow-up report on 10 February 2006 which concluded that: "I expect that [she] will be ready to return to work by March 29, 2006".

... In response to this message, on 7 March 2006, Dr. Serguei Oleinikov, Deputy Director, MSD, informed OHR that "according to medical certificate received ..., [Ms. Shanks] may return to work by 29 March 2006. Her sick leave has been approved through the end of March 2006". That same day, OHR advised the SSC Director: "Please see message below from Dr. Oleinikov. If you wish [MSD] to reconsider her case or to review her medical condition more in detail, kindly advise. Otherwise, [she] is cleared to return to work on 29 March 2006."

... On 13 March 2006, Dr. Oleinikov advised Ms. Lee that considering [Ms. Shanks'] long illness she would have to be cleared by MSD to return to work.

... When [Ms. Shanks] was advised of this, she made an appointment with MSD and saw Dr. Pasquier-Castro on 3 April 2006. Dr. Pasquier-Castro told the Tribunal that before this appointment she read [Ms. Shanks'] file, but would not have seen the

10 February 2006 letter from Dr. Moroz as she did not consider it important to check the previous medical reports. The reason for her seeing [Ms. Shanks] was because she had exhausted her entitlements to sick leave.

... Dr. Pasquier-Castro did not undertake a medical evaluation of [Ms. Shanks] on 3 April, but discussed with her the two options proposed by OHR. These were either to request disability or to take special leave without pay. Dr. Pasquier-Castro expressed reservations about the latter option considering [Ms. Shanks'] difficult financial situation but did not inform [Ms. Shanks] that if she was granted disability she would be terminated from her employment with UNDP. Although [Ms. Shanks] told her that she was not sure that she wanted to stop working, Dr. Pasquier-Castro did not discuss with her the possibility that she could resume her duties gradually and on a part-time basis. Dr. Pasquier-Castro told her she could not evaluate her without Dr. Moroz's assessment but advised her about the possibility of filing a claim for her injuries from the accident with the Advisory Board on Compensation Claims (ABCC), and promised that she would consult ABCC regarding the claim as it should normally have been submitted within some weeks of the accident.

... [Ms. Shanks] explained that she could not get Dr. Moroz's assessment on her capability to return to work at that time, since he was at a conference and the results from her vocational training program at the Rusk Institute had not yet been finalised.

... After this meeting, Dr. Pasquier-Castro concluded that [Ms. Shanks] was not fit for work in the foreseeable future. Her opinion was based on [Ms. Shanks'] ongoing rehabilitation treatment; what the Doctor described as her chronic depression; a carpal tunnel syndrome issue; and her short-term memory problems which the Doctor believed were demonstrated by the fact that [Ms. Shanks] took notes and relied on a note book during their meeting. Under cross-examination the Doctor accepted that taking such notes was not necessarily a result of memory impairment, but could also be a compulsive habit. Dr. Pasquier-Castro admitted that she had not been in contact with [Ms. Shanks'] workplace, SSC, to learn more about her functions but based her opinion on her general knowledge about working at the United Nations.

... When questioned about her diagnosis of chronic depression and anxiety, Dr. Pasquier-Castro explained that this came from a consultation with [Ms. Shanks] in 2003. Under cross-examination she accepted that [Ms. Shanks] did not in fact suffer from a chronic condition of this sort. [Ms. Shanks] explained to the Tribunal that, in 2003, she had consulted Dr. Pasquier-Castro for her assistance to obtain sick leave for stress as her mother was dying and her office had refused her request for leave to take care of her family.

... On 4 April 2006, Dr. Pasquier-Castro phoned Dr. Moroz. He told her that he thought that it was unlikely [Ms. Shanks] would return to her previous level of health as far as cognitive impairment was concerned and believed that she might be better off going on a disability benefit. Dr. Moroz explained to the Tribunal that the spirit of the conversation was about the options for [Ms. Shanks] and what would suit her best if she were not to return to work. At that stage, he did not realise that taking disability meant that she would be terminated from her employment as no one from the United Nations had explained this to him; instead, he thought that it would result in her being provided with monthly stipends and continued health care coverage.

... On 7 April 2006, Dr. Oleinikov, MSD, advised the Copenhagen office of OHR that MSD was “recommending [Ms. Shanks] for a disability benefit”, and requested OHR to “[p]lease make sure that UNDP forwards a similar request to the Secretary of the Pension Board”.

... On 10 April 2006, Dr. Moroz advised MSD in writing:  
I have seen [Ms. Shanks] the day after we spoke on the telephone. We reviewed her medical history and progress so far as well as the options available to her under the [United Nations] guidelines that you explained to me. [She] took a few days to think it over and we agreed that the best course for her would be the long-term disability. She will not reach her baseline level of functioning and will not be able to perform her duties without limitations.

... Also on 10 April 2006, OHR advised [Ms. Shanks] of MSD’s decision to recommend her for a disability benefit to the United Nations Staff Pension Committee (UNSPC), which by delegation from the Standing Committee has the power to determine incapacity for the purpose of award of disability benefits.

... The same date, [Ms. Shanks] responded to OHR: “I hereby confirm that you may proceed as per the recommendation of the [MSD] regarding my disability”. [She] told the Tribunal that OHR had requested her to revert with precise language reaffirming that MSD could proceed, but that OHR had not explained her that the consequence would be of termination of her employment with UNDP if she was found to be disabled. She became aware of that only later the same day after speaking to a colleague.

... On 11 April 2006, the Copenhagen office of OHR submitted a request to UNSPC “for the award of a disability under Article 33 of the [United Nations Joint Staff Pension Fund (UNJSPF)] Regulations”. The email was copied to a number of United Nations staff, including Ms. Lee (who was based in New York) and appears to have been sent at 11:50 a.m., Copenhagen time or 5:50 a.m., New York time. [Ms. Shanks] was not copied on the email.

... Also on 11 April 2006, after having been informed of the implications of taking a disability allowance by her colleague, [Ms. Shanks] changed her mind and decided instead that she wanted to return to work. She therefore wrote to Ms. Lee at 11:50 a.m., New York time, as follows:

I know I sent an email regarding [recommendation for disability] yesterday, I just want to confirm that there is absolutely no other option available to me. Is there a possibility that I could return to work on a part-time basis/or with light duties with gradual progression. The only two options that were offered were: Special leave without pay or separation with disability.

... On the same day at 1:22 p.m., [Ms. Shanks] wrote Ms. Lee another email stating:

I have been thinking about the recommendation for disability and would really like to explore the possibility of gradually returning to work on a parttime basis for a short period and if I really cannot cope then take the disability. I really would like to give this a try before fully accepting the recommendation for disability.

... [Ms. Shanks] also spoke to someone at MSD and tried to speak to Dr. Moroz and another professional involved in her rehabilitation to obtain the information required to provide her with the proper clearance.

... In response at 4:19 p.m. (New York time) on the same date, after OHR Copenhagen's email to UNSPC, Ms. Lee advised [Ms. Shanks] that "any return to work on part-time basis/or with light duties with gradual progression has to be recommended/cleared by [MSD]". She informed [Ms. Shanks] that MSD had instead recommended disability to the UNSPC. As for the procedure, she explained that, "[f]ollowing consideration of the request and the advice of the UN Medical Director [i.e., the head of MSD], [UNSPC] will determine whether or not you are incapacitated within the meaning of Article 33(a) of the UNJSPF [Regulations and Rules]". She suggested [to Ms. Shanks] to "speak to the [MSD] on their recommendation for disability", explained to her that "[s]pecial leave without pay will not be appropriate when there is a recommendation for disability". She also encouraged her to "revert to [UNDP] after [she had] spoken to [MSD]".

... Ms. Lee did not tell [Ms. Shanks] that OHR's Copenhagen office had already emailed UNSPC on the same date recommending [Ms. Shanks] for disability nor did she alert her that she would need to take action to prevent UNSPC from declaring her disabled. She told the Tribunal that it was not for UNDP or OHR to contact the UNSPC; normally MSD would do this.

... On 18 April 2006, on the advice from Dr. Pasquier-Castro given on 3 April 2006, [Ms. Shanks] submitted a claim to ABCC for compensation under Appendix D to the Staff Rules for the injuries that she sustained on 27 September 2004. In her claim, [Ms. Shanks] described the nature of the injuries and indicated that “all of the above injuries continue to cause pain and limitations”. [Ms. Shanks] explained to the Tribunal that these claims for injuries were made regarding her condition as it was in 2004, immediately after the accident, when she was partly paralysed and could not read or write, and that they were not related to her much improved condition in April 2006.

... On 25 April 2006, having spoken to someone at the UNSPC who told her that her disability was up for consideration the next day, [Ms. Shanks] emailed Ms. Lee, OHR, copying Dr. Sudershan Narula, the then United Nations Medical Director, (the Director), and Dr. Moroz: “I would appreciate your assistance to have my disability hearing postpone[d] until I am able to reach [Dr. Moroz] my doctor at NYU medical center for further clarification on my medical status. Thanking you in anticipation for your urgent assistance.”

... In Dr. Narula’s email response, apparently of the same date, copied to Ms. Lee and Dr. Moroz, she pointed out to [Ms. Shanks] that the implications of UNSPC postponing its determination would be that, as her sick leave was exhausted, she would be placed on leave without pay and this would have an impact on her health insurance. She said, “I wanted to tell you that before I make a request that we should not present your case tomorrow”.

... [Ms. Shanks] immediately responded to Dr. Narula, copying Ms. Lee and Dr. Moroz stating that, “[b]ased on the progress I have made so far, I would like to be given the opportunity to return to work with gradual progression with the possibility of medical re-evaluation within 1 month”.

... On the same date, 25 April 2006, Dr. Narula replied by email, copying Ms. Lee and Dr. Moroz, “if your attending physician is now of the opinion that you could return to work part-time, we will have no objection”.

... On 26 April 2006, at 11:55 a.m., Dr. Moroz sent an email to MSD stating: “[Ms. Shanks] can return to work with specific time and activity limitations. I will have written recommendations ready by the end of the week”.

... However, UNSPC was not asked to postpone its consideration of her disability and, at a meeting later on 26 April 2006, based on the information before it decided that [Ms. Shanks] met the established criteria for incapacity and that she was thus entitled to a UNJSPF disability benefit under [article] 33 of the UNJSPF regulations

and rules. Dr. Narula was present at this meeting, but did not make any comments about Dr. Moroz' declaration that [Ms. Shanks] was fit to return to work with certain limitations or her wanting to return to work and therefore not being declared disabled. OHR did not take any action or make any efforts to ensure that Dr. Narula would put forward to UNSPC [Ms. Shanks'] request to have the hearing of her case postponed.

... After receiving the results from her vocational training program, on 27 April 2006, Dr. Moroz reaffirmed her capacity to return to work as of 1 May 2006 subject to the following limitations:

- a. [Ms. Shanks] should begin with reduced schedule consisting of four hours a day, four days a week (total of 16 hours weekly);
- b. Frequent breaks should be incorporated in the workday (15 minutes every two hours) as needed;
- c. A working environment with the least amount of noise and other distractions should be provided;
- d. Assignments with clear directions and a timeframe for expected date of completion should be provided;
- e. A telephone headset should be provided if [her] responsibilities will include using a telephone;
- f. A lumbar rest needs to be attached to her office chair;
- g. One assignment at a time will allow [Ms. Shanks] to focus on the task fully;
- h. [Ms. Shanks] should continue using her hand orthoses when using computer keyboards.

... Dr. Moroz told the Tribunal these limitations were merely suggestions and that they could be adapted to the specific circumstances of [Ms. Shanks'] work situation. For instance, when asked in evidence whether [Ms. Shanks] could work 20 hours a week, which is the minimum amount of hours that UNDP allows for part time employees, he said that this would have been feasible.

... He also stated that he expected that "[Ms. Shanks would] be able to work progressively longer and perform progressively complex assignments".

... [Ms. Shanks] wrote to Mr. Zhou, the SSC Director, telling him she had been cleared to work from 1 May 2006, but was waiting for MSD to issue medical clearance. When Mr. Zhou told her he was waiting for the final decision, she wrote to Dr. Narula to follow-up on her medical clearance following the advice from Dr. Moroz. Mr. Zhou did not contact Dr. Moroz or MSD to inquire about the suggested accommodations. After [Ms. Shanks'] accident, Mr. Zhou had only contacted her once, which was when she was hospitalized and with the purpose of having her sign her RCA.

... [Ms. Shanks] was invited to a meeting on 15 May 2006, with Ms. Lee and Dr. Narula, to discuss the option of returning to work on a part-time basis. Ms. Lee told the Tribunal that she probably knew the outcome of the UNPSC decision before this meeting. Dr. Narula advised [Ms. Shanks] to think carefully about what disability meant, including the protection of her after-service health plan. In Ms. Lee's evidence, she said she did not think the work accommodations suggested by Dr. Moroz were possible, but that she had decided to go back to the SSC to find out the possibility of a return. She did this by sending an email to the SSC director, Mr. Zhou, directly after the meeting.

... On the same day SSC advised OHR:  
Based on Dr. Moroz' medical certification, the management has reservations to provide ... this kind of arrangement as this will not be fair for both (the staff member as well as the corporate) as there is no 100 % assurance that [she] will fully recover. The situation might be detrimental in the end, as we cannot ensure that we will always be sensitive to her needs as the work will demand focusing on what we will commit to the Organization and to the Member States.

For your information, most of the function that is [sic] assigned to her would require a lot of computer usage (using the Atlas system budget forecasting to name a few), a lot of telephone dealings, fully blown conference room renovation, and a lot of distribution of publications via website and hard copies.

Since this is becoming to be a HR [sic] issue more than a management one, we would like [OHR] to advice [sic] the [SSC] management on how to move forward given the commitment we are about to report and pledge to the Executive Board and the Member States as well as the pending reprofiling because of the expanded activity set in the vision of the Director.

... On 17 May 2006, [Ms. Shanks] was advised by UNJSPF that the "UNSPC [had] determined [her to be] incapacitated for further service and consequently entitled to a disability benefit".

... On the same date, Ms. Lee advised [Ms. Shanks] that SSC had "reservations" about her wish to return to work on a part-time basis given the limitations imposed by Dr. Moroz as well as the "job requirements" and "work situation/work pressure" at the office.

... On 19 June 2006, [Ms. Shanks] requested OHR to take all necessary steps to arrange her return to work as early as possible in accordance with Dr. Moroz's certification that she was capable of returning to work from 1 May 2006.

... However, in a letter dated 22 June 2006, which was copied to, inter alia, Dr. Narula and Mr. Zhou, Ms. Lee advised [Ms. Shanks] that:

Since the [UNSPC] has determined that you are incapacitated for further service and you were informed of this decision on 17 May 2006, UNDP as your employer is bound by it and has no other choice than to comply with it. We are therefore proceeding with the implementation of this decision and the termination of your appointment with UNDP for health reasons in accordance with UN staff regulation 9.1 ...

If you do not agree with [UNSPC's] decision, you can appeal it in accordance with Section K of the UNJSPF Regulations and Rules.

Your appeal is against [UNJSPF], not against UNDP. I am attaching Section K of the UNJSPF Regulations and Rules for your information.

... On 26 June 2006, in a letter from the Manager, Benefits & Entitlements Services, OHR, it was recommended for the OHR Director's approval that [Ms. Shanks'] fixed-term appointment be terminated by 30 June 2006 for reasons of health pursuant to staff regulation 9.1(b). The reason given was that UNSPC, upon recommendation from Dr. Oleinikov, had determined that [Ms. Shanks] was "incapacitated for further service". Her entitlements were calculated as 10.2 months of net base salary less amount of disability benefit received and 3 months' net base salary in lieu of notice.

... On 27 June 2006, the OHR Director approved the recommendation to separate [Ms. Shanks]. Ms. Lee confirmed to the Tribunal that the termination was not because of the inability of the Organization to accommodate the conditions that [she] needed to return to work but because of the award of disability. Ms. Lee said that where a disability award is granted by UNSPC, UNDP always proceeds to termination for health reasons and that she ha[d] never seen an exception to that.

... From that time, [Ms. Shanks] took a number of steps to appeal the decision, including a request to suspend the decision to terminate her services with UNDP, an administrative review and an appeal to the Joint Appeals Board (JAB). She also appealed against the UNSPC's decision. She exhausted those remedies without success. Although the JAB found that the Respondent had violated certain procedures, this was not accepted by the Secretary-General. At no stage during that

process was she afforded a hearing of her case to enable her to explain the circumstances.

... On 24 October 2006, [Ms. Shanks] was paid compensation from ABCC under Appendix D in the amount of USD 100,435.14. According to [Ms. Shanks], this only partly covered the medical expenses she had paid herself.

... On 28 November 2008, [Ms. Shanks] was offered a fixed-term appointment by the [United Nations Development Fund for Women (UNIFEM)] after a competitive selection process.

... On 6 January 2009, the Coordinator of the Panel of Counsel on behalf of [Ms. Shanks] requested that [Ms. Shanks] be given medical clearance to start her appointment with [UNIFEM]. The new UN Medical Director advised OHR/UNIFEM that he could not issue medical clearance in the absence of new medical information.

... The post which [Ms. Shanks] had encumbered was kept open until February 2009. Mr. Zhou told the Tribunal that he was looking forward to welcoming [her] back. No other person was recruited or assigned against the position.

... In the following months, [Ms. Shanks] underwent further medical testing as required by the UN Medical Director but before this could be completed, on 15 June 2009, UNIFEM withdrew the offer of appointment for lack of medical clearance.

... On 10 July 2009, Dr. Moroz found that at the time of writing there were no medical contraindications to full-time employment within [Ms. Shanks'] occupation.

... On 3 August 2009, [Ms. Shanks] furnished the UN Medical Director with the results of the further medical testing.

... On 24 August 2009, the UN Medical Director informed [Ms. Shanks] that on the basis of the new medical information his Office would favorably consider a future request for medical clearance.

... On 26 April 2010, the UNSPC, upon receipt of new medical reports by MSD, decided to discontinue the disability benefit awarded to [Ms. Shanks] in April 2006.

... Throughout this time, although [Ms. Shanks] was entitled to the disability benefit payable from 1 July 2006 to 28 February 2009, she refused to accept it. [She] told the Tribunal that she would be breaking federal laws if she received disability while being capable of working and that she was applying for other

positions. Since April 2006, she has held different temporary employments with Colgate-Palmolive, Limited Brands and the United Nations Industrial Development Organization. She also volunteered as a public relations person for congressional events. Currently, she is studying Public Health, but does not hold any paid employment.

3. In its “Judgment on Liability”, No. UNDT/2011/209 of 8 December 2011, the Dispute Tribunal acknowledged the complexity of the case as well as the varied medical opinions as to Ms. Shanks’ fitness to return to work, and the practical implications of absorbing a person with disabilities in a busy office under renovation. Overall, however, the UNDT agreed with Ms. Shanks that her case demonstrated “a collective failure of officials to act with due diligence”. It considered:

None of these failures appear to have been deliberate or done out of any improper purpose. In fact, it seems that, at all times, the UN officials both in MSD and OHR hoped that [she] would take the disability termination in order to relieve her financial problems and to ensure some security of health care in the future. However, this is not what [she] wanted. She wanted the opportunity to resume work and was prepared to take the risk of receiving no disability benefits.

4. Specifically, the Dispute Tribunal found OHR had violated Ms. Shanks’ rights by:
- a. Not advising in a timely manner [her] or her private attending physician, Dr. Moroz, that the consequence of a disability finding by UNSPC would be termination of her appointment. If she had had that information before 10 April 2006, it is unlikely that she would have given consent for her case to go to UNSPC;
  - b. Not informing [her], or any of the relevant medical advisors, about the possible alternative of her gradually returning to work on part-time basis instead of her obtaining disability or special leave with pay;
  - c. Not telling [her] on 11 April 2006, when she had changed her mind, that the case had already been submitted to the UNSPC so that she could take steps to rectify the situation at an early stage;
  - d. Not ensuring that UNSPC knew that [she] had had a change of heart regarding her being declared disabled;
  - e. Continuing with the referral to UNSPC contrary to [her] explicit request;

f. A systemic failure in the lack of any policy for a gradual return to work ... which meant that neither OHR nor SSC ever gave this option proper consideration;

g. Terminating [her] when the medical evidence of her incapacity was inconclusive as Dr. Moroz had already cleared her for resuming her duties albeit with some limitations.

5. Insofar as the responsibility of MSD was concerned, the Dispute Tribunal recalled that its role “in making critical decisions that affect the personal and professional lives of staff members invests it with the responsibility to act in a consistent and coordinated manner in the best interests of staff members and the Organisation” and held that “MSD failed to meet that responsibility ... Its actions and inactions contributed to the failures of the Respondent in this case.”

6. Having found in favour of Ms. Shanks on liability, the Dispute Tribunal decided not to immediately rule on remedies. Rather, it stated, “the Tribunal wishes to provide the parties with the opportunity of settling the question of remedies in an amicable manner, given the complexity of the matter and the range of options available to the parties”. An amicable resolution did not prove possible, however, and the Dispute Tribunal was obliged to issue its “Judgment on Relief”, No. UNDT/2012/062 on 3 May 2012, in which it took account of Ms. Shanks’ pecuniary and non-pecuniary damage.

7. With respect to pecuniary loss, the UNDT found it necessary to consider Ms. Shanks’ “fitness to return to work; the likely duration of the contract she could reasonably have expected to have been given; and the amount of work she would likely have been able to perform in view of her disability during the hypothetical contract period”. It held that, had it not been for the impugned decision, “it is more likely than not that [she] would have been found fit to resume her duties, initially on a part-time basis”. Given that the last extension of Ms. Shanks’ contract before the accident was for 18 months, and in light of “the positive statements about her performance”, the Dispute Tribunal considered it “more likely than not that she would have been offered an extension for, at least, the same time period had her employment not been improperly terminated”. The Dispute Tribunal elected not to offset any actual income Ms. Shanks earned during the period in question, as “any offset would be so minimal that it should not be taken into account”.

8. Accordingly, the UNDT calculated what income Ms. Shanks could have expected from the Organization during the 18-month period. It found “on the balance of probabilities, that, while [she] could have started work at 16 hours a week in March 2006 on medical advice, at least

by 1 July 2006, she was fit to return to more consistent employment” and concluded that she would have gradually increased her working hours from 50 per cent to 100 per cent. Accordingly, the Dispute Tribunal calculated her pecuniary damages at 75 per cent of the full-time salary she would have obtained had her contract been extended from 1 July 2006 to 31 December 2007.

9. The UNDT accepted Ms. Shanks’ evidence that “she suffered considerable frustration and anxiety when she realised that her wishes had been overlooked by [the SPC] declaring her incapacitated when she specifically asked for it not to do so”, as well as “immaterial damage from the shock of learning of the decision to terminate her employment” and “the stress and anxiety of pursuing the claim against the decision that she was incapacitated while at the same time demonstrating her increasing capacity for work”. The Dispute Tribunal took note of the fact that this was a humiliating experience for Ms. Shanks. It was also mindful of the fact that she lost the opportunity of a position with UNIFEM because she did not have medical clearance and found, “[h]ad her contract with UNDP not been terminated, the issue of such clearance would not have occurred”. In sum, the Dispute Tribunal held that her “personal and professional life was seriously impaired by the negligence of the responsible officials resulting in her being wrongfully terminated”.

10. In total, the Dispute Tribunal awarded Ms. Shanks pecuniary damages of “75 percent of the full-time [net base salary] she would have obtained had her contract in SSC, UNDP, been extended for an additional 18 months’ period, from 1 July 2006 to 31 December 2007” and non-pecuniary damages in the amount of USD 50,000, always provided that the total compensation could not exceed the cap of two years’ net base salary, as provided in Article 10(5) of the Statute of the Dispute Tribunal, Ms. Shanks having “failed to specify the exceptional circumstances to justify any higher award”.

### **Submissions**

#### **Secretary-General’s Appeal**

11. The Secretary-General submits that the Dispute Tribunal erred in its findings that Ms. Shanks ought not to have been terminated for reasons of health and that the SPC process should have been stayed when her physician indicated she could return to work on a part-time basis. He asserts that the decision as to her fitness for service was not solely at the discretion of her physician and that the Organization had not granted “unconditional clearance” for her return,

as the limitations or accommodations she would have required rendered her unfit to work, even on a part-time basis.

12. The Secretary-General further submits that the UNDT erred in concluding that the Organization had failed to “fairly or adequately” consider Ms. Shanks’ request to return to work, part-time. He states that there is no right or entitlement to part-time working arrangements, and that the UNDP Policy on Flexible Working Arrangements (UNDP Policy) requires the Head of Office or Division to assess whether part-time employment is feasible. In the instant case, the Administration acted in accordance with the UNDP Policy and exercised its discretionary authority lawfully and properly, concluding that Ms. Shanks’ request to work part-time, with accommodations, could not be granted.

13. The Secretary-General challenges the finding of the Dispute Tribunal that UNDP had no strategy for the employment of disabled persons, and was not in compliance with the Convention on the Rights of Persons with Disabilities, and notes that UNDP has employed disabled persons, subject to medical clearance for their functions.

14. With respect to relief, the Secretary-General contends that the UNDT erred in its assessment of pecuniary damages, in particular in its assumption that Ms. Shanks could have worked at an average of 75 per cent over an eighteen-month period, given that her physician’s formal assessment had not cleared her to work more than 14 hours per week, with limitations, and that the SPC had found her incapacitated for further service (which finding was upheld by the Appeals Tribunal). There was, thus, no evidence that she could have worked at 50 per cent and subsequently at 100 per cent during the period in question.

15. Furthermore, the Secretary-General contends that Ms. Shanks is estopped from arguing that she would have been fit for full-time service during that period, given her contemporaneous allegations regarding her “pain and limitations” before the ABCC, and her acceptance of its award on, *inter alia*, that basis.

16. The Secretary-General avers that the UNDT erred in its presumption that Ms. Shanks’ fixed-term contract would have been extended for eighteen months, and recalls that the majority of her contracts were for a shorter duration and that her return to work, in particular on a part-time basis, “would necessarily have been subject to an initial trial to determine whether the

arrangement was mutually beneficial and appropriate". He notes that the UNDP Policy does not permit part-time employment to be approved for a duration in excess of twelve months.

17. The Secretary-General asserts that the Dispute Tribunal erred in failing to offset from its compensation sums Ms. Shanks had already received from the Organization, namely the USD 100,435.14 she was granted by the ABCC for a 39 per cent permanent loss of function.

18. Finally, the Secretary-General submits that the UNDT erred in making an award for moral damages which were not substantiated by Ms. Shanks or, in the alternative, submits that the amount ordered was excessive. He submits that she provided no satisfactory evidence as to moral damage suffered and contends that her own testimony does not justify an award of moral damages of USD 50,000, which is exceptional in quantum.

### **Ms. Shanks' Answer**

19. Ms. Shanks requests that the Appeals Tribunal affirm the UNDT Judgments, which are reasonable and sound, and order prompt payment of the relief awarded.

20. She argues that the Dispute Tribunal was best placed to determine her case, particularly in view of the complex circumstances and the extensive testimony heard, and that "[s]ome degree of deference should be given to the factual findings by the UNDT as the court of first instance". That failing, she contends that "the only way to effectively reconsider the decision of the UNDT would be through a re-hearing", which would inevitably further delay resolution of the case.

21. Ms. Shanks asserts that the UNDT was not unreasonable in finding that, had the Administration provided the relevant information to the SPC, it would have had no basis for declaring her incapacitated for further service. In this regard, she claims that her physician's clearance for her return to work, on a part-time basis, to which MSD had "no objection", was sufficient to authorize her resumption of functions. The limitations listed by her physician were "merely suggestions", she maintains, and were adaptable. Moreover, she was able to work on a 50 per cent basis and meet her work outputs, as required by the UNDP Policy, and, in time, could have been expected to be able to work for longer periods and on more complex assignments.

22. Ms. Shanks contends that the UNDT conclusion that UNDP failed to fairly or adequately consider her request to work part-time was reasonable. She argues that the Administration abused its discretionary authority in "failing to follow procedure, being procedurally inconsistent

and ignoring relevant medical materials”. In particular, she was not medically evaluated by MSD on 3 April 2006; OHR, rather than MSD, submitted the request for a disability award; her work unit was not involved in any substantive discussion of reasonable accommodations for her return to work; and, there is no indication that UNDP gave any genuine consideration to her return to work rather than automatically terminating her following the SPC disability award.

23. Ms. Shanks asserts that the Organization violated the International Labour Organization’s “Code of practice on managing disability in the workplace” as well as the Convention on the Rights of Persons with Disabilities, not even granting her an opportunity to try to resume her functions, or assume alternative ones, or to identify “opportunities or adjustments required”, and, as such, the UNDT finding was correct in this regard.

24. Ms. Shanks claims the UNDT award of pecuniary damages was reasonable and proper, and supported by written and oral evidence provided. In view of the fact that she has been able to take up paid employment, as well as her physician’s testimony, it is “more likely than not [that she could have worked] at least at a 50 per cent capacity initially, leading up to a 100 per cent capacity within a reasonable period of time”. Furthermore, the UNDT was correct in presuming her contract would have been extended for a period of 18 months, given her most recent contract, which was most relevant in view of her rank and responsibilities, and her positive performance assessment.

25. With respect to the ABCC award, Ms. Shanks submits that as her claim was made on the basis of her condition immediately following the accident, it reflected the pain and suffering she incurred in 2004 but not her ongoing and improved condition by 2006. Moreover, the ABCC award was quite independent from the UNDT compensation, being granted for medical expenses and loss of function but not for emotional injury or loss of earnings. As such, it was rightly not deducted from the compensation for pecuniary damages awarded by the UNDT.

26. Ms. Shanks asserts that the UNDT did not err in its award for, or quantum of, non-pecuniary damages, but relied on its assessment of the matter and evidence before it as well as the oral testimony it heard, which clearly demonstrated the harm she had suffered and the opportunities she had lost. Moreover, she alleges that the Secretary-General is abusing the process of internal justice and “squanders the time, money, and resources of the Organization” in routinely appealing UNDT awards of compensation.

27. Finally, Ms. Shanks submits that she is entitled to additional non-pecuniary damages for the “exceptional delays” in resolution of her case and “the abuse of process by the Secretary-General in appealing the award”.

### **Considerations**

28. As a preliminary matter, the Appeals Tribunal rejects Ms. Shanks’ request for an oral hearing. The factual and legal issues arising from the appeal have already been clearly defined by the parties and there is no need for further clarification.

29. The UNDT delivered two separate judgments, the first dealing with the issue of liability (UNDT/2011/209, of 8 December 2011) and the second with the issue of compensation (UNDT/2012/062, of 3 May 2012).

30. Despite the lengthy history of the case, the issue of liability falls within a narrow compass. The crucial question which must be answered on appeal is: was the UNDT correct in finding that Ms. Shanks had a right to return to work? If the answer is yes, the appeal fails and we then proceed to consider the question of compensation. If the answer is no, then the appeal is allowed.

31. The case turns on the medical evidence.

32. The UNDT found that had the UNSPC not proceeded with its determination, Ms. Shanks would more likely than not have been found fit to resume her duties, initially on a part-time basis.

33. The medical evidence available to the UNDT in arriving at this finding was as follows:

Dr. Moroz gave regular medical certificates to the SSC Director and to MSD, including Dr. Pasquier-Castro, in support of extensions of Ms. Shanks’ leave. On 10 February 2006, he gave a follow-up report which concluded that: “I expect that [Ms. Shanks] will be ready to return to work by March 29, 2006.” Dr. Moroz’ report prompted Dr. Oleinikov, Deputy Director, MSD, to inform OHR that “according to medical certificate received”, Ms. Shanks could return to work on 29 March 2006. OHR referred Dr. Oleinikov’s message to the SSC Director and advised him that unless he wished MSD to consider Ms. Shanks’ medical condition in more detail, she was cleared to return to work on 29 March 2006. Dr. Oleinikov subsequently advised Ms. Lee, OHR, that in view of Ms. Shanks’ long illness, she would have to be cleared by MSD to return to work. Ms. Shanks accordingly saw Dr. Pasquier-Castro on 3 April 2006. However, Dr. Pasquier-Castro

did not make any medical evaluation of Ms. Shanks, telling her that she could not do so without Dr. Moroz' assessment. Ms. Shanks explained that she could not get Dr. Moroz' assessment of her capacity to return to work at that time, since he was at a conference and the results of her vocational training program had not yet been finalised.

34. On 4 April 2006, Dr. Moroz stated in his telephone call with Dr. Pasquier-Castro that it was not likely that Ms. Shanks would return to her previous level of health as far as cognitive impairment was concerned and he believed she might be better off going on a disability benefit.

35. On 7 April 2006, Dr. Oleinikov advised the Copenhagen office of OHR that MSD was recommending Ms. Shanks for a disability benefit, and requested OHR to ensure that UNDP forwarded a similar request to the Secretary of the Pension Board.

36. On 10 April 2006, Dr. Moroz advised in writing that he had talked the matter over with Ms. Shanks and they both agreed that the best course would be "the long-term disability". Dr. Moroz expressed the opinion that Ms. Shanks "will not reach her baseline level of functioning and will not be able to perform her duties without limitations".

37. On 11 April 2006, the Copenhagen Office of OHR submitted a request to UNSPC for an award of a disability benefit under Article 33 of the UNJSPF Regulations. The e-mail was copied to Ms. Lee. However, Ms. Shanks changed her mind and decided that she wanted to return to work. In this regard, she tried to speak to Dr. Moroz to obtain a proper clearance.

38. On 18 April 2006, Ms. Shanks submitted her claim for compensation to the ABCC.

39. On 25 April 2006, Ms. Shanks e-mailed Ms. Lee, copying Dr. Narula, asking to have her disability hearing postponed until she could reach Dr. Moroz for clarification of her medical status. Dr. Narula replied to Ms. Shanks by e-mail, copying Ms. Lee and Dr. Moroz, that if her treating physician (Dr. Moroz) was of the opinion that she could return to work part time, there would be no objection.

40. On 26 April 2006, Dr. Moroz informed MSD that Ms. Shanks could return to work subject to specific time and activity limitations.

41. On 27 April 2006, after receiving the results from Ms. Shanks' vocational training program, Dr. Moroz reaffirmed her capacity to return to work as of 1 May 2006, subject to certain limitations (which we will come to consider shortly).

42. On 15 May 2006, Ms. Shanks met with Ms. Lee and Dr. Narula to discuss the option of returning to work on a part-time basis. Dr. Narula advised her to think carefully about disability. Ms. Lee, in her testimony before the UNDT in 2011, said that she did not think the work accommodations suggested by Dr. Moroz were possible but that she had decided to explore this possibility with Mr. Zhou, who was Ms. Shanks' supervisor.

43. On 17 May 2006, Ms. Lee advised Ms. Shanks that she had reservations about her wish to return to work on a part-time basis. Also on this date, Ms. Shanks learned that the UNSPC had determined her incapacitated for further service and consequently entitled to a disability benefit. Notwithstanding this information, on 19 June 2006 Ms. Shanks requested OHR to take all necessary steps to arrange her return to work as early as possible in accordance with Dr. Moroz' certification that she was able to return to work from 1 May 2006. On 22 June 2006, Mr. Zhou sent a letter to Ms. Shanks, which was copied to Dr. Narula and Ms. Lee, in which he referred to the UNSPC's determination and advised that UNDP was bound to commence proceedings for the termination of her employment for health reasons in accordance with UN Staff Regulation 9.1(a). On 27 June 2006, the OHR Director approved the recommendation to separate Ms. Shanks.

44. Ms. Shanks did not challenge the recommendation of MSD that she was medically unfit for further service. However, she did appeal the UNSPC determination of 26 April 2006 that she was incapacitated for further service. She submitted a formal request for review to the UNSPC on 14 August 2006. On 20 April 2007, the UNSPC decided to uphold its determination. On 26 June 2007, she appealed the UNSPC decision to the Standing Committee of the United Nations Joint Staff Pensions Board (UNJSPB) which, on 11 July 2007, upheld the UNSPC's decision. On 24 November 2008, Ms. Shanks requested the Standing Committee to reconsider its decision, but was advised by the UNJSPF secretariat that the Standing Committee had no inherent power to reconsider its own decisions. Ms. Shanks then appealed to the former Administrative Tribunal on 29 May 2009 and the case was subsequently transferred to the Appeals Tribunal.

45. The Appeals Tribunal also upheld the determination of the UNSPC that Ms. Shanks was incapacitated. The Appeals Tribunal decided that there was no basis for reversing the decision of the Standing Committee. The Appeals Tribunal noted that by letter dated 20 March 2008, the UNJSPF secretariat advised Ms. Shanks of the need for a medical report on the current state of her health in preparation for the UNSPC review of her eligibility for continued disability benefit. As no new medical information was submitted, the UNSPC deferred the review to 19 November 2008, when it decided to suspend the disability benefit as Ms. Shanks had again failed to submit the required medical update.<sup>2</sup> Ms. Shanks then filed a request for reconsideration, which the Appeals Tribunal dismissed.<sup>3</sup> Ms. Shanks then filed an application for interpretation of the meaning of this previous decision, which the Appeals Tribunal denied.<sup>4</sup>

46. There were additional facts evidencing that Ms. Shanks was unfit for further service. On 18 April 2006, she filed a claim for compensation with the ABCC, in respect of which she was paid compensation of USD 100,435.14 in October 2006. In her claim for compensation, she had stated that “all of the above injuries continue to cause pain and limitations”. At the hearing before the UNDT in 2011, Ms. Shanks explained that, in using those words, she had been referring to her condition as in September 2004. Although not making any specific finding on the point, the UNDT, for some reason, appears to have accepted this explanation. Taken at face value, the use of the word “continue” in the present tense leads to the incontrovertible interpretation that such statement was referring to her condition as at the time of making her claim for compensation. It is quite incongruous for Ms. Shanks to tell the ABCC in April 2006 that she was suffering continuing pain and limitations and to claim that, in the same time period in April 2006, she was fit enough to return to work.

47. However, Ms. Shanks’ case is that there was also evidence in the form of a clearance from Dr. Moroz, which had been accepted by Dr. Narula, that Ms. Shanks was fit enough to return to work and that if this evidence had been provided to the UNSPC in a timely manner then it would have had no basis for declaring her incapacitated for further service.

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<sup>2</sup> *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-026.

<sup>3</sup> *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-026 bis.

<sup>4</sup> *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-065.

48. Dr. Moroz' limitations imposed on Ms. Shanks returning to work on 1 May 2006 were as follows:

- a. [Ms. Shanks] should begin with reduced schedule consisting of four hours a day, four days a week (total of 16 hours weekly);
- b. Frequent breaks should be incorporated in the workday (15 minutes every two hours) as needed;
- c. A working environment with the least amount of noise and other distractions should be provided;
- d. Assignments with clear directions and a timeframe for expected date of completion should be provided;
- e. A telephone headset should be provided if [her] responsibilities will include using a telephone;
- f. A lumbar rest needs to be attached to her office chair;
- g. One assignment at a time will allow [Ms. Shanks] to focus on the task fully;
- h. [Ms. Shanks] should continue using her hand orthoses when using computer keyboards.

49. Dr. Moroz' clearance was therefore not unconditional. He imposed quite significant limitations on the type of work Ms. Shanks was able to perform. Most important was the limitation of a reduced work schedule of 16 hours per week, which incorporated a 15 minute break every two hours. With this limitation, Ms. Shanks was not able to satisfy the UNDP Policy requirements for part-time employment, that is, a work capacity of at least 50 per cent of a 40-hour working week.

50. The UNDP Policy provides at section 2 that “[a]s a first guiding principle, it should be understood that the policies put forth *are intended to facilitate flexible working arrangements but they do not create an entitlement for such arrangements*”. (Original emphasis).

51. Section 4, “Temporary Part-Time Employment”, provides:

The key features of part-time employment are:

- (a) An existing staff member wishes to reduce their work schedule on temporary basis while serving in their own post.
- (b) Work schedule may be compressed 50 percent to 90 percent of full employment.
- (c) Salary and allowances adjusted to reduced work level; and
- (d) Duration may range from 6 to 12 months.

52. Dr. Moroz' clearance clearly did not meet the minimum UNDP Policy requirement of a work schedule of 50 per cent of full employment. Moreover, Dr. Narula's statement on 25 April 2006 did not change Ms. Shanks' situation whatsoever, and so did not supersede Dr. Oleinikov's statement of 7 April 2006 recommending disability. Dr. Narula's statement regarding Ms. Shanks returning to work part-time was dependent on Dr. Moroz certifying that she was able to do so. Dr. Moroz did not do this. His limitation that she could only work 16 hours per week meant that she could not satisfy the UNDP Policy requirement of a work capacity of 50 per cent of full employment. Dr. Moroz' clearance meant that, at the very highest, Ms. Shanks was capable of working at a capacity of 40 per cent of full employment. Allowing for the breaks he recommended, her capacity came down to 35 per cent.

53. At the time that OHR made its decision to terminate Ms. Shanks' service, there was no other medical evidence available to it. On the issue of liability, it is irrelevant that at the hearing before the UNDT in 2011, Dr. Moroz alleged that the limitations he listed were "merely suggestions and that they could be adapted to the specific circumstances of the Applicant's work situation". He also stated at the hearing that "the Applicant could work 20 hours a week, which is the minimum amount of hours that UNDP allows for part-time employees". However, Dr. Moroz did not put forward either of those opinions at the material time in June 2006 when Ms. Shanks' service was terminated. In fact, at the material time, he did not put forward any medical opinion which could have enabled Ms. Shanks to satisfy the UNDP Policy in order for her to return to work part-time. Nor was there any medical evidence available at that time which would have had that effect. As mentioned earlier, this Tribunal noted that in 2008 Ms. Shanks was not able to produce medical evidence that she was no longer incapacitated. On the facts before the UNDT, it was not until 2009 that Ms. Shanks was able to produce new medical information capable of rescinding her disability status.

54. We find that there was no evidence to support the UNDT's conclusion that, had the UNSPC not proceeded with its determination, Ms. Shanks would more likely than not have been found fit to resume her duties. The only valid conclusion available on the medical evidence was that Ms. Shanks was not entitled to return to work on a part-time basis since she was not able to obtain medical clearance permitting her to do so. It follows that it was proper for the Secretary-General to terminate Ms. Shanks' appointment, since there was no other option.

55. Ms. Shanks' inability to satisfy the minimum UNDP Policy requirements for part-time employment was a crucial piece of evidence which the UNDT failed to properly consider. This failure led the UNDT into serious factual errors, resulting in manifestly unreasonable decisions. These factual errors taint both of the UNDT Judgments and render the findings therein untenable.

56. The failure of OHR to inform Ms. Shanks that a determination of disability would result in her termination had no consequences for Ms. Shanks. There was no option but to terminate her appointment in any event. She thus suffered no actual prejudice which could sound in compensable damages.<sup>5</sup>

57. The UNDT Judgments on Liability and Relief, which are both erroneously based on improper termination, cannot be allowed to stand and are accordingly set aside.

### **Judgment**

58. The appeal is allowed and the Judgments of the UNDT on Liability and Relief are set aside.

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<sup>5</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095; *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of March 2013 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Chapman

Entered in the Register on this 24<sup>th</sup> day of May 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar