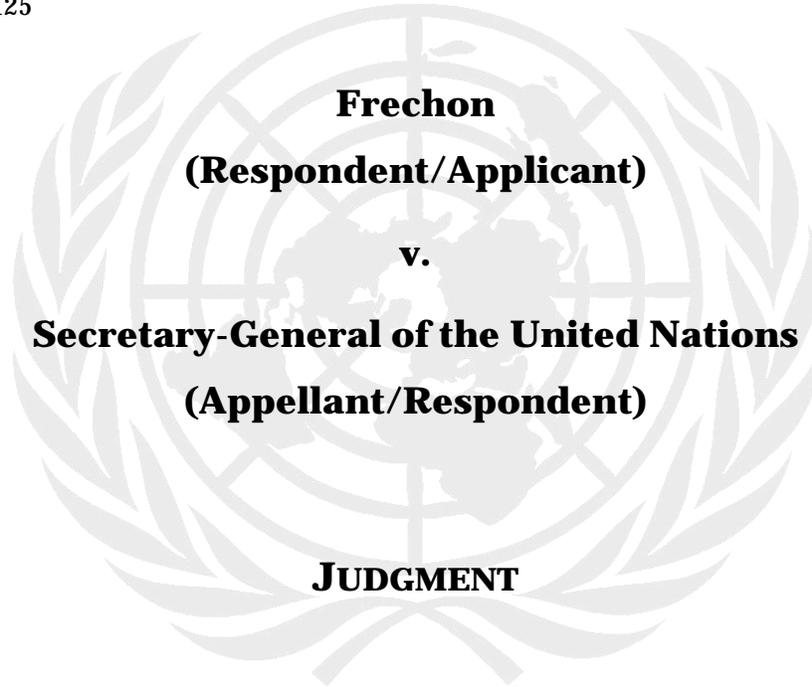




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2010-125



**Frechon  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Mary Faherty, Presiding  
Judge Kamaljit Singh Garewal  
Judge Jean Courtial

**Judgment No.:** 2011-UNAT-132

**Date:** 8 July 2011

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Antonio Bautista/Hugh McCairley

**Counsel for Appellant/Respondent:** Phyllis Hwang

**JUDGE MARY FAHERTY**, Presiding.

### Synopsis

1. The Staff Regulations and Rules applicable to fixed-term appointments, and the judicial review of cases involving these Regulations and Rules have established as a first principle that a fixed-term appointment has no expectancy of renewal. Exceptions however may arise to this general principle.
2. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that there were circumstances in the present case which took it outside of the scope of former Staff Rule 109.7 on “expiration of fixed-term appointments” and which put the case within the scope of former Staff Rule 109.1(b) which defines “termination”.
3. We therefore, in all circumstances, find that the Dispute Tribunal was correct in rescinding the decision made to terminate Carole Frechon’s (Frechon) employment.
4. We uphold the Order reinstating Frechon but hereby vary the Orders made under 5.2(i) and (ii) of the Dispute Tribunal Judgment to an Order reinstating Frechon for the purpose of the Administration initiating the procedures pursuant to administrative instruction ST/AI/1999/16. Given the Dispute Tribunal’s finding that Frechon was incapable of working for reasons of health, we find no basis for the Order made in paragraph 5.2(ii). Such entitlements as may accrue to Frechon will be determined under ST/AI/1999/16.
5. We affirm the Order made in paragraph 5.2(iii) of the Dispute Tribunal’s Judgment and uphold the Order made in paragraph 5.2(iv), subject to the principles in *Warren*<sup>1</sup> to apply to the question of interest.

### Facts and Procedure

6. On 24 June 2001, Frechon joined the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, as a translator/interpreter. Her contract was extended in June 2002 and June 2003.

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<sup>1</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

7. In July 2003, Frechon began developing paresthesias and numbness in the two “ulnar” fingers of her left hand. She was diagnosed with left ulnar nerve damage at the elbow level (cubital tunnel syndrome) and her injury was later determined as mostly service-related.<sup>2</sup> Following a surgery in Spain, Frechon resumed work at the ICTR on 27 January 2004. However, despite electrotherapy, massages, and the use of painkillers, the pain and paresthesias recurred. Frechon was placed on extended sick leave from the end of November 2004 and remained on sick and/or annual leave until her separation on 31 July 2007.

8. For the purpose of determining her fitness to return to work, Frechon underwent two medical evaluations, one in Geneva in November 2005 and the other in New York in May 2006. The Geneva evaluation concluded that Frechon was not fit to return to work and that, if she were to return to Arusha in the future, accommodations would have to be made as part of her working arrangements. The New York evaluation, on the other hand, concluded that Frechon was able to perform at the sedentary level of work for an eight-hour day but that, given her decreased fingering and handling ability, it was unlikely that she could perform the sedentary level if it required working with a computer workstation.

9. On 2 November 2006, the ICTR informed the United Nations Headquarters that arrangements (provision of a dictaphone, a dedicated typist and the Dragon Naturally Speaking voice-recognition software) had been made to enable Frechon to resume her duties as translator without having to use a keyboard. The United Nations Medical Service Division (MSD) thereafter declared that Frechon was fit to return to work in Arusha. Frechon, however, disagreed with that decision and requested the convening of a Medical Board.

10. A three-member Medical Board was constituted to examine Frechon and to determine whether she was fit to work as a translator through the use of appropriate work accommodations. To this question the Medical Board replied in its report of 11 April 2007 that

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<sup>2</sup> For that service-related injury, Frechon was awarded inter alia monetary compensation in the amount of USD 35,167.20, which was equivalent to 15 per cent permanent loss of the function of the whole person, under Appendix D of the Staff Rules.

[t]he experts are of the opinion that Ms. Frechon is not in a position to resume her previous professional activity in Arusha, Tanzania. Reasons: No possibility of appropriate medical treatment in the locality. The use of a computer keyboard has become impossible, as mentioned in all the reports we were able to review. (Unofficial translation)

11. In a letter dated 30 April 2007, the Director of MSD asked Dr. Rheiner, Chairman of the Medical Board, to provide further clarification to the questions that had been presented to the Medical Board, as he did not think that the Medical Board's report answered them fully. While Dr. Rheiner did not respond, the other two members of the Medical Board, Dr. Lee and Dr. Kanj, responded to the letter separately. Their answers to the question as to whether Frechon was fit to work as a translator, providing that appropriate work accommodations were made, are quoted below. In his letter dated 2 May 2007, Dr. Lee stated:

- a. Ms. Frechon is fit to work as a translator, providing appropriate work accommodations are made.
- b. The accommodations made by ICTR appropriately addressed Ms. Frechon's needs as defined by the provided job description.
- c. Ms. Frechon requires a multi-disciplinary effort for treatment to include an upper extremity surgeon, pain management specialist, physical therapist, and a facility with diagnostic imaging. The nature of the treatment is pain management and physical therapy once every one to two weeks, with the possibility for later surgery.

However, in his letter dated 11 June 2007, Dr. Kanj answered "no" to the question, adding that

[t]he experts are of the opinion that Ms. Frechon is not in a position to resume her previous professional activity in view of the diagnosis established above. It should be noted that signs of recurrence and aggravation of the symptoms have been noted after each resumption of the professional activity, even with the adaptations proposed and implemented in 2004, and that the professional pathology and the handicap were recognized. (Unofficial translation)

12. From November 2004 onwards, when Frechon was placed on extended sick and/or annual leave, her fixed-term appointment was renewed for varying periods of duration, with the last extension carrying her to 31 July 2007.

13. In a letter dated 31 July 2007, the Under-Secretary-General for Management advised Frechon of the decision not to renew her fixed-term appointment beyond

31 July 2007 in light of the conclusion by the Medical Board that she was not able to resume her professional activities with the ICTR in Arusha due to the fact that there was no appropriate medical treatment within a reasonable distance of Arusha.

14. Frechon appealed the decision but she did not prevail during either the administrative review phase or in front of the Joint Appeals Board (JAB). On 13 May 2009, the Deputy Secretary-General informed Frechon of the JAB's findings and the decision of the Secretary-General not to renew her contract in light of the JAB's findings.

15. On 18 September 2009, Frechon filed an application with the Dispute Tribunal challenging the decision not to renew her fixed-term appointment beyond 31 July 2007. On 30 October 2009, the Secretary-General filed an answer, which consisted of his previous submissions to the JAB as well as the JAB report.

16. In Judgment No. UNDT/2010/089 dated 7 May 2010, Judge Izuako found that, contrary to the assertion by the Secretary-General, Frechon's fixed-term appointment "was allowed to run until the end of the term and was not renewed on medical grounds", her contract "came to an end as a result of her service-incurred injury... Rather than abide by the Organization's procedure for dealing with staff members who find themselves in such a predicament, the Respondent opted to 'allow' [Frechon's] fixed-term appointment to run out to avoid his legal obligations". In her view, Frechon's separation was "initiated by the Secretary-General" due to her inability to resume her professional activities as a result of her service-incurred injury, and was thus "in fact terminated" entitling her to the procedures set forth in administrative instruction ST/AI/1996/16 "Termination of appointment for reasons of health" issued on 28 December 1999. Moreover, the contested decision "was informed by improper motive".

17. Judge Izuako criticised the Administration for its failure to comply with the procedures set forth in ST/AI/1999/16, including initiating a request to the United Nations Staff Pension Committee (UNSPC) for a determination as to whether Frechon should be awarded a disability benefit, and granting Frechon special leave with half pay for the period from 28 March 2007 through 31 July 2007.

18. Judge Izuako remanded the case to the Administration for concurrence on the implementation of the correct procedure required under ST/AI/1999/16. She also

ordered the Secretary-General to pay Frechon compensation equivalent to three months' net base salary for the delay in complying with the ST/AI/1999/16 procedures.

19. In a subsequent Judgment No. UNDT/2010/124 on the merits dated 14 July 2010, Judge Izuako "rescind[ed] the decision to terminate [Frechon's] employment", and ordered the Administration to i) reinstate Frechon to a position whose duties she was able to carry out given her impairment; ii) pay Frechon her lost earnings from 31 July 2007 to the date of her reinstatement at eight per cent per annum for the said period; iii) pay Frechon her sick leave entitlement from 28 March 2007 to 31 July 2007; and iv) in case the Secretary-General should decide not to reinstate her, pay Frechon two years' net base salary at the rate in effect on 31 July 2007, with interest payable at eight per cent per annum as from 90 days from the date of distribution of the judgment until payment.

20. On 30 August 2010, the Secretary-General filed an appeal from UNDT Judgment No. UNDT/2010/124 and clarified that his appeal also addressed the issues discussed in Judgment No. UNDT/2010/089. On 15 October 2010, the Registry received Frechon's answer.

21. On 30 September 2007, after she had launched an appeal against the decision to separate her from service at the end of her fixed-term appointment, Frechon submitted a request to the United Nations Joint Staff Pension Fund (UNJSPF) for a disability benefit under Article 33(a) of its Regulations. On 28 May 2008, the UNSPC rejected Frechon's request for disability benefit and, on 19 November 2008, upheld its earlier decision of 28 May.

22. Subsequently at its meeting of 15 July 2009, the Standing Committee of the United Nations Joint Staff Pension Board (Pension Board) rejected Frechon's appeal and confirmed the UNSPC's decision not to grant her a disability benefit. It considered that the inability to use a computer keyboard was not reasonably incompatible with the continued performance by Frechon of her duties in a member organization.

23. On 16 October 2009, Frechon filed an appeal from the decision of the Pension Board's Standing Committee. On 4 December 2009, the UNJSPF filed a Respondent's answer.

24. In Judgment No. 2010-UNAT-003 dated 30 March 2010, this Court rescinded the contested decision and remanded Frechon's request for a disability benefit to the Pension Board for review as to whether it was actually possible for Frechon to perform duties of a translator in a member organization, or at least duties which are commensurate with her education and professional qualifications and reasonably compatible with her impairment, taking into account the duties actually required of a translator and the technology available to compensate for her inability to use a computer keyboard.

25. The Registry was informed by the UNJSPF that the case, as remanded by the United Nations Appeals Tribunal (Appeals Tribunal), would be reviewed by the Standing Committee of the Pension Board in July 2011.

### **Submissions**

#### **Secretary-General's Appeal**

26. The Secretary-General clarifies that his appeal addresses issues raised not only in Judgment No. UNDT/2010/124 but also in Judgment No. UNDT/2010/089.

27. The Dispute Tribunal exceeded its competence and erred in both law and fact. The Dispute Tribunal's conclusion that the non-renewal of Frechon's fixed-term appointment constituted a termination is directly contradicted by Staff Rule 109.7(b), which reads that "[s]eparation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules". The Dispute Tribunal failed to recognize the distinction between the non-renewal of an appointment based on medical grounds and the termination of an appointment for reasons of health. It was within the discretion of the Secretary-General to decide not to renew a fixed-term appointment, and taking such a decision does not constitute a "separation initiated by the Secretary-General".

28. Since the non-renewal of Frechon's appointment does not constitute a "termination", ST/AI/1999/16 is not applicable to her case. Likewise, section 4 "Delay in determination" of ST/AI/1999/16 under which a staff member may be placed on special leave with half pay is not applicable.

29. The Dispute Tribunal determined that the decision not to renew Frechon's appointment "was informed by improper motive" without providing any justification as to how it arrived at such a conclusion. Such a conclusion was all the more surprising since the JAB had specifically found that Frechon had failed to substantiate her allegations that the non-renewal was tainted by improper considerations.

30. Section 3 of ST/AI/1999/16 only addresses the right of a staff member to challenge a decision that he or she should be considered for a disability benefit. It does not provide for the right to challenge a decision that he or she should not be considered for a disability benefit. The entitlement to special leave with half pay under section 4 of ST/AI/1999/16 is triggered only when the staff member is challenging a decision that he or she should be considered for a disability benefit. While section H(4)(a) of the UNJSPF Regulations does provide for the right of a staff member to challenge a decision that he or she should not be considered for a disability benefit, section H(4)(a) of the UNJSPF Regulations cannot trigger the entitlement of staff members to be placed on special leave with half pay.

31. In the present case, Frechon requested that the UNSPC review whether she was entitled to a disability benefit. She also exercised her right to challenge the Medical Director's decision that she was able to return to duty. However, neither of these challenges gave Frechon any entitlement to be placed on special leave with half pay under section 4 of ST/AI/1999/16.

#### **Frechon's Answer**

32. Despite the unanimous conclusions reached by the Medical Board, the Medical Director still decided to ask the same questions in order to subvert the Medical Board's conclusions and superimpose his own decision. The Dispute Tribunal was correct in annulling the decision taken in disregard of the findings of the Medical Board and in an attempt to substitute the administration's own partial view of the matter. Frechon's separation from service was made under the guise of non-renewal of contract to evade the obligations for termination of service for health reasons.

33. Considerations of health obviously played a part or were a decisive factor in the decision not to renew Frechon's appointment. Consequently, the provisions of Staff Regulations on termination and disability benefits are applicable.

34. Frechon, as a result of her service-incurred injury, is not able to resume her normal professional activity in Arusha nor anywhere else in the world. Her separation from service, ostensibly on the expiration of her fixed-term appointment, was effectively initiated by the Secretary-General for reasons of health and is indeed a termination.

35. The Secretary-General's contention regarding the applicability of ST/AI/1999/16 given that the administrative instruction is silent on the right of a staff member to challenge a decision that he or she should not be considered for a disability benefit, is specious and incorrect. Since ST/AI/1999/16 was promulgated in conjunction with Article 33 of the UNJSPF Regulations, which allows for challenges to a decision that a staff member should not be considered for a disability benefit, it logically follows that the provisions and entitlements under ST/AI/1999/16 are applicable when invoked by a staff member who is not considered for a disability benefit.

36. The establishment of a Medical Board and the fact that the Medical Board sustained Frechon's contentions made Frechon eligible for special leave with half pay.

37. Frechon has not been awarded more than two years' compensation. Lost earnings represent a form of compensation, but are not to be included as compensation for purposes of Article 10(5) of the UNDT Statute, which refers exclusively to compensation in lieu of rescission or specific performance.

38. The question of the appropriate rate of interest is a matter for the Dispute Tribunal to decide in light of the circumstances of the particular case. The Secretary-General has failed to present any argument as to why the interest rate awarded is inappropriate and therefore it should be allowed to stand.

#### **Considerations**

39. In the present case, the Secretary-General's principal contentions are that the Dispute Tribunal erred on a question of law in concluding that the non-renewal of Frechon's fixed-term appointment constituted a "termination" within the meaning of

former Staff Rule 109.1(b), and that the Dispute Tribunal erred in law in its determination that the procedure set out in ST/AI/1999/16 “Administrative Instruction – Termination of appointment for reasons of health” was applicable to Frechon’s case.

40. The Secretary-General further contends that the Dispute Tribunal erred in law and fact, and exceeded its jurisdiction in concluding that the administrative decision not to renew Frechon’s appointment was “informed by improper motive”.

41. Former Staff Rule 109.1(b) defines “termination” as “...a separation from service initiated by the Secretary-General, other than retirement at the age of sixty years or more or summary dismissal for serious misconduct”.

42. Former Staff Rule 109.7 on “Expiration of fixed-term appointments” provides as follows:

(a) A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

(b) Separation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules.

43. The Secretary-General invokes a wealth of jurisprudence from the former Administrative Tribunal in which the issue of the non-renewal of fixed-term appointments has been addressed. The former Administrative Tribunal consistently affirmed that such appointments carry no expectation of renewal. The Secretary-General also cites the more recent jurisprudence of this Tribunal in *Balestrieri* and *Syed*,<sup>3</sup> which affirmed the principle that fixed-term appointments, as defined in the relevant Staff Regulations and Rules, carry no expectation of renewal.

44. However, the jurisprudence of both the former Administrative Tribunal and this Tribunal have established that an administrative decision not to renew a fixed-term contract may be challenged in certain circumstances, for example where the actions of the Administration give rise to a legitimate expectation on the part of the staff member that his or her fixed-term contract may be renewed or extended. The case law has also established that an exception to the rules governing the expiry of a fixed-term contract

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<sup>3</sup> *Balestrieri v. Secretary-General of the United Nations*, Judgment 2010-UNAT-041; *Syed v. Secretary-General of the United Nations*, Judgment 2010-UNAT-061.

will arise if the administrative decision not to renew is based on improper motives or if there are countervailing circumstances.

45. It is in the context of these established case law principles that the findings of the Dispute Tribunal in the present case, on the issue of the expiry of a fixed-term contract versus the termination of an appointment, as defined in the relevant Staff Regulations and Rules, must be assessed.

46. In the course of its Judgment No. UNDT/2010/089 of 7 May 2010, the Dispute Tribunal stated *inter alia*:

It is the Respondent's argument that since the Applicant's fixed-appointment "was allowed to run until the end of the term and was not renewed on medical grounds," [...]the present situation does not amount to a termination of contract but instead falls under the ambit of former Staff Rule 109.7 and hence the Applicant does not have any legal right to compensation under Chapter IX and Annex III of the Staff Rules. The Tribunal is not convinced by this argument. Having considered all the evidence before it, the Tribunal is of the opinion that the Applicant's fixed term-appointment came to an end as a result of her service-incurred injury. Apart from the said injury, there is nothing before the Tribunal to show that the Applicant's fixed-term appointment would not have been renewed beyond its expiration date. Rather than abide by the Organization's procedures for dealing with staff members who find themselves in such a predicament, the Respondent opted to "allow" the Applicant's fixed-term appointment to run out to avoid his legal obligations.

47. In the course of its Judgment No. UNDT/2010/124 of 14 July 2011, the Dispute Tribunal reprised the findings it made in Judgment No. UNDT/2010/089 in the following terms:

- (i) The Applicant's fixed term appointment came to an end as a result of her service-incurred injury.
- (ii) The Applicant's fixed term appointment was in fact improperly terminated and it was disingenuous for the Respondent to argue that "it was allowed to run until the end of the term and was not renewed on medical grounds."
- (iii) The administrative decision not to renew the Applicant's fixed-term appointment due to the Applicant's inability to resume her professional activities with ICTR in Arusha was informed by improper motive.
- (iv) The applicable procedural rules that should have been followed by the Respondent in this case contained in ST/AI/1999/16 were not complied with.
- (v) The Applicant was entitled to be placed on special leave with half pay for the period from 28 March 2007 to 31 July 2007.

48. The Secretary-General in the course of his submissions to this Tribunal maintains as follows:

[T]he Dispute Tribunal did not provide any justification as to how it arrived at the conclusion that the non-renewal decision was informed by ‘improper motives’. Such a conclusion is all the more surprising since the JAB had specifically found that [Frechon] had “not substantiated her allegations that the non-renewal of her appointed [sic] was tainted by ...improper considerations.” At best, the Appellant can only surmise that the basis for the conclusion that the non-renewal decision was informed by “improper motives” was the Dispute Tribunal’s disagreement with the UN Medical Director’s summary of the Medical Board’s findings and his determination that [Frechon] was not incapacitated...

49. In its Judgment of 7 May 2010 the Dispute Tribunal recited in detail Frechon’s employment history and set out the sequence of events from the date of the service-related injury up to the ultimate convening, following Frechon’s request, of the Medical Board in April 2007. Moreover, it reviewed the events which occurred following the Medical Board having furnished its Report of 11 April 2007 to the Medical Director.

50. The Dispute Tribunal rejected the Medical Director’s interpretation of the Medical Board’s Report and found that “the [Medical] Board concluded that [Frechon] was incapable of further service as defined by section 1 of ST/AI/1999/16”.

51. The Secretary-General contends that the finding of the Dispute Tribunal in this regard was tantamount to that Tribunal substituting its own judgment for that of the United Nations Medical Director as to whether Frechon was incapacitated, and the Secretary-General relies on the Judgment of the former Administrative Tribunal in *Baba-Moussa* in support of its contention that the Dispute Tribunal is not empowered “to substitute its opinion for that of the competent medical authorities”.<sup>4</sup>

52. In the present case all of the relevant facts were before the Dispute Tribunal, including the Medical Board’s assessment of Frechon’s capacity to perform her functions as a translator. The Medical Board’s conclusions in this regard were that “[t]he experts are of the opinion that Ms. Frechon is not in a position to resume her professional activity in Arusha, Tanzania - Reasons: No possibility of appropriate medical treatment

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<sup>4</sup> Former Administrative Tribunal Judgment No. 468, *Baba-Moussa* (1989), para. VI.

in the locality. The use of a computer keyboard has become impossible, as mentioned in all the reports we were able to review.”

53. The Dispute Tribunal’s interpretation of that conclusion was that Frechon was incapable of further service, as defined by section 1 of ST/AI/1999/16.

54. We find nothing in the submissions of the Secretary-General to convince us that this finding was erroneous in law or in fact, or beyond the competence of the Dispute Tribunal, with regard to the facts as they were before that Tribunal. We are satisfied that the Dispute Tribunal’s conclusion was not tantamount to it having stepped into the shoes of the United Nations Medical Director.

55. It is beyond question that the Secretary-General himself, when informing Frechon that her contract was not being renewed, advised her that this was because of her inability to resume her professional activities with the ICTR in Arusha. Thus, her incapacity was inextricably linked to the decision communicated to her on 31 July 2007.

56. The Dispute Tribunal determined, effectively, that all of the foregoing matters took the case outside of the confines of the provisions of Former Staff Rule 109.7 and concluded that the “undisputed evidence before [the Dispute Tribunal] leads to the conclusion that the Applicant’s separation from service was indeed ‘initiated by the Secretary-General’ due to her inability to resume her professional activities as a result of her service-incurred injury”.

57. On this basis, the Dispute Tribunal concluded that Frechon’s contract was in fact terminated for medical reasons.

58. This Tribunal finds no grounds, on the basis of the Secretary-General’s submissions, to disagree with this finding. The burden is on the Secretary-General to establish that the Dispute Tribunal erred in law or fact and/or exceeded its jurisdiction. We are of the view that the Secretary-General has not surmounted this hurdle.

59. As correctly observed by the Dispute Tribunal, the procedure which should have been invoked, following receipt of the Medical Board’s opinion, was that set out in ST/AI/1999/16.

**Judgment**

60. We therefore, in all the circumstances, find that the Dispute Tribunal was correct in rescinding the decision made to terminate Frechon's employment.

61. We uphold the Order reinstating Frechon, but hereby vary the Orders made under 5.2(i) and (ii) in the Dispute Tribunal Judgment to an Order reinstating Frechon for the purpose of the Administration initiating the procedures pursuant to ST/AI/1999/16. Given the Dispute Tribunal's finding that Frechon was incapable of working for reasons of health, we find no basis for the Order in paragraph 5.2(ii). Such entitlements as may accrue to Frechon will be determined under ST/AI/1999/16.

62. We affirm the Order in paragraph 5.2(iii).

63. We uphold the Order in paragraph 5.2(iv) save that the interest payable on such compensation is to be calculated on the basis of the Appeals Tribunal's decision in *Warren*.<sup>5</sup>

Original and Authoritative Version: English

Dated this 8<sup>th</sup> day of July 2011 in Geneva, Switzerland.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Courtial

Entered in the Register on this 29<sup>th</sup> day of August 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

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<sup>5</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.