**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

KORTES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
Simon Thomas

**Counsel for Respondent:**
Alister Cumming, ALS/OHRM, UN Secretariat

## Introduction

1. On 13 February 2017, the Applicant, a former United Nations staff member, filed an application in which she contests the decision to find her ineligible for After-Service Health Insurance ("ASHI"). The Applicant is seeking eligibility for ASHI, based on the condition that she herself pay the premiums for the 13 months needed for her to reach the 10-year requirement, or, as an alternative, reasonable financial compensation for the difference in health care costs that she will have to pay on behalf of herself and her spouse as long as they are living, for a similar standard of care. In addition, the Applicant requests compensation for moral harm.

2. The Respondent contends that the contested decision is lawful as the Applicant did not meet the eligibility criteria for ASHI under sec. 2.1(a) of ST/AI/2007/3 (After-service health insurance), and requests the dismissal of the application.

## Factual and procedural background

3. The Tribunal notes the following facts as presented by the Applicant and uncontested by the Respondent.

4. The Applicant joined the United Nations on 3 December 2007. One of her key reasons for deciding to join the Organization was the security and benefits offered, health insurance being a priority on the list for her and her husband, who had been freelancers with difficulty affording proper health insurance for a long time before that.

5. After joining the Organization, the Applicant discussed the post-retirement health insurance options with a staff member in human resources (Ms. JM, who has since retired). Ms. JM stated that the Applicant would be qualified to receive ASHI,

but that if she had less than 10 years of service at the time of retirement, she may have to make some additional payments herself.

6. As a citizen of the United States where there is no nationalized health insurance, and as someone married to a dependant spouse who had no other insurance coverage, the Applicant wanted to be sure that they would have coverage under ASHI. Thus, on 25 January 2011, the Applicant wrote an email to the United Nations Insurance Service with a query as follows:

> Dear Mr. [K]:
>
> I will only have worked 9 years at age 62, my mandatory retirement age, but I understand that 10 years of service is required in order to receive health insurance coverage at the time of separation/retirement. I was told by [Ms. JM] in OHRM (now retired) that in a case like this a staff member can pay premiums for one year after retirement and then be covered like all other retirees. Can you confirm this and/or let me know if anything has changed? I couldn't find information on this on the website.

7. On the same day, Mr. K from the Insurance Service responded to the Applicant by email as follows:

> Dear Mary Lee: This information is correct, however you must have been covered for those nine years you have been employed.

8. On the same date, 25 January 2011, the Applicant responded to Mr. K, thanking him for his prompt reply, and giving him further details. The Applicant pointed out that she would actually be 13 months short of the 10 years required to have regular ASHI coverage without a "buy in". The Applicant did this just to confirm that it would not make a difference that it was 13 months, rather than the "one year" she had previously mentioned. Mr. K responded to the Applicant's email some hours later confirming that it would not be a problem. He said, "yes, you would be allowed" to pay for the 13 months. He also said, "you need at least 5 years of coverage and you must be covered at the time of retirement".

9. From the Applicant's interactions with Mr. K in 2011, and based on his responses to her questions, the Applicant was of the understanding that she would separate on retirement, pay an extra premium for 13 months, and then her husband and she would be covered under the regular ASHI rules from when she turned 62. The Applicant therefore did not make further queries until 2016, when she began preparing for her upcoming retirement.

10. In June 2016, the Applicant went to the insurance office to see if there were any administrative steps she should be making for a smooth transition to ASHI. The insurance office representative told the Applicant that she could not apply for ASHI until the first month during which she would be retiring, which would mean October 2016.

11. On 12 October 2016, the Applicant read an email (sent on 11 October 2016) sent to her by Ms. MH of the health insurance office stating that she had been determined ineligible for ASHI.

12. On 14 October 2016, the Applicant again went to the insurance office and spoke with Ms. MH. At this time, the Applicant was told that she was ineligible for ASHI. After the insurance office reviewed the emails from January 2011, their response was that the buy-in option had changed on 1 July 2007 and that that the Applicant was not eligible.

13. On 24 October 2016, the Applicant filed her request for management evaluation of the contested decision.

14. On 24 October 2016, the Applicant filed an application for suspension of action of the contested decision, which was rejected by the Dispute Tribunal by Order No. 253 (NY/2016) dated 31 October 2016 on a *prima facie* unlawful basis.

15. On 13 February 2017, the Applicant filed the present application on the merits.

16. On 15 March 2017, the Respondent filed his reply.

17. By Order No. 46 (NY/2017) dated 17 March 2017, the Tribunal instructed the parties to attend a Case Management Discussion ("CMD") on 28 March 2017 to discuss the further proceedings.

18. At the 28 March 2017 CMD, upon the Tribunal's inquiry, the parties stated that they had no objection for the present case to be decided by the same Judge who also issued an order on an application for suspension of action regarding the same decision as that at issue in the present case. The parties informed the Tribunal, *inter alia*, of their intentions regarding submitting additional evidence. The Tribunal considered that the Applicant's testimony would be relevant for her alleged moral damages. The Tribunal further directed the parties to agree on a date for the hearing. By Order No. 65 (NY/2017) issued on 30 March 2017, the Tribunal ordered that:

> … By 5:00 p.m. on 18 April 2017, the Respondent is to file:
>
> a. A written explanation/clarification from Mr. WS regarding which the provisions he based his advice to the Applicant on 25 January 2011 in relation to her health insurance coverage; and
>
> b. Information on whether there are any staff members in a situation similar to that of the Applicant, meaning employed after 1 July 2007 and having less than 10 years of continuous service at the date of separation, but who are receiving ASHI after their separation from service;
>
> … By 5:00 p.m. on 3 May 2017, the Applicant is to file her comments, if any, to the documents and submissions filed by the Respondent.
>
> … By 5:00 p.m. on 10 May 2017, the parties are to file a jointly signed submission proposing a hearing date, excluding the time period of 15 to 26 May 2017.

19. On 18 April 2017, the Respondent filed a submission pursuant to Order No. 65 (NY/2017).

20. On 3 May 2017, the Applicant filed her submission in response to Order No. 65 (NY/2017).

21. On 10 May 2017, the parties filed the jointly signed submission pursuant to Order No. 65 (NY/2017).

22. On 4 August 2017, by Order No. 156 (NY/2017), the Tribunal instructed the parties to participate in a half-day hearing at the Tribunal's court room scheduled for 14 September 2017.

23. On 15 August 2017, the parties were informed via email that, due to administrative reasons, the hearing was rescheduled for 22 September 2017.

24. On 22 September 2017 the Tribunal conducted the scheduled hearing, at which the Applicant participated in person and assisted by her Counsel, Mr. Simon Thomas, who participated remotely via skype. The Respondent was represented by Mr. Alister Cumming, who was present in person in the court room in New York.

25. Before the Applicant commenced her testimony, the Applicant's Counsel informed the Tribunal that the Applicant had additional documentation in support of the submissions already made in her application, consisting of statements related to positions that the Applicant was offered before 2016 by other employers and which she refused because she wanted to continue to work for the United Nations in order to have the benefit of health insurance after retirement. The Respondent's Counsel stated that, if new evidence was to be entered on the record, he should have been notified in advance and, if such concrete offers of employment were made to the Applicant, it would change the submissions set out in the application.

26. After hearing the Applicant's testimony, taking note of the Applicant's Counsel's statement that the additional documentation did not relate to new aspects of the case, but were supportive of submissions already filed, and in the light of the Applicant's oral evidence, the Tribunal granted the Applicant's request to file additional written supportive evidence by 25 September 2017, considering that this evidence is related to some of the statements made during her testimony.

27. At the request of the Tribunal, the Applicant provided the Respondent's Counsel with copies of the additional statements to be added to the record for his review. The Respondent's Counsel reviewed the statements and indicated that he would have no additional evidence to adduce in relation to these documents.

28. After the parties presented their oral closing submissions, the Tribunal identified from their arguments that a comparative document in relation to the alleged financial loss suffered by the Applicant as a result of the contested decision appeared to be relevant for the case, and ordered the Applicant to file said document by 6 October 2017.

29. The Tribunal informed the parties that a transcript of the hearing will be made available to the parties, in principle by 13 October 2017, subject to its availability. The Tribunal further instructed the parties to file their written closing submissions by 3 November 2017, based only on the evidence on the record, including the additional written documentation indicated in Order No. 221 (NY/2017) and in accordance with the oral closing statements made before the Tribunal.

30. The Tribunal encouraged the parties, while reviewing the entire evidence for the preparation of the written closing submissions, to continue exploring an informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions.

31. The Applicant filed additional documentation in support of her submissions on 25 September 2017 and filed the statement in relation to the alleged financial loss suffered by her as a result of the contested decision on 6 October 2017.

32. On 16 October 2017, the transcript of the 22 September 2017 hearing was made available to the parties. On the same day, the Registry sent an email to the parties informing them that there was a technical issue during the hearing which resulted in part of the hearing not being recorded and therefore not available for transcription. The Registry noted that the Applicant's Counsel's closing submissions

on Skype have been affected by this issue and are not captured in the transcript. Upon the instruction of the assigned Judge, the parties could review the transcript and inform the Tribunal by a joint submission on 19 October 2017 if the Applicant's Counsel's closing submissions are to be added to the record of the case by either through a short hearing in the court room of the New York Registry, or by written notes prepared prior to the hearing if these are available to the Applicant's Counsel. The parties confirmed that there was no need for a further hearing. The Applicant's Counsel further confirmed that the submissions made on behalf of the Applicant at the oral hearing would be able to be covered in the Applicant's closing submission.

33. The parties duly filed their closing statements by 3 November 2017.

**Parties' submissions**

34. The Applicant's principal contentions may be summarized as follows:

*The Applicant reasonably relied on the Administration's advice to her detriment*

a. The Applicant reasonably relied on the Administration's advice that she would be covered under ASHI at her retirement. The Applicant clarified with the insurance office in 2011 that she would be able to be covered under ASHI after paying an additional premium for the initial period. The answer that she received in 2011 was not conditional or ambiguous; she was told that she would be covered at retirement if she had five years of coverage. The Applicant satisfied both of these requirements and should have been able to rely on the Administration's advice that she was eligible. It is now a failure of the Organization's obligation of good faith towards the Applicant.

b. The Applicant suffered material harm from her reliance on the Administration's advice. Health insurance is of critical importance to the Applicant and her spouse, and she now cannot afford an adequate standard of

coverage. The Applicant cannot overstate the importance of keeping this coverage, particularly with the decreasing availability of affordable health insurance in the United States in the current climate.

c. The Applicant remained employed with the Organization to her detriment. She would have found alternate employment outside the United Nations where she could have had health insurance coverage if the Applicant knew in 2011 that she would not be eligible for ASHI. The Applicant is well qualified (including at the time for various Professional level posts), having a master's degree in social work, but she stayed working in a General Service level post during her time with the United Nations. She stayed with the United Nations at a lower level than what she is qualified for in order to provide for a standard of post-retirement care for her husband and herself, including health care. Her chances to find alternate employment at that time would have been very high, but that now they are substantially decreased because of her age.

*The Administration is estopped from correcting the incorrect decision*

d. The Respondent cannot change a decision where it has reasonably been relied on to someone's detriment. The Respondent incorrectly argues that the Appeals Tribunal decision in *Cranfield* 2013-UNAT-367 allows him to correct any incorrect decision he has previously made. The Appeals Tribunal in *Cranfield* actually found that there is not a blanket discretion to correct an incorrect decision that has been communicated. In *Cranfield*, the Appeals Tribunal stated that "how the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case", and "considered the question of whether, in the particular circumstances of this case, the Administration should be estopped from revoking the [decision]". Further, the *Cranfield* case is not directly analogous on its facts. In that case, there was no actual detrimental reliance by the Applicant; she merely had a belief that she was eligible for conversion to a permanent

appointment, but this did not change her actions or decisions. In the Applicant's case, conversely, the record shows that she relied on the information she was given.

e. This process, which has come suddenly and unexpectedly at the last minute as a change to what the Applicant was told in 2011, has caused the Applicant great stress and anxiety. The Applicant has been having trouble sleeping and is panicked about what her family, for which she is the provider, will do.

*Remedies*

f. The Applicant is seeking eligibility for ASHI, based on the condition that she herself pay the premiums for the 13 months needed to reach the 10-year mark. The Respondent does not deny that the Organization has the ability and has allowed individuals to buy in to ASHI (or similar schemes) by paying premiums for the time that the individual falls short of the qualifying period.

g. If the Tribunal finds that the Applicant cannot have the remedy of being allowed to buy-in to ASHI, the Applicant seeks reasonable financial compensation for the difference in health care costs that she will have to pay on behalf of herself and her spouse while they are living, for a similar standard of care.

h. In addition, the Applicant requests compensation for the moral harm.

35. The Respondent's principal contentions may be summarized as follows:

*The contested decision is lawful*

a. The Application is without merit. The decision is lawful. It was made in accordance with ST/AI/2007/3 (After-service health insurance). The

Applicant joined the United Nations on 3 December 2007 and separated from service on 1 November 2016. In accordance with sec. 2.1(a) of ST/AI/2007/3, a staff member recruited after 1 July 2007 must have been a participant in a contributory health insurance plan of the United Nations for a minimum of 10 years in order to be eligible for ASHI. The Applicant has not been a participant in a United Nations health insurance plan for 10 years.

b. The Applicant is not eligible for enrolment in ASHI. Section 2.1(a) of ST/AI/2007/3 provides that a staff member, who was recruited on or after 1 July 2007, is entitled to enroll in ASHI, if they have been a participant in the Organization's health insurance plan for a minimum of 10 years. The Applicant had approximately eight years and 11 months of participation.

*The Applicant cannot rely on the Organization's mistake*

c. Staff members are responsible for knowing the applicable internal laws of the Organization (*Dzuverovic* 2012-UNAT-375, citing *El-Khatib* 2010-UNAT-029). Furthermore, the Organization has a duty to correct errors (*Cranfield* 2013-UNAT-367). In order for a legitimate expectation to arise, the Administration must make an express promise to the staff member (*Ahmed* 2011-UNAT-153).

d. The Applicant refers to an email dated 25 January 2011, from a Benefits Assistant. This email does not grant a right to ASHI, nor did it contain a decision that the Applicant was eligible for ASHI. Such a decision could only be taken after an application for ASHI in accordance with sec. 7 of ST/AI/2007/3. Instead, the email provided information, based on the information provided by the Applicant.

e. In this case, incorrect information was provided based on an erroneous understanding of the Applicant's situation. In the email dated 25 January 2011, the Applicant referred to her date of recruitment as "12/3/07". Within

the United Nations, this date is understood as 12 March 2007. A staff member recruited in March 2007, retiring with nine years participation, would be eligible for ASHI. As a result of a transposition error and a misunderstanding of the Applicant's situation, she was incorrectly advised that she would be entitled to enroll in ASHI. A legitimate expectation cannot arise from information provided based on a misunderstanding.

f. Additionally, sec. 7.4 of ST/AI/2007/3 provides that staff members who are close to retirement or early retirement should ensure that they are provided with all relevant information concerning the after-service health insurance programme. Such information is available from the office administering their in-service health insurance coverage. The Applicant corresponded with the Health and Life Insurance Section of the Office of Programme Planning, Budget and Accounts in January 2011, nearly five years before her retirement. At that time, she was therefore not "close to retirement". The Applicant ought to have made further enquiries regarding her eligibility for ASHI closer to her retirement date (*Kortes* Order No. 253 (NY/2016)). Had she done so, she would have been aware that she was ineligible for ASHI.

*Remedies*

g. As the Applicant is ineligible for enrollment in ASHI, the Tribunal should not order that she be found eligible.

h. There is no basis for the Tribunal to order financial compensation to enable the Applicant to purchase comparable insurance on the commercial market. Even if the Dispute Tribunal finds that the Applicant ought to be eligible for enrollment in ASHI, the Dispute Tribunal may only order rescission of the contested decision. Compensation may only be paid as an

alternative to rescission of a contested decision in cases of employment, promotion or termination.

i. Furthermore, the Applicant has a duty to mitigate her losses (*Dube* 2016-UNAT-674, *Appleton* 2013-UNAT-347). She has failed to demonstrate that she has made reasonable efforts to obtain other health insurance, either through employment or on the commercial market, in order to provide her with health care coverage after her separation from service.

**Consideration**

*Receivability framework*

*Receivability ratione personae*

36. The application is filed by a former United Nations staff member. It is therefore receivable *ratione personae*.

*Receivability ratione materiae*

37. It is uncontested that the decision constitutes an appealable administrative decision under art. 2.1(a) of the Statue of the Tribunal and the application is therefore receivable.

38. The Tribunal further notes that the Applicant timely filed a request for management evaluation on 24 October 2016, which is within 60 days from the date the contested decision was notified to her on 12 October 2016.

*Receivability ratione temporis*

39. The Tribunal notes that the Applicant filed the present application on 13 February 2017 within 90 days from the date she received the decision on his request

for management evaluation, namely 21 November 2016. The Tribunal concludes that the application is receivable *ratione temporis*.

*Applicable law*

40. The United Nations Charter, which was signed on 26 June 1945 and entered into force on 24 October 1945, provides, in relevant parts, as follows (emphasis omitted):

> Article 55
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

41. The Universal Declaration of Human Rights adopted by General Assembly resolution 217 (III) (International Bill of Human Rights) on 10 December 1948 provides as follows (emphasis omitted):

> Preamble
>
> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> […]
>
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

[…]

Now, therefore, the General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

[…]

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

[…]

Article 25

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
>
> Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

42. General Assembly Resolution 2200A (XXI) (The International Covenant on Civil and Political Rights), adopted on 16 December 1966 and entered into force on 23 March 1976, states as follows:

> Article 26
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

43. The Equality of Treatment (Social Security) Convention, 1962 states as follows:

> Article 2
>
> 1. Each Member may accept the obligations of this Convention in respect of any one or more of the following branches of social security for which it has in effective operation legislation covering its own nationals within its own territory:
>
> (a) medical care;
>
> (b) sickness benefit;
>
> (c) maternity benefit;
>
> (d) invalidity benefit;
>
> (e) old-age benefit;
>
> (f) survivors' benefit;
>
> (g) employment injury benefit;
>
> (h) unemployment benefit; and

(i) family benefit.

[…]

Article 7

1. Members for which this Convention is in force shall, upon terms being agreed between the Members concerned in accordance with Article 8, endeavour to participate in schemes for the maintenance of the acquired rights and rights in course of acquisition under their legislation of the nationals of Members for which the Convention is in force, for all branches of social security in respect of which the Members concerned have accepted the obligations of the Convention.

2. Such schemes shall provide, in particular, for the totalisation of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits.

44. The Maintenance of Social Security Rights Convention, 1982 states as follows:

Preamble

[…] Recalling the principles established by the Equality of Treatment (Social Security Convention 1962, which relate not only to equality of treatment of acquired rights and rights in course of acquisition [...]

Article 2

[…] this convention applies to those of the following branches of social sec*u*rity for which a Member has legislation in force: (a) medical care [..]

Article 6

Subject to the provisions of paragraph 3, subparagraph (a), of Article 4 of this Convention, each Member shall endeavour to participate with every other Member concerned in schemes for the maintenance of rights in course of acquisition, as regards each branch of social security referred to in paragraph 1 of Article 2 of this Convention and for which every one of these Members has legislation in force, for the benefit of persons who have been subject successively or alternately to the legislation of the said Members.

> Article 7
>
> 1. The schemes for the maintenance of rights in course of acquisition referred to in Article 6 of this Convention shall provide for the adding together, to the extent necessary, of periods of insurance, employment, occupational activity or residence, as the case may be, completed under the legislation of the Members concerned for the purposes of
>
> (a) participation in voluntary insurance or optional continued insurance, where appropriate;
>
> (b) acquisition, maintenance or recovery of rights and, as the case may be, calculation of benefits.
>
> 2. Periods completed concurrently under the legislation of two or more Members shall be reckoned only once.
>
> 3. The Members concerned shall, where necessary, determine by mutual agreement special arrangements for adding together periods which are different in nature and periods qualifying for right to benefits under special schemes.
>
> 4. Where a person has completed periods under the legislation of three or more Members which are parties to different bilateral or multilateral instruments, each Member which is concurrently bound by two or more of the instruments in question shall add these periods together, to the extent necessary, in accordance with the provisions of these instruments, for the purposes of acquisition, maintenance or recovery of rights to benefit.

45. ST/AI/394 (After-Service Health Insurance) adopted on 19 May 1994 provided in relevant part as follows:

> <u>Persons eligible for after-service health insurance coverage</u>
>
> 2. After-service health insurance coverage is optional. It is available only as a continuation of previous coverage without interruption in a contributory health insurance plan of the United Nations. In this context, a contributory health insurance plan of the United Nations is defined to include a contributory health insurance plan of another organization in the common system under which staff members may be covered by special arrangement between the United Nations and that organization. In order to be enrolled in the after-service health insurance programme, the former staff member and his or her spouse and eligible dependent children, or the surviving spouse and eligible dependent children of the former staff member, must all

have been covered under such an insurance scheme at the time of the staff member's separation from service or death. A child born within 300 days of the staff member's separation from service or death is eligible for coverage, provided that the other eligibility requirements are met.

3. Coverage under the after-service health insurance programme is available to persons in the following categories:

(a) A … staff member who, while enrolled in a United Nations contributory health insurance plan … was separated from service, other than by summary dismissal:

…

(ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations … for a minimum of five years and is eligible to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF …

…

Contributions to the cost of after-service health insurance

5. The cost of participating in a United Nations after-service health insurance plan shall be governed by the following conditions:

(a) The cost of participation under the provisions of subparagraphs 3(a)(i) and 3 (c)(i) shall be borne on the basis of joint contributions by the United Nations and the participants concerned;

(b) The cost of participation under the provisions of subparagraph 3(a)(ii) shall be borne on the basis of joint contributions by the United Nations and the participants concerned provided that the former staff member had participated in a contributory health insurance plan of the United Nations or a contributory health insurance plan of a specialized agency or IAEA for a total period of contributory participation of at least 10 years;

(c) The cost of participation under the provisions of subparagraph 3(a)(ii) for all those not meeting the conditions in subparagraph 5(b) will be borne in full by the participants concerned. When the former staff member's combined participation as a staff member and as an after-service health insurance participant has reached a total of 10 years, the cost of participation shall be borne thereafter jointly by the Organization and the participant concerned;

(d) Joint contributions by the United Nations and the after-service health insurance participants, as indicated in subparagraphs 5(a), 5(b) and 5(c) above, shall be computed in accordance with the established

> contribution and subsidy scales for the particular health insurance plan concerned. The participants' contributions shall be calculated on the basis of the higher of the following two rates:
>
> (i) One third of the remuneration used for calculating the health insurance subsidy of the staff member concerned at the date of separation; or
>
> (ii) The total of the periodic benefits payable on the staff member's account under the Regulations of UNJSPF or under appendix D to the Staff Rules, or both, whether or not part of such benefits has been commuted to a lump sum or reduced by the exercise of any other permissible option, including early retirement;
>
> (e) The cost of participation in an after-service health insurance plan for those individuals eligible under subparagraphs 3(b) and 3(c) (ii) will be determined on the same basis as would have been used for participation by the former staff member concerned, taking into account the length of his or her participation in a United Nations health insurance plan as a staff member and as a participant in an after-service health insurance plan.

46. General Assembly Resolution 61/264 (Liabilities and proposed funding for after-service health insurance benefits), adopted on 4 May 2007, approved changes to the after-service health insurance provisions for new staff members recruited on or after 1 July 2007 as follows (emphasis added):

> 12. Approves changes to the after -service health insurance provisions for new staff members recruited on or after 1 July 2007 as follows:
>
> (a) The alignment of after-service health insurance eligibility and subsidy requirements to ten years' minimum participation in the United Nations health insurance plans, eliminating the buy-in provision after five years of participation;
>
> (b) The application of a theoretical pension of a minimum of twenty-five years of service as the basis of assessing retiree contributions as opposed to using the actual number of years of service when less than twenty-five;
>
> (c) The introduction of a minimum participation requirement for after-service health insurance eligibility of dependents of at least five years at the time of retirement of the United Nations employee, or two years if the spouse has coverage with an outside employer or a national Government, except where the dependent is newly acquired within this

> period and is enrolled within thirty days of the effective date of the dependent relationship.

47. Staff Rule 6.6 on medical insurance provides as follows:

> Staff members may be required to participate in a United Nations medical insurance scheme under conditions established by the Secretary-General.

48. Staff Regulation 6.2 on social security provides as follows:

> The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave, maternity and paternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

49. ST/AI/2007/3 entered in force on 1 July 2007 replaced ST/AI/394 (After-service health insurance) in order to implement General Assembly resolution 61/264. Section 2.1(a)(ii) of ST/AI/2007/3 includes the following relevant provisions regarding eligibility to ASHI (emphasis in the original):

> **Section 1**
>
> **After-service health insurance coverage**
>
> 1.1 The purpose of the present administrative instruction is to set out provisions governing the after-service health insurance programme effective 1 July 2007.
>
> 1.2 After-service health insurance coverage is optional for eligible former staff members and their dependents. It is available only as a continuation, without interruption between active service and retirement status, of previous active-service coverage in a contributory health insurance plan of the United Nations. In this context, a contributory health insurance plan of the United Nations is defined to include a contributory health insurance plan of other organizations in the common system under which staff members may be covered by special arrangement between the United Nations and those organizations.
>
> **Section 2**
>
> **Eligibility for after-service health insurance coverage**

2.1 Individuals in the following categories are eligible to enroll in the after-service health insurance programme:

> (a) A … staff member who was **recruited on or after 1 July 2007**, who while a contributing participant in a United Nations contributory health insurance plan … was separated from service, other than by summary dismissal:
>
> …
>
> (ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a **minimum of ten years** and is eligible and elects to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF …
>
> (b) A … staff member who was **recruited before 1 July 2007**, who while a contributing participant in a United Nations contributory health insurance plan as defined in section 1.2 above, was separated from service, other than by summary dismissal:
>
> …
>
> (ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a **minimum of five years** and is eligible and elects to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF;

2.2 For the purpose of determining eligibility in accordance with paragraph 2.1 above and cost sharing in accordance with paragraph 3.2(b) below, participation in a contributory health insurance plan of the United Nations is defined to include: (a) Participation in a contributory health insurance plan of other organizations in the common system under which staff members may be covered by special arrangement between the United Nations and those organizations; (b) The cumulative contributory participation during all periods of service under 100 or 200 series appointments, continuous or otherwise. Except in cases of extension of appointment beyond the normal age of retirement, only participation in a United Nations health insurance plan prior to the attainment of the normal age of retirement shall count towards meeting the five- or ten-year participation requirement for enrolment.

2.3 At the time of enrolment for after-service health insurance coverage the eligible subscriber may elect coverage for himself or

herself and may also elect to include coverage for his or her spouse (as recognized by the United Nations) and/or eligible dependent children as defined in paragraph 2.4 below subject to the following requirements:

(a) A 100 or 200 series staff member who was recruited on or after 1 July 2007 and meets the eligibility criteria noted in paragraph 2.1 (a) (i) or 2.1 (a) (ii) above may elect to include coverage for his or her spouse and eligible dependent children who were enrolled in the same contributory health insurance plan as the former staff member for a minimum of five years (or two years if the spouse had coverage with an outside employer or a national Government) and was so enrolled at the time of the former staff member's separation from service. However, in the case of a spouse or dependants newly acquired five or fewer years prior to the staff member's separation from employment, the two- and five-year participation requirements will not apply provided such spouse or dependant(s) is/are enrolled within 30 days of the effective date of the dependency relationship;

(b) A 100 or 200 series staff member who was recruited before 1 July 2007 and meets the eligibility criteria noted in paragraph 2.1(b)(i) or 2.1(b)(ii) above may elect to include coverage for his or her spouse and eligible dependent children who were enrolled in the same contributory health insurance plan as the former staff member at the time of the former staff member's separation from service;

(c) A surviving spouse who meets the eligibility criteria noted in 2.1 (c) may elect to include coverage for his or her eligible dependent children who were enrolled in the same contributory health insurance plan as the former staff member at the time of the former staff member's death.

**Section 3**

**Contributions to the cost of after-service health insurance**

3.1 The cost of participating in a United Nations after-service health insurance plan for staff recruited on or after 1 July 2007 shall be governed by the following conditions:

(a) The cost of participation under the provisions of paragraphs 2.1(a)(i) and 2.1(a)(ii) above shall be borne on the basis of joint contributions by the United Nations and the participants concerned;

(b) Joint contributions by the United Nations and the after-service health insurance participants, as indicated in paragraph 3.1 (a) above, shall be computed in accordance with the established contribution and subsidy scales for the particular health insurance plan concerned. Contributions shall be calculated on the basis of the higher of the following two rates:

(i) The total of all the periodic benefits payable on the staff member's account under the Regulations of UNJSPF or under appendix D to the Staff Rules, or both, including all cost-of-living increases provided thereon, whether or not part of such benefits has been commuted to a lump sum or reduced by the exercise of any other permissible option, including early retirement; or

(ii) The theoretical periodic benefit that would have been payable on the staff member's account under the Regulations of UNJSPF had the staff member completed 25 years of contributory service.

3.2 The cost of participating in a United Nations after-service health insurance plan for staff recruited **before 1 July 2007** shall be governed by the following conditions:

(a) The cost of participation under the provisions of 2.1(b)(i) shall be borne on the basis of joint contributions by the United Nations and the participants concerned;

(b) The cost of participation under the provisions of 2.1(b)(ii) shall be borne on the basis of joint contributions by the United Nations and the participants concerned provided that the former staff member had participated in a contributory health insurance plan of the United Nations for a total period of contributory participation of at least 10 years.

(c) The cost of participation under the provisions of 2.1(b)(ii) for former staff not meeting the conditions in 3.2(b) above shall be borne in full by the participants concerned. When the concerned participants' combined active service and after-service participation totals 10 years, the cost will be borne jointly by the United Nations and the participants concerned;

**Consideration**

50. Universal legal conventions/treaties establishing the fundamental principles of international human rights law, such as the ones mentioned above, constitute the legal foundation of and are directly applicable to and by all organizations and entities founded/created after their adoption by the General Assembly, at the international, regional and national level, in order for them to promote, protect and monitor the implementation of fundamental human rights, including the United Nations—the leading promoter of human rights around the world.

51. The Tribunal considers, in light of the mandatory provision of staff regulation 1.1(c) and jurisprudence established by the Dispute Tribunal in *Villamoran* UNDT/2011/126 (confirmed by the Appeals Tribunal in *Villamoran* 2011-UNAT-160 and *Korotina* UNDT/2012/178 (not appealed)) that at the top of the hierarchy of the Organization's internal legislation is the Charter of the United, which was signed on 26 June 1945 and entered into force on 24 October 1945, together with other universal conventions/treaties, including but not limited to the Universal Declaration of Human Rights adopted by the General Assembly on 10 December 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the General Assembly on 16 December 1966 and entered into force respectively on 3 January 1976 and 23 March 1976, followed by the Staff Regulations adopted by the General Assembly and Staff Rules adopted by the Secretary-General and other relevant resolutions and decisions adopted by the General Assembly, Secretary-General's bulletins and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

52. Further, the Tribunal considers that, from the mandatory provision of staff regulation 1.1(c), it results that the Secretary-General is mandated by the General Assembly to adopt Staff Rules which must follow the principles established in the United Nations Charter, in the Staff Regulations and in other relevant resolutions and

decisions adopted by the General Assembly with the purpose of implementing them, and the Secretary-General must ("shall") exercise his mandate ensuring that the rights and obligations of the staff members as set out in these texts are fully respected.

53. The Tribunal notes that the Appeals Tribunal has ruled in this sense in *Ovcharenko et al.* 2015-UNAT-530, para. 35, stating as follows:

> … Decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision […] must be considered lawful, having been taken by the Secretary-General in accordance with the content of higher norms.

54. The Tribunal considers that, *a contrario*, the decisions taken by the Secretary-General, including the decisions to implement and/or execute the Staff Regulations established by the General Assembly, General Assembly resolutions, which are not in accordance with the content of higher norms, are unlawful.

55. Consequently, the Staff Rules, administrative instructions or information circulars cannot limit, in part or in whole, or extend, the area of application of the Staff Regulations, including the ones regarding medical care and health insurance. Further, as results from staff regulation 1.1(c), the Secretary-General must exercise his mandate in adopting staff rules, administrative instructions and information circulars that are consistent with/conform to and follow the staff regulations and the relevant resolutions and decisions adopted by the General Assembly, and he must ensure that the rights and obligations of the staff members, as set out in the staff regulations and the relevant resolutions and decisions adopted by the General Assembly, are fully respected.

56. The Tribunal considers that any staff rules, administrative instructions and/or information circulars which introduce modifications/changes consisting in limitations and/or extensions of area of application of the Charter of the United Nations, the Staff Regulations and other resolution adopted by the General Assembly, unless corroborated with the higher legal norms, are null and void since the Staff Rules,

administrative instructions and information circulars derive directly from these documents and cannot limit/exceed their letter and spirit. As indicated previously, the Charter of the United Nations, the Staff Regulations and other resolutions adopted by the General Assembly are to be implemented accordingly in the Staff Rules, administrative instructions and information circulars regarding the staff members' rights and obligations and, in case there is any contradiction between them, the Charter of the United Nations, the Staff Regulations and the relevant resolutions adopted by the General Assembly prevail.

57. As results from the above, the right to medical/health care, which includes the right to health insurance during and after service, is a fundamental human right which cannot be denied and/or limited.

58. The Tribunal notes that the only existing provisions in the Staff Regulations and Rules related to the right to medical/health care, including medical health insurance during and after service, are the following:

> Staff Rule 6.6
>
> Medical insurance
>
> Staff members may be required to participate in a United Nations medical insurance scheme under conditions established by the Secretary-General.
>
> …
>
> Staff Regulation 6.2
>
> The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave, maternity and paternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

59. None of the existing legal provisions include any specific reference to the after-service health insurance system in order to establish the different categories of participants, all the funding sources, the different categories of beneficiaries of after-

service health insurance (current retirees, active employees currently eligible to retire, active employees not eligible to retire), minimum contributory period and other eligibility requirements for after-service health care or to define the so called "right to buy-in" and its applicability.

60. The Tribunal further notes that General Assembly Resolution 61/264 (Liabilities and proposed funding for after-service health insurance), adopted on 4 April 2007, introduced a major change in relation to a fundamental and essential contractual right, namely the right to after-service health insurance. The Tribunal is of the view that General Assembly Resolution 61/264 relates to the fundamental human right of medical care/health, which includes the right to after-service health insurance, and should have been implemented through specific and clear staff rules adopted by the Secretary-General. However, due to an inherited practice, over the years, this important contractual right was and is currently implemented through inferior legislation—administrative instructions (ST/AI/172, adopted on 27 March 1967; ST/AI/394, adopted on 19 May 1994; and the current ST/AI/2007/3) and periodic information circulars (for example, ST/IC/2016/13, which is applicable in the present case, and was later replaced by ST/IC/2017/18).

61. As results from para. 12 of General Assembly Resolution 61/264, the General Assembly decided the realignment of the conditions related to the after-service health insurance eligibility and subsidy requirements up to 10 years' minimum participation in the United Nations health insurance plans and the elimination of the "the buy-in provision after five years of participation".

62. The Tribunal considers that the implementation of General Assembly Resolution 61/264 through ST/AI/2007/3 (After-Service Health Insurance) is unlawful for the following reasons.

63. There is no express provision in General Assembly Resolution 61/264 to eliminate the buy-in provisions after more than five years of participation or to

completely eliminate the participant's right to buy-in up to 10 years of contributory participation for staff members recruited on or after 1 July 2007, and ST/AI/2007/3 exceeded the provisions of General Assembly Resolution 61/264 by denying the right to buy-in for staff members recruited on or after 1 July 2007.

64. The Administration erred when, instead of implementing General Assembly Resolution 61/264, which expressly referred only to the after-service health care insurance for staff members recruited on or after 1 July 2007, through a separate new document, it created a new administrative instruction applicable both to staff members recruited before 1 July 2007 and to staff members recruited on or after 1 July 2007.

65. The Administration decided to insert in the new ST/AI/2007/3 the old provisions of ST/AI/394 applicable to staff members recruited before 1 July 2007, which had the effect of creating a parallel system whereby staff members recruited before 1 July 2007 retained the right to buy-in after five years of participation, provided that the staff member had participated in a contributory health insurance plan of the United Nations for a total period of contributory participation of at least 10 years (sec. 3.2(b) ST/AI/2007/3), while the staff members recruited after 1 July 2007 have no such right. The provisions of sec. 2.1 ST/AI/2007/3 are discriminatory against staff members recruited on or after 1 July 2007, who, unlike staff members recruited before 1 July 2007, cannot voluntarily buy-in extra period of contributory participation after more than five years of participation to fulfill the minimum 10 years of participation required for eligibility to ASHI. The only criterion for distinguishing the health care rights under ST/AI/2007/3 is the date of employment.

66. The Tribunal further considers that the right to medical/health care, which includes the right to medical insurance during and after service, is a fundamental human right and cannot be denied and/or limited/restricted by any reason, like for example the date of employment of the staff member, especially in systems based on voluntary enrolment of and contributions by staff members. In this regard, the

Tribunal notes that eligibility for ASHI is based on a voluntary system and joint contributions by staff members pursuant to sec. 4 of ST/AI/2007/3, which establishes that contributions by staff members is an integral component for after-service coverage as failure to remit the contributions in full will result in suspension of insurance coverage.

67. The Tribunal concludes that the right to equal access to ASHI is not granted under the current legal framework and therefore not respected by the Organization for all staff members under the parallel system established by ST/AI/2007/3. The Tribunal is of the view that the General Assembly made no pronouncement on the right for staff members recruited on or after 1 July 2007 to buy-in extra years of contribution to make up the 10 year minimum participation in the United Nations health insurance plans, in order to deny this right after more than five years of contribution or to eliminate it completely. There is no basis for distinguishing eligibility for after-service health insurance coverage based solely on the date of recruitment of a staff member. To do so, as in ST/AI/2007/3, creates an arbitrary and discriminatory system which contravenes the mandatory standards established in the following provisions of the universal international conventions, as detailed in the section "Applicable law": art. 55 of the Charter of the United Nations, arts. 1, 2, 7 and 25 of the Universal Declaration of Human Rights, art. 26 of the International Covenant on Civil and Political Rights, arts. 2, and 7 of the Equality of Treatment (Social Security Convention, 1962) and arts. 6 and 7 of the Maintenance of Social Security Rights Convention, 1982.

68. In addition, the Tribunal considers that the Administration's position regarding the interpretation and application of the provisions of ST/AI/2007/3 in the Applicant's case, a retired staff member who was recruited after 1 July 2007, is incorrect. As results from the contested decision and the following response by the Management Evaluation Unit, the Applicant's request to enroll in ASHI was rejected because she was considered not eligible to do so. In this sense, the Tribunal notes that the contested decision to find her ineligible for ASHI coverage indicated that: (a) the

Applicant entered into service on 3 December 2007; (b) she became a participant in a United Nations health insurance plan as of 1 January 2008; and (c) in October 2016, she was considered not eligible to enroll in ASHI because she had only 8 years and 10 months of contributing participation at the time of her retirement.

69. The Respondent filed the statement of Mr. WK, a benefits assistant with the Accounts Division of the Office of Programme Planning, Budget and Accounts, in which he confirmed that he advised the Applicant on 25 January 2011 that she would be eligible for ASHI if she was to retire on 31 October 2016, based on an erroneous reading of the date of the beginning of her appointment–"12/03/2007", namely 12 March 2007, instead of the correct date, 3 December 2007.

70. The Management Evaluation Unit ("MEU") noted in its management evaluation letter to the Applicant dated 21 November 2016 as follows:

> […] a Benefits Assistant at the Insurance Service provided you with misinformation in 2011 based on his reading of your email whereby you indicated that your initial coverage date was *"12/3/07"*. Based on United Nations dating convention, he read such date as 12 March 2007, rather than 3 December 2007. The MEU considered that, while the mistake is understandable given that elsewhere in the same email you reference your retirement date as 31/10/16 *(i.e.*., day/month/year), a careful reading of your email would have indicated that you meant December 2007 given that you also stated elsewhere that you would have served a little less than nine years by retirement age.
>
> The MEU, however, considered that even if the Administration is responsible for this misinformation in your case, the Administration has a duty and the right to correct its error. As the United Nations Appeals Tribunal (UNAT) stated in *Cranfield*, 2013-UNAT-367:
>
> > *"In situations where the Administration finds that it has made an unlawful decision or an illegal commitment; it is entitled to remedy the situation.* […] *When the responsibility lies with the Administrator the unlawful decision, it must take upon itself the responsibility therefore and act with due expedition once alerted to the unlawful act*".

> The MEU noted that the UNDT in its Order rejecting your application for a suspension of action considered your claim of legitimate expectation against the provisions of Section 7.4 of the ST/AI2007/3 which requires a staff member who is close to retirement to seek all relevant information regarding ASHI. It was noted that you last sought information regarding your situation in January 2011, which is close to six years prior to your retirement date. It was further noted that information regarding the ten year participation requirement was readily available on the HLIS website. The MEU observed that the UNDT found that the email from 25 January 2011 from HLIS was no longer relevant.
>
> While taking note of the views of the UNDT, the MEU considered that it was reasonable on your part to rely on the information provided to you by a staff member from HLIS. However, in weighing the right of the Organization to correct its mistake against your interests, the MEU had regard to whether you suffered harm as a result of such reliance. You had argued that your reliance on this information prevented you from taking other possible action, such as looking for another employment that could have provided you with continued insurance coverage. The MEU considered this argument to be highly speculative given the uncertainty of such employment. Absent evidence of any material harm suffered by you as a result of reliance on the misinformation, the MEU found that the balance of interest weighed in favor of the Organization applying its rules correctly. In this regard, the MEU did not consider the fact that you are now obligated to seek health care insurance outside of the United Nations to be a material harm given that as a staff member recruited after 1 July 2007 with your retirement date, you were never eligible for ASHI.
>
> Based on the foregoing considerations, the MEU recommended upholding the decision that you are not eligible for ASHI.

71. It results that by stating in the MEU letter dated 21 November 2016 that "it was reasonable on [the Applicant's] part to rely on the information provided [in 2011]", the Administration has accepted (after the clarification of the fact that the Applicant was recruited after 1 July 2007), the information provided to her in January 2011 remained reliable for more than five years until June 2016. The Respondent also accepted that the Applicant's reliance on this information was reasonable.

72. The Tribunal concludes that the Applicant's contention that she reasonably relied on the information provided by the Administration and to her detriment was confirmed after the management evaluation review.

73. Further the Tribunal notes that in *Cranfield* 2013-UNAT-367 the Appeals Tribunal stated as follows:

> 48. While the Administration, once alerted to the unlawfulness of the decision of 12 October 2011, is entitled to remedy that unlawfulness, the Appeals Tribunal nonetheless considered the question of whether, in the particular circumstances of this case, the Administration should be estopped from revoking the contract of indefinite appointment granted on 12 October 2011.
>
> 49. The erroneous assessment that Ms. Cranfield was entitled to a contract of indefinite appointment was made by personnel within DHRM/PAPS. Short of believing herself eligible for conversion, no blame can be laid at the feet of Ms. Cranfield for the Administration's mistake. For its part, once alerted that Ms. Cranfield was ineligible for conversion to a contract of indefinite appointment, the Administration sought to correct the situation within a timeframe of 97 days from the initial communication to her and after it received legal advice. The fact that Ms. Cranfield was left in a position where, for approximately three months, she believed she was converted to a contract of indefinite appointment does not, of itself, suffice to find that the Administration should be estopped from correcting the decision of 12 October 2011. Such a course could only be considered if the Appeals Tribunal was satisfied that Ms. Cranfield, in reliance on the 12 October 2011 decision, acted to her detriment to the extent that it would not be in the interests of justice to allow the indefinite appointment to be revoked.
>
> …

74. It results that the Appeals Tribunal considered that the Administration's action to correct a mistake was reasonable within a relative short period of time, namely 97 days, and that such a short period in itself, does not suffice to find that the Administration should be estopped from correcting the decision.

75. However, the Tribunal considers that in the present case, a correction of a mistake made by the Administration in January 2011 in June 2016, after more than

five years, is itself sufficient to find that the Administration should be estopped from correcting the decision, taking into consideration that the Applicant relied on the information provided by the Administration to her detriment.

76. Moreover, no consideration was given to a correct and non-discriminatory protection of her right to after-service medical/health care, which is a fundamental human right. including to the aspect that it was a right in course of acquisition when she reached the mandatory retirement age.

77. The Tribunal sees no reason for the discriminatory system to exist since it is the right of a staff member not to be discriminated based on her or her employment date. Furthermore, the Tribunal considers that no liabilities will incur to the Organization if the staff members employed on or after 1 July 2017 were equally afforded the right to buy-in extra years, up to 10 years, of participation in a contributory health insurance plan in order to be eligible to enroll in ASHI. As indicated by the Respondent in his closing statement, sec. 3.2(c) of ST/AI/2007/3 requires staff members recruited before 1 July 2007 with less than 10 years participation in the Organization's contributory plan *to pay both the staff member's and the Organization's contributions for ASHI until the combined active service and after-service participation totals 10 years*. Therefore, any staff member employed on or after 1 July 2007 who will exercise his or her right to buy in up to 10 years of participation will cover the contributions for the remaining period up to 10 years both for the Organization and for himself or herself and the Organization will bear no unjustified costs related to buying-in extra years of participation in a contributory health insurance plan up to the required 10 years.

78. The Tribunal considers that the denial of the Applicant's right to cover, from her own pocket, the buy-in for the remaining period up to 10 years, in order to enroll in ASHI, resulted not only in a discriminatory and unfair denial of her fundamental right to after-service medical care, but also of her spouse's derivate right for after-service health insurance coverage. In this sense, the Tribunal notes that, according to

sec. 2.3 of ST/AI/2007/3, "at the time of enrolment for after-service health insurance coverage the eligible subscriber may elect coverage for himself or herself and may also elect to include coverage for his or her spouse". Therefore, the Applicant's spouse who appears to have been enrolled in the same contributory health insurance plan as the Applicant for at least five years, was also to be included in the after-service health insurance coverage at the time of the Applicant's separation.

79. Furthermore, the Tribunal notes that the provisions of sec. 8 of ST/AI/2007/3 (Transfer from one health insurance plan to another) appear to create a disproportionate burden on members of the United States based health plans, without giving proper consideration to adding the relevant periods of residence, as required by the mandatory provisions of art. 7 of the Maintenance of Social Security Rights Convention, 1982 in relation to the relevant periods of residence: "The schemes for the maintenance of rights in course of acquisition referred to in Article 6 of this Convention shall provide for the adding together, to the extent necessary, of periods of insurance, employment, occupational activity or residence, as the case may be (a) participation in voluntary insurance or optional continued insurance, where appropriate […]".

80. The non-United States citizen staff members have an option that allows them to transit to another more appropriate health plan in their new country of residence. Such a right is denied to the after-service participants who reside in the United States, who may transfer from one plan to another, but in doing so may be made subject to the additional condition that there must be two years' coverage under any such plan before a change can be made. The Tribunal trusts that the Organization will also revisit the provisions of sec. 8 and make the necessary amendments to ensure that there is equal treatment of all staff members.

81. In light of the above, the unlawful contested decision is to be rescinded.

82. The Respondent is to allow the Applicant to pay the health insurance contribution equivalent to 13 months up to 10 years, and consequently to consider the Applicant eligible to enroll for ASHI coverage retroactively from the date of separation from the Organization pursuant to art. 2.3 of ST/AI/2007/3. The ASHI plan is to be considered effective on the date when the Applicant will voluntarily complete her additional contributions required to fulfil the 10 years of participation.

83. Taking into consideration that the contested decision relates to a separation from service due to retirement, which, pursuant to staff rules 9.5 and 9.6(b), is not a termination, the Tribunal is not required to establish an alternative compensation pursuant to art. 10.5 (a) of the Statute of the Dispute Tribunal that the Respondent may elect to pay as an alternative to the rescission of the decision to find the Applicant ineligible for ASHI.

*Relief*

84. The Statute of the Dispute Tribunal states, as relevant:

> Article 10
>
> 5. As part of its judgement, the Dispute Tribunal may order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in

exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

85. The Tribunal considers that art. 10.5 of its Statute includes two types of legal remedies:

a. Article 10.5(a) refers to rescission of the contested decision and/or specific performance and to a compensation that the Respondent may elect to pay as an alternative to rescinding the decision and/or to the specific performance as ordered by the Tribunal. The compensation, which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission of the contested decision and/or the specific performance ordered and payment of the compensation as established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression "[t]he Dispute Tribunal shall … determine an amount of compensation"; and

b. Article 10.5(b) refers to a compensation.

86. The Tribunal considers that the compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5(b) of the Statute.

87. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two types of compensation is that each of them, separately, "shall normally not exceed the equivalent of two years net base salary of the

applicant", namely four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

88. When the Tribunal considers an appeal against an administrative decision, the Tribunal can decide to:

a. Confirm the decision; or

b. Rescind unlawful decision and set an amount of alternative compensation; or

c. Rescind the decision, and, in disciplinary cases, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the law, the applied unlawful sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10.5(b).

89. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

90. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same

position s/he would have been had the Organization complied with its contractual obligations.

91. The Tribunal notes that the Applicant requested, as relief for the consequences of the contested decision, a reasonable financial compensation for the difference in health care costs that she will have to pay for herself and her spouse while they are living, for a similar standard of care. Taking into consideration the Tribunal's decision to rescind the contested decision and to recognize the Applicant's eligibility to enroll in ASHI retroactively from the date of her retirement from the Organization, the request for material damages is to be rejected.

*Moral damages*

92. The Applicant requests moral damages as a result of the administrative decision.

93. While noting the recent change in the Appeals Tribunal jurisprudence regarding the required evidence for compensation for moral damages as reflected in the judgments of July 2018 such as *Timothy* 2018-UNAT-847, the Tribunal underlines that the hearing took place on 22 September 2017. At the time, the applicable Appeals Tribunal jurisprudence regarding the standard of evidence establishing that the Applicant's testimony was sufficient evidence for an award of compensation for moral damages was followed by this Tribunal in the present case.

94. The Tribunal is satisfied that the Applicant has suffered moral injury as demonstrated in her testimony before the Tribunal, in which she explained the psychological harm suffered as a result of the contested decision. She stated that the psychological harm manifested itself in anxiety, depression and inability to sleep. The Applicant informed the Tribunal that she has sought therapy and been prescribed medications, but is not able to afford the same standard of psychological treatment as pre-retirement, as a result of the high cost of treatment.

95. The Applicant also explained that she and her husband are both United States citizens, both of retirement age or close thereto, and both without any other reasonable prospect of obtaining employment that would give them access to affordable health care. She further informed the Tribunal that in the United States particularly, due to the high cost of health care and regulatory uncertainty, this news was unexpected and devastating. The Applicant further testified that, as a consequence of the contested decision, she and her dependant husband have had to entirely re-think their post-retirement life plans at a point when it is almost impossible for the Applicant to find a solution, other than being permitted to enroll in ASHI.

96. Moreover, the Applicant stated that, despite receiving attractive offers from other companies in 2011, she did not accept them because she wanted to enroll in ASHI and benefit from the after-service health care system both for herself and for her dependant spouse.

97. The Tribunal notes that her testimony was confirmed in writing by Mr. MK, Ms. MF and Ms. KM which all contacted the Applicant between 2011-2015 for job offers. Mr. MK indicated that he contacted the Applicant twice in 2013 and 2015 to join their team as full-time employee and the major reason for which she declined the offer and chose to remain with the United Nations was the post-employment health insurance benefits that she would lose.

98. Ms. KM stated that both in November 2010 and 2011 the Applicant was offered a job based on her experience as a writer and editor, but she refused due to her long commitment with the United Nations and her belief that the offer would not be able "to match their benefit package, including the comprehensive health insurance offered to her by the [United Nations]". Taking into consideration all the circumstances of the case together with the above findings recognizing the Applicant's eligibility to enroll in ASHI effective from the date of the payment of the contribution for the remaining period of 13 months up to the required period of 10

years, the amount of the contribution to be paid by the Applicant is to be calculated from October 2016, the date of the Applicant's retirement.

99. The Applicant's request for moral damages is therefore to be granted. The Tribunal considers that the present judgment, together with USD 3,000, represents a reasonable and sufficient compensation for the moral harm caused to the Applicant by the contested decision.

**Conclusion**

100. In light of the foregoing, the Tribunal DECIDES:

a. The application is granted in part. The contested decision is rescinded and the Applicant is to be considered eligible to enroll in ASHI coverage pursuant to sec. 2.3 of ST/AI/2007/3 retroactively from the date of her retirement from the Organization. The ASHI plan is to be considered effective on the date when the Applicant will voluntarily complete her additional contributions required to fulfil the 10 years of participation;

b. An award of compensation in the alternative is not made since the present case is not a case concerning appointment, promotion or termination of the staff member;

c. The request for material damages is rejected;

d. The Respondent is to pay the Applicant USD 3,000 as moral damages caused by the contested decision;

e. The above shall be paid within 60 days from the date this judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5 percent shall be added to the US Prime Rate until the date of payment.

**Observations**

101. The Tribunal is of the view that, in order for the Organization to be able to fulfill its obligation relating to the fundamental right to medical/health care under the relevant applicable provisions of the universal international conventions (cited in para. 66 above), the Organization is expected to approve clear staff rules in relation to a staff members' right to medical insurance during and after their service with the Organization. In the alternative, it is expected that ST/AI/2007/3 is to be amended by adopting a new provision consisting of sec. 3.1(c) ST/AI/2007/3, with an identical content with the current sec. 3.2(c).

102. In the interim, the Tribunal trusts that the Organization will give priority to the applicable universal international conventions and will implement ST/AI/2007/3 in a way that will no longer discriminate against staff members employed on or after 1 July 2017 by recognizing their right to buy-in up to 10 years of contribution to a health insurance plan, as is currently the case for the staff members recruited before 1 July 2007.

*(Signed)*

Judge Alessandra Greceanu

Dated this 19th day of October 2018

Entered in the Register on this 19th day of October 2018

*(Signed)*

Nerea Suero Fontecha, Registrar, New York