UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-615

Ejaz, Elizabeth, Cherian & Cone

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Rosalyn Chapman Judge Mary Faherty
Case Nos.:	2015-711, 2015-712 and 2015-713
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Appellants:	François Loriot
Counsel for Respondent:	Simon Thomas

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it three appeals of Judgment No. UNDT/2015/031, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 1 April 2015, in the matter of *Aly et al. v. Secretary-General of the United Nations*.[1] Four individuals of the Aly *et al.* group – Mr. Amjad Ejaz, Mr. Jose Elizabeth, Mr. Matthew Cherian and Mr. Stephen Cone – appealed on 8 May 2015, and the Secretary-General filed his answer on 14 July 2015.[2]

2. For reasons of judicial economy, the Appeals Tribunal has consolidated the three appeals, noting that each of the appeals arises from Judgment No. UNDT/2015/031 and both the staff members' appeals, as well as the Secretary-General's answer to each, are substantively identical.

Facts and Procedure

3. The following facts are uncontested:[3]

> ... The Applicants worked for a number of years in the Distribution Section (formerly called the Publishing Section) in the Department for General Assembly and Conference Management ("DGACM"). Apparently, as a result of technological advances within the publishing industry, in 1990, the Organization began a series of job analyses that eventually led to a 1998 reorganization of the Publishing Section. The Applicants considered that the reorganization had led to an increase in their functions and responsibilities, without commensurate reclassification of their posts[.]
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> ... On 8 May 2004, the Applicants filed an appeal, under sec. 5 of ST/AI/1998/9 (System for the classification of posts), with the [Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM")] against "decisions announced by email on 4 March 2004 related to the audit and classification of their posts" [which] had not resulted in reclassification of the Applicants' posts[.]

[1] Aly *et al.* concerned 24 staff members: Aly, Brown, Cherian, Cone, Coriette, Diaz, Elizabeth, Ejaz, Gamit, Jordano, Golfarini, Hadera, Hassanin, Hto, Kaufman, Maung, McCall, Nemeth, Pava, Saffir, Samuel, Sebro, Smith and Vocile.

[2] Mr. Ejaz (Case No. 2015-711) and Mr. Elizabeth (Case No. 2015-712) filed individual appeals, while the appeal of the late Mr. Cherian and the late Mr. Cone was filed jointly (Case No. 2015-713) by the executors of their respective estates. Eighteen staff members of the original Aly *et al.* group jointly filed a separate appeal, which is under consideration this session and is addressed in *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622.

[3] Impugned Judgment, paras. 3-20. See also *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622, para. 2.

... On 9 September 2004, the Director for the Division of Organizational Development, OHRM ("D/DOD/OHRM") informed the Applicants of OHRM's conclusion that the procedures set out in ST/AI/1998/9 [...] had been fully observed in considering the classification of their posts. Citing sec. 5 of ST/AI/1998/9, the D/DOD/OHRM stated that if the Applicants wished to proceed under that provision, it would be necessary to show for each post that the classification standards were incorrectly applied resulting in classification of the posts at the wrong level[.]

... The Applicants' cases were never submitted to the [New York General Service Classification Appeals Committee ("NYGSCAC")] for review[.]

... On 22 June 2007, the Applicants filed a statement of appeal to the former Joint Appeals Board ("JAB") against the implied decision not to submit their appeals to the NYGSCAC for review[.]

... [... In paragraphs 36 and 37 of] JAB Report No. 2001 [the Panel held that] (emphasis in original):

> ... [It] *unanimously concluded* that [the] Appellants' due process rights had been violated by the Administration's failure to review their cases in a timely manner [and] *unanimously agreed* to recommend for the moral injury suffered, Appellants be granted three months net-base salary at the rate in effect as at end August 2008, i.e. the date of this report.
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> ... [It] *unanimously agreed* to recommend that [the] Appellants submit their cases to the [NYGSCAC] as expeditiously as possible and no later than 90 days from the date of the Secretary-General's decision on the [JAB Report].

... [On] 6 November 2008, the Deputy Secretary-General informed the Applicants of the Secretary-General's decision to reject the JAB's first recommendation relating to compensation for moral injury and to accept the second recommendation that the Applicants submit their cases to the NYGSCAC[.]

... The Applicants appealed the Secretary-General's decisions to the former United Nations Administrative Tribunal ... [and the] appeal was later transferred to the Dispute Tribunal [...].

... On 29 October 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/195 [First UNDT Judgment].[4] [...]

...

[4] *Aly et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/195.

... The [Dispute] Tribunal concluded that the decision to remand the case to the NYGSCAC was reasonable and fair, awarded USD 20,000 to each of the Applicants for excessive delays and procedural non-compliance, and rejected the rest of the pleas [...]. [... T]he [Dispute] Tribunal ordered:

> a. The case to be remanded to the NYGSCAC for classification decisions on the proviso that each applicant submitted the case[] for review within sixty days of the date the Judgment became executable;
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> b. For all such cases submitted in accordance with the above order, the NYGSCAC shall render decision within 180 days of the date that the Judgment became executable; and
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> c. The Respondent to pay USD 20,000 to each of the Applicants within 60 days of the date the Judgment became executable.

... Neither of the parties appealed [Judgment No.] UNDT/2010/195.

... [On] 21 December 2010, the Chief, Human Resources Policy Service ("HRPS"), OHRM advised Counsel for the Applicants that the NYGSCAC was in the process of being reactivated and that the Applicants could submit their cases for review through the Committee's Secretary.

... [On] 8 February 2011, Counsel for the Applicants wrote to the Secretary of the NYGSCAC requesting that their 8 May 2004 appeals for classification [...] be reviewed by the NYGSCAC in accordance with UNDT/2010/195 [and requested to be] informed of the CAC composition, procedures and of the new ST/IC reactivating the CAC [as well as to have] access to all documents which will be submitted to the CAC, and [informed that] they are all available to testify on their duties and responsibilities discharged for the period under consideration.

... [On] 16 February 2011, [...] the Administrative Law Section advised Counsel for the Applicants that Payroll Operations Unit had approved all payments related to [Judgment No.] UNDT/2010/195.

... [On] 4 March 2011 [...] the ASG/OHRM advised the Secretary-General of the Joint Negotiation Committee's decision to recommend Ms. VL as chairperson of the NYGSCAC[,] [...] submitted [...] the names of three staff members that OHRM recommended for appointment by the Secretary-General [and] advised the Secretary-General of the names of three staff members that, on 24 February 2011, the Staff Council had nominated for membership of the NYGSCAC.

... On 13 May 2011, the ASG/OHRM [informed] the Executive Office of the Secretary-General [...] that two of the staff members recommended by OHRM for membership of the NYGSCAC [could not ...] "participate in the deliberations of the Committee", and recommended two other staff members as replacements.

> ... [On] 27 May 2011, [...] the Office of the Deputy Secretary-General advised the ASG/OHRM (and others) that the Secretary-General had "approved" the requests of the ASG/OHRM in regard to the proposed members of the NYGSCAC.
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> ... On 7 June 2011, the ASG/OHRM issued [Information Circular] ST/IC/2011/17 (Membership of the New York General Service Classification Appeals Committee).
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> ... On the same day, the chairperson of the NYGSCAC transmitted to the ASG/OHRM the NYGSCAC's analysis of the cases submitted by the Applicants. The memorandum stated:
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> > The Committee met on a number of occasions during May 2011 to consider the cases. ...
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> > ...
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> > After undertaking a preliminary discussion on the circumstances of the cases, the documents available, and the structure of the review, the Committee proceeded with a factor-by-factor analysis of the existing job descriptions under appeal on their merits and separate from other issues within the UNDT judgment. In their evaluation, the Committee applied the General Service Job Classification Standards that were in effect at the time of the initial classification of the job descriptions.
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> ... The NYGSCAC did not conduct a review of the cases of three of the Applicants, finding that [since] a classification decision had not been made in respect of two of the Applicants' job descriptions [Mr. Ejaz and Mr. Elizabeth] [...] there was therefore no initial classification to review. In respect to the case of a third Applicant [Mr. Cherian], the NYGSCAC stated that "due to the fact that neither the staff member, OHRM or DGACM could [...] locate, []or confirm the existence of revised and completed job description, the Committee could not conduct a review of [Mr. Cherian's] case". The NYGSCAC found that the posts of the other [21] Applicants had been appropriately classified, and recommended upholding the initial classification decisions.
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> ... On 8 June 2011, the ASG/OHRM [...] approve[d] the NYGSCAC report.
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> ... [On] 9 June 2011, [...] the Compensation and Classification Section, OHRM advised Counsel for the Applicants that the NYGSCAC had completed the review of the appeal of the classification decisions ordered by the [Dispute] Tribunal [and a]ttached [...] the final approved copy of the report of the NYGSCAC.

4. On 6 September 2011, Aly *et al.* filed an application with the Dispute Tribunal contesting the post reclassification decision made by the ASG/OHRM on 8 June 2011, based on the NYGSCAC recommendations of 7 June 2011, challenging, in particular, the legality of the appointments to the NYGSCAC and its composition, as well as the resultant

NYGSCAC report and its findings. By way of remedy, Aly *et al.* sought pecuniary and non-pecuniary damages, as well as legal costs for abuse of proceedings. They did not expressly request either rescission of the contested decision or remand of their case to the NYGSCAC for reconsideration.

5. On 1 April 2015, the Dispute Tribunal rendered Judgment No. UNDT/2015/031, which upheld the application, in part. As a preliminary matter, the UNDT noted that it would not consider the additional grounds of appeal that were improperly raised by Aly *et al.* in their closing submissions, without being granted leave to do so. In relation to the merits of the complaints, the UNDT found that the NYGSCAC review process was flawed in that:

a) the NYGSCAC began its deliberations before its members had been properly appointed under Section 7.3 of ST/AI/1998/9;[5]

b) there was no evidence that the Secretary-General had properly appointed the NYGSCAC chairperson and its members, as required by Section 7.3 of ST/AI/1998/9;[6]

c) Aly *et al.*'s right to be informed of the composition of the NYGSCAC in a timely manner was not respected, insofar as ST/IC/2011/17 was issued by the ASG/OHRM on 7 June 2011, the same day that the NYGSCAC issued its report;[7]

d) Aly *et al.*'s right to receive a copy of the report of the reviewing service and to file their comments before the NYGSCAC pursuant to Section 6.7 of ST/AI/1998/9 was breached;[8]

e) the NYGSCAC report was not based on the documents which were required to be filed by Aly *et al.* and OHRM, but rather on documents which remained unknown to Aly *et al.*;[9]

f) none of the issues raised by Aly *et al.* were analyzed by the NYGSCAC and, the UNDT thus accepted Aly *et al.*'s contention that they were not accorded due process and found the NYGSCAC report to be unlawful;[10] and

[5] *Ibid.*, para. 56.
[6] *Ibid.*, para. 57.
[7] *Ibid.*, para. 53.
[8] *Ibid.*, para. 62.
[9] *Ibid.*, paras. 66-68.

g) the foregoing deficiencies were not identified or addressed by the ASG/OHRM in her final review, nor did she produce a final, reasoned decision.[11]

6. The Dispute Tribunal thus rescinded the ASG/OHRM's decision of 8 June 2011, together with the NYGSCAC recommendations and remanded Aly *et al.*'s application for a full and fair consideration of their grounds of appeal to the NYGSCAC, which was to make its recommendations to the ASG/OHRM for her final decision, and ordered that the entire process be completed within 90 days of the publication of the UNDT Judgment.[12]

7. The UNDT rejected Aly *et al.*'s request for moral damages and compensation for excessive delays, finding that their claim for compensation for the period from 2000 until 2009 was *res judicata*, having been adjudicated in the first UNDT Judgment, and that there was no delay given that the NYGSCAC issued its recommendation concerning Aly *et al.*'s appeal within 180 days from 21 December 2010, as ordered in the first UNDT Judgment. It also rejected Aly *et al.*'s request for costs, on the basis that the order of rescission of the contested decision together with the remanding of the case for reconsideration was reasonable and sufficient compensation for the delays in the procedure.

Submissions

The Appellants' Appeals

8. The Appellants submit that the UNDT was correct to rescind the contested decision, but erred in law and procedure when it remanded the cases of the four Appellants to the NYGSCAC for reconsideration since the NYGSCAC cannot review their cases. In particular, Mr. Ejaz and Mr. Elizabeth, both of whom have since retired and separated from the Organization,[13] cannot participate in the new NYGSCAC reclassification procedure ordered by the UNDT given that, as already recognized by the NYGSCAC in its 2011 report, OHRM's Classification Section has never completed the proper job description classification documents – i.e., a job description finalized by OHRM with its classification rating note–concerning the two posts they held, a fact which the Respondent admitted before the UNDT. Further, Mr. Cherian and Mr. Cone passed away in 2012, a fact of which

[10] *Ibid.*, para. 74.
[11] *Ibid.*, paras. 77-78.
[12] *Ibid.*, para. 80.
[13] Ejaz, appeal form cover; appeal brief, para. 29.

the UNDT was aware, and their estates cannot participate in a new reclassification procedure before the NYGSCAC, as the UNDT ordered.

9. The UNDT conducted an extensive review of the NYGSCAC appeal procedure and correctly concluded that the procedure was marred by a series of irregularities, including OHRM's failure as the "reviewing service" to conduct such a review of the cases of any of the members of Aly *et al*.[14] However, the UNDT Judgment did not go further to recognize the particular situation of Appellants Ejaz and Elizabeth whose appeals were not even considered by the NYGSCAC because OHRM had neglected to prepare the basic classification notice required for a revised job description to be issued, as well as that of Mr. Cherian, whose job description was never finalized. Each of these illegal situations essentially resulted from the Respondent's own gross negligence and the failure to comply with the Organization's internal procedures. Moreover, despite having requested clarification as to the NYGSCAC's procedures, composition and documents which would be submitted to NYGSCAC members for consideration, the NYGSCAC Secretary never informed Appellants Ejaz, Elizabeth and Cherian that their cases would be disregarded.

10. The UNDT erred in ordering remand as a substitute for compensation for the harm, suffering and pecuniary losses the Appellants had endured since 2010, and it failed to exercise its jurisdiction to award the Appellants compensation. The Appellants are entitled to compensation for delay because the procedural irregularities and delays are the sole responsibility of the Respondent. In the case of Appellants Ejaz, Elizabeth and Cherian, it took the Respondent more than three years of proceedings to finally admit – in December 2014 – that their cases could not have been reviewed by the NYGSCAC in 2011 because only draft job descriptions had been presented for its review. Despite knowing this, the Respondent submitted the invalid draft job descriptions to the NYGSCAC which had no choice but to conclude five months later that it could not adjudicate on them. At this point, it is impossible for their job descriptions to be finalized, since not only Appellants Ejaz and Elizabeth, but also their supervisors, have all retired from the Organization, while Appellants Cherian and Cone have passed away.

[14] Ejaz & Elizabeth appeal brief, paras. 11-12; Cherian & Cone appeal brief, paras. 11-12, citing impugned Judgment, para. 62.

11. In the view of the Appellants, the *Fuentes* Judgment of the Appeals Tribunal stands for the proposition that where a reclassification decision is found illegal and remand is no longer executable, compensation is owed by the Respondent.[15] The extended period of time of 15 years and the numerous vain efforts to have their salaries adjusted to match their increased duties, compounded by the legitimate expectations created by successive senior officials satisfied the criteria of "exceptional cases" of Article 10(5)(b) of the UNDT Statute warranting an award in excess of the statutory limit of two years' net base salary. The Appellants submit that, having regard to the difference in salary between their then posts and their salary at a reclassified level, they have incurred pecuniary losses equivalent to USD 127,500, being almost three years' net base salary, without taking into account their accrued pension losses for the rest of their lives.[16] The pecuniary losses incurred by Mr. Cherian, who sought reclassification to the G-7 level, were even higher.[17]

12. Recalling that the purpose of compensation "is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations",[18] the Appellants do not ask the UNDT or the Appeals Tribunal to undertake the reclassification process in lieu of the NYGSCAC, but rather to establish the *quantum* of indemnity which will compensate them for the Respondent's shortcomings and violations of procedure. In the instant case, having regard to all the studies, reports and recommendations made during over 20 years by the highest United Nations authorities, there was at least an 80 per cent chance that each of the Appellants' posts would have been reclassified at a higher level. The Appellants are only claiming just compensation for work already performed, from which the Organization benefited for over 15 years.

13. The Secretary-General has abused proceedings, caused delays and should be responsible for paying moral damages and legal costs. Over the last 20 years, the Secretary-General has imposed on the Appellants numerous vain attempts and recourses for reclassification of their posts, which should have ensured equality of treatment and salary in view of the Appellants' new complex duties, and created false expectations on reclassification by luring the Appellants into numerous administrative and judicial processes, while continuing to disregard the official procedures outlined in ST/AI/1998/9.

[15] *Fuentes v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-105.
[16] Ejaz & Elizabeth appeal brief, para. 31; Cherian & Cone appeal brief, para. 31.
[17] Cherian & Cone appeal brief, para. 32.
[18] *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

Accordingly, the Appeals Tribunal should sanction the Secretary-General's abuse of procedure which, since the first UNDT Judgment in 2010, has again deprived the Appellants of a just, timely and fair reclassification hearing and salaries commensurate with their duties.

14. Each of the Appellants request that the Appeals Tribunal:

a) affirm the UNDT's rescission order but vacate the UNDT's order remanding the case to the NYGSCAC;

b) award compensation in the sum of two years' net-base salary, or an amount equivalent to each Appellant's unpaid salary reclassification increase retroactive to the first of the month following receipt of the Appellant's classification request in October 2000;

c) award USD 50,000 for moral damages and violations of due process and one year's net-base salary for non-pecuniary losses, including delay, loss of promotion and distress throughout 12 years of protracted negotiations;

d) award compensation in the sum of one year's net base salary for non-pecuniary damages;

e) order costs in the sum of USD 20,000 for the Secretary-General's abuse of process before the NYGSCAC and the UNDT, evidenced by raising frivolous arguments intended to mislead the UNDT, including paying lip service to the procedures of ST/AI/1998/9 and principles of due process and continuously denying the due process violations; and

f) refer OHRM officials to the Secretary-General for accountability for the harm, damages and dilatory proceedings suffered by the Appellants.

The Secretary-General's Answer[19]

15. The Appellants have not clearly articulated their grounds of appeal. Their appeals do not clearly identify the errors of fact, law, jurisdiction, procedure or competence which

[19] The Secretary-General filed the same answer in all three appeals against the impugned Judgment. See *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622, paras. 16-23.

they allege may justify overturning or modifying the UNDT Judgment on the basis of Article 2(1) of the Appeals Tribunal Statute. While the Appellants make several assertions of errors by the UNDT, none establishes that the UNDT made any error such as to warrant a reversal of its decision to order the rescission of the contested decision of 8 June 2011, and to remand it for reasoned consideration. Nor have the Appellants identified any new harm that they say results specifically from the UNDT's decision to remand the classification appeal, and thus they have not shown any prejudice as a result of the UNDT Judgment. Rather, the Appellants seek to incorporate a long factual history and a petition to what they view as general unfairness, without regard to matters that have already been decided on in the course of these proceedings–which the UNDT correctly found to be *res judicata*– and compensation already awarded.

16. The UNDT properly exercised its authority to order a rescission and remand under Article 10(5)(a) of its Statute and in accordance with the jurisprudence of the Appeals Tribunal in *Baig et al.*, which held that "it is not the function of this Tribunal to stand in the shoes of the ASG/OHRM and involve itself in the decision-making process reserved for the ASG/OHRM".[20] The UNDT's decision to order the rescission of the decision and to remand the matter to the ASG/OHRM also comports with the Appeals Tribunal's jurisprudence which has generally deferred to the "broad discretion of the UNDT in the management of cases".[21] Further, the rescission and remand ordered by the UNDT present the best opportunity for the matter to be fully, finally and fairly determined on its merits, as well as reserves the Appellants' right to challenge any appealable decision after the classification appeal process has been completed.

17. Remand to the ASG/OHRM further advantages the Appellants because neither the Appeals Tribunal nor the UNDT is well placed to conduct a review of the merits of 24 reclassification appeals, particularly when, as the UNDT found, the information available before the remand was ordered was insufficient for a proper decision to be taken, and all the more considering that the Appeals Tribunal does not have the requisite technical expertise. It would also be neither appropriate nor expeditious for the UNDT or Appeals Tribunal to consider such matters *de novo,* particularly because the reclassifications

[20] *Baig et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 62.
[21] *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.

are already being considered under the remanded process. Accordingly, the interests of justice and judicial economy would be served by the present appeal being dismissed.

18. In the alternative, should the Appeals Tribunal decide to vacate the UNDT Judgment and examine the merits of the matter, recalling that a Tribunal's role is limited to a "judicial review of the exercise of discretion by the competent decision maker", it should uphold the ASG/OHRM's decision of 8 June 2011 not to reclassify the posts, and reject the Appellants' request for the emoluments they would have received had they been reclassified retroactively from October 2000. The NYGSCAC considered at length the merits of the classification appeals in May and June 2011, and the review procedure was comprehensive and correct in substance, regardless of any procedural shortcoming. The record shows that the NYGSCAC carefully considered all of the materials before it and individually reviewed each Appellant's job description on a case-by-case basis, and on its own merits, analysing each based on the applicable classification standards. The Appellants have not identified any specific error made by the NYGSCAC in considering the merits of their requests for reclassification.

19. The Appellants' contention that there was a high likelihood that the posts they occupied would be reclassified on the basis of "studies, reports and recommendations" is pure conjecture. There was no certainty that any Appellant would have been promoted even if his respective post had been reclassified. As each Appellant would have had to apply and compete against other qualified candidates for the reclassified post, and no material submissions regarding the merits of each Appellant's candidature were made, any compensation awarded on this basis would be speculative and thus contrary to the Appeals Tribunal's jurisprudence. Further, the Appellants did not mitigate their alleged loss, as they chose not to apply for the four reclassified posts announced in the Publishing Section in 2006, or to other posts.

20. In relation to damages, the UNDT correctly rejected the request for additional compensation for moral damages for the period from 2000 until 2009, on the basis that this was *res judicata*. Its finding should be upheld as the Appellants have already been paid compensation for losses until the date of the first UNDT Judgment issued in October 2010, which the Appellants did not appeal. As the process undertaken since then has been the result of compliance with the UNDT's lawful directions, it does not constitute delay. Further, the Appellants offered no persuasive evidence either before the UNDT or in their appeal to

show that they had suffered any moral injury since the first UNDT Judgment, nor did they establish how the claimed amount corresponded to any actual moral damages that they had suffered. The Appellants have failed to establish that the UNDT erred by not awarding them moral damages.

21. The Appellants' claim for USD 20,000 in costs should also be dismissed. It is unclear whether they allege the UNDT erred by declining to make such a finding, or request the Appeals Tribunal to make such a finding itself. However, the UNDT did not find any evidence of abuse of proceedings. The Appellants merely attempt to re-litigate the dismissal of their request for costs in the first UNDT Judgment, which they failed to appeal. Further, to the extent that costs are requested to "sanction the Respondent's pattern of abuse of procedure and dilatory proceedings", this would be punitive, and thus prohibited by both Tribunals' Statutes.

22. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeals in their entirety.

Considerations

Preliminary matter – request for oral hearing

23. Appellants Elizabeth, Cherian and Cone request an oral hearing in order that they may give evidence on financial harm and moral suffering, loss of salary and ancillary pension income since 2000, as well as anxiety, abuse and manipulation of proceedings by the Respondent. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute. Having regard to the submissions filed and the materials on record we do not think it is necessary to receive further evidence on appeal. The applications for an oral hearing are therefore denied.

Merits of the Appellants' claims

Applicable Law

24. Article 10 of the UNDT Statute provides, in part:

> 4. Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable

> administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.
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> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
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> (*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 for harm, supported by evidence, 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 for harm, supported by evidence, and shall provide the reasons for that decision.
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> 6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.
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> 7. The Dispute Tribunal shall not award exemplary or punitive damages.
>
> 8. The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

25. In ascertaining the most efficient manner in which to adjudicate these appeals involving a protracted classification review process spanning over 20 years, as well as how to remedy the situation, this Tribunal has carefully weighed all the facts, the applicable law, the arguments urged upon us and the particular circumstances of these Appellants.

26. In particular, Messrs. Ejaz and Elizabeth, who have since retired and separated from the Organization, cannot participate in the new NYGSCAC reclassification procedure ordered by the UNDT given that, as already recognized by the NYGSCAC in its 2011 report, OHRM's Classification Section has never completed the proper job description classification documents – i.e., a job description finalized by OHRM with its classification rating note – concerning the posts they held, a fact which the Respondent admitted before the UNDT.

27. Further, Mr. Cherian and Mr. Cone passed away in 2012, a fact of which the UNDT was aware, and their estates cannot participate in a new reclassification procedure before the NYGSCAC as the UNDT ordered. In the case of Mr. Cherian, he also did not have his job description finalized.

28. On 6 September 2011, the Appellants, together with the others in the Aly *et al.* group, filed a joint application with the Dispute Tribunal contesting the post reclassification decision made by the ASG/OHRM on 8 June 2011, based on the NYGSCAC recommendations of 7 June 2011, in which they challenged, in particular, the legality of the appointments to the NYGSCAC and its composition, as well as the resultant NYGSCAC report and its findings. By way of remedy, the Appellants sought pecuniary and non-pecuniary damages, as well as legal costs in the sum of USD 20,000 for abuse of proceedings. The Appellants did not expressly request either rescission of the contested decision or remand of the case to the NYGSCAC for reconsideration.

29. The Dispute Tribunal found the contested decision flawed and rescinded the ASG/OHRM decision of 8 June 2011, together with the NYGSCAC recommendations, and ordered a remand of Aly *et al.*'s case for a full and fair consideration of their grounds of appeal to the NYGSCAC, which was to make its recommendations to the ASG/OHRM for her final decision. The Dispute Tribunal, however, dismissed the request for compensation and costs.

30. The Appellants submit that the UNDT was correct to rescind the contested decision, but erred in law and procedure when it did not consider their peculiar circumstances by remanding their case to the NYGSCAC for reconsideration. They contend it is impossible for their job descriptions to be finalized, since not only Appellants Ejaz and Elizabeth, but also their supervisors, have all retired from the Organization, while Appellants Cherian and Cone have passed away. We find these reasons legitimate.

31. The Appellants seek rescission of the remand and compensation by way of unpaid salary reclassification increase or two years' net base salary and one year's net base salary for moral damages, costs of USD 20,000 against the Secretary-General for abuse of process at both the NYGSCAC and the UNDT.

32. Other than the above factual differences, the instant matter is, *prima facie*, similar to the related case disposed of by the Appeals Tribunal at this same 2016 Spring Session in *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622. The *Aly et al.* Judgment applies, *mutatis mutandis*, to the instant cases and, as such, paragraphs 30 to 51 thereof are adopted hereunder in their entirety:[22]

> ... Generally, the Appeals Tribunal defers to the broad discretion of the Dispute Tribunal in the management of its cases.[23] And the Appeals Tribunal has criticised the Dispute Tribunal for awarding damages when the Applicant has not requested it.[24] Similarly, the Appeals Tribunal defers to the discretion of the Dispute Tribunal to remand a case. While the Appeals Tribunal may reverse an award of damages in cases where a party has not made such a request, by parity of reasoning, it may likewise reverse the awards of damages of the Dispute Tribunal pursuant to its powers under Article 2(3) of our Statute.
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> ... The Appeals Tribunal has ruled that when a reclassification decision is found illegal and a remand is no longer available then compensation is owed by the Respondent:[25]
>
> > Generally, when the Administration's decision is unlawful because the Administration, in making the decision, failed to properly exercise its discretion and to consider all requisite factors or criteria, the appropriate remedy would be to remand the matter to the Administration to consider anew all factors or criteria; it is not for the Tribunals to exercise the discretion accorded to the Administration. However, in the present case, remand is not available because Mr. Egglesfield has retired from service with the Organization.
>
> ... In *Fuentes*, the Appeals Tribunal affirmed the Dispute Tribunal's order that the Secretary-General pay 24,500 Swiss Francs as compensation for the illegal decision not to reclassify her post.[26] The Dispute Tribunal noted that Ms. Fuentes had received no response to her appeal of the non-classification decision; that the Administration had failed to respect the procedures under ST/AI/1998/9; and that the decision not to reclassify her post was therefore illegal. The Dispute Tribunal held that since Ms. Fuentes had, in the meantime, been promoted, a remand could no longer offer a remedy to her position. The Appeals Tribunal approved the Dispute Tribunal's assessment of compensation:

[22] *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622, paras. 30-51.
[23] *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.
[24] *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009, para. 46.
[25] *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 27.
[26] *Fuentes v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-105, para. 32.

> ... [I]f the administration had, without unreasonable delay, made a decision on the applicant's request, she would have had a good chance of being appointed to a G-5 level post by January 2004 and so of being paid at that level. The damages suffered by the applicant must be calculated as follows: the difference in salary received between the G-4 and G-5 levels during the period from 1 February 2004 to 1 December 2009, on which date she was actually promoted to the G-5 level, an amount of 49,000 Swiss francs; in this case, however, that compensation shall be divided by two to reflect the fact that the damage suffered is only that of losing a good *chance* to receive the above-mentioned sum. The respondent is therefore ordered to pay the applicant the sum of 24,500 Swiss francs inclusive of interest.[27]

... Similarly in *Chen*,[28] the staff member was denied equal pay for equal work for many years. Her immediate supervisors tried to remedy the situation, but ran into bureaucracy and lack of funds. The Appeals Tribunal affirmed the decision of the Dispute Tribunal that the failure to apply the same job description to the Appellant's post as applied to posts with the same job description deprived the Appellant of her rightful opportunity to be considered for promotion. It also affirmed the decision to award her compensation calculated as the difference in salary allowances and other entitlements between her P-3 level and the P-4 level to which she was entitled from the time of her request for classification in August 2006 to the time of her retirement in December 2010, including the equivalent of the loss in pension rights.

... It is clear that the Appellants did not request a remand in their application. They rather contested the decision of the ASG/OHRM based on the recommendation of the NYGSCAC to maintain the classification of their posts following the remand of their case as per Judgment No. UNDT/2010/195 delivered on 29 October 2010. The remedy they were seeking was compensation in the sum of two years' net base salary or "an amount equivalent to the Appellant's unpaid salary reclassification increase *retroactive to the first of the month following receipt of the Appellant's classification request in October 2000*", in addition to compensation for non-pecuniary damages and costs.

... Contrary to the submission by the Secretary-General that a remand presents the best opportunity for having the matter fully, finally and fairly determined on its merits, the Appeals Tribunal is of the view that a second remand is unviable and unfair, having regard to the fact that the protracted classification review process in this case was mainly due to the reluctance and failure of the Administration to follow its own Regulations, Rules and administrative issuances. Furthermore, 11 of the 18 Appellants have retired and a remand in such cases could not offer an effective remedy. In addition, the Appellants claim that all their supervisors, who were competent witnesses in 2010, have also retired or are deceased.

[27] *Fuentes v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/064, para. 51.
[28] *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107.

... From the circumstances of this case, we are of the view that the Dispute Tribunal erred in failing to consider all the requisite factors, fair play and equity on the side of the Appellants who had been involved in a protracted classification review process, by remanding the case instead of awarding compensation, which would be the most effective remedy.

... It is not, in substance, disputed that there were massive procedural violations on the part of the Administration causing delays in dealing with the legitimate requests of the Appellants for reclassification of their posts, which, under normal circumstances, should have ensured an equality of treatment and salaries of the Appellants' new complex duties arising from the reorganization of the Publishing Section of DGACM and the downsizing of staff. The Secretary-General has not presented any evidence that there were any differences between the jobs of the Appellants and those of the 12 other staff members whose posts were reclassified. Rather, there was evidence that the supervisors of these Appellants had through the years supported and endorsed the need for the reclassification of their posts and that the Appellants had received written assurances.

... In our view, the delay and flawed processes cast a doubt on the readiness of the Administration to adequately and fairly consider, upon demand, the request for reclassification of the posts, which has been pending since 2004. Tolerating such a situation was a form of discrimination and humiliation.

... There was the need to uphold and ensure equal pay for equal work and to restore staff confidence in the United Nations system and also to reflect the quality of their duties and responsibilities of their respective posts. The Appeals Tribunal recognises that the delay and the difference in treatment of the Appellants resulted in inappropriate inequalities and in a violation of the principle of equal pay for equal work, which we have emphasized in *Tabari*: "Denial of pay is a violation of the principle of 'equal pay for equal work' which is a right granted under Article 23(2) of the Universal Declaration of Human Rights, which stipulates: 'Everyone, without any discrimination, has the right to equal pay for equal work".[29] The delay also violates the prohibition of discrimination embodied in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

... The Appellants, over the past twenty years, have consistently stated they performed functions exceeding their original job descriptions and the Administration has not disputed that statement. We hold that the Appellants had a right to request reclassification when the duties and responsibilities of their posts changed substantially as a result of the restructuring within their office, pursuant to Section 1.1(b) of ST/AI/1998/9.

[29] *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030, para. 17.

... The classification system is promulgated under the Staff Regulations and Rules and it is part of the conditions of employment for all staff members as the rules are incorporated by reference into all United Nations employment contracts.

... In reliance on Staff Regulation 2.1, the former United Nations Administrative Tribunal (Administrative Tribunal) consistently held that the classification of posts of staff members is part of their conditions of service,[30] and classification of a post is to be done according to its job description and failure to regularise the discrepancy between the level of classification and an employee's functions is a breach or a violation of a staff member's rights. The Administrative Tribunal Judgment No. 1113, *Janssen* (2003) on failure to implement a classification for budgetary reasons resulting in violation of the applicant's rights; the Administrative Tribunal Judgment No. 1136, *Sabet and Skeldon* (2003) on failure to carry classification to its conclusion in violation of the principles in Staff Regulation 2.1; and the Administrative Tribunal Judgment No. 1115, *Ruser* (2003) on failure to correct the discrepancy between the level of classification and the budget of the staff member's post are of relevant and persuasive authority.

... The decision by the Dispute Tribunal that it did not have the competence to decide on the Appellants' request for compensation equivalent to the difference in salary, allowance and other entitlements between their current posts' levels and the next level is an error of law. The Dispute Tribunal is not required to undertake the reclassification process before awarding damages. Once there was a breach or a violation of the rights of the Appellants, they were entitled to compensation and not a remand.

... The Dispute Tribunal has discretion under Article 10(5) of its Statute to award compensation where the circumstances, equity and justice of the case so demand. Article 10(5) empowers the Dispute Tribunal to rescind a contested administrative decision and to set an amount of compensation or both. The history of the case should have informed the Dispute Tribunal that another remand was not the appropriate remedy, and a more suitable remedy was required, which, in our opinion, is compensation. In fact, our jurisprudence so demands. As the Appeals Tribunal reiterated in *Chen*: "The Administration has an obligation to prevent such a violation. It did not and must pay the damages."[31]

... The Appellants have been involved in a series of vain and fruitless attempts and recourses for the reclassification of their posts. We are not saying their posts would have been reclassified or they would have been promoted had the proper procedure been followed; we are saying that if the classification had been done, the Appellants would have had the opportunity to be considered for the reclassified posts. In our view, this is the only possible conclusion from the facts of the case. The failure to apply the

[30] Former Administrative Tribunal Judgment No. 388, *Moser* (1987), para. XIV.
[31] *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, para. 25.

> same job classifications to the Appellants' posts as applied to posts with the same job descriptions deprived the Appellants of their rightful opportunity to be considered for the reclassified posts.
>
> ... It is correct that there is no automatic right to promotion to an upgraded post, but in this case, the Appellants performed the functions of the positions and the Organization has had the benefit of their performances at a lesser salary than that of their counterparts working under the same job descriptions.
>
> ... From the foregoing, we affirm the rescission by the Dispute Tribunal of the decision of the ASG/OHRM based on the recommendations of the NYGSCAC to maintain the classification of their posts.
>
> ... We, however, reverse the UNDT order to remand the case back to the NYGSCAC for reconsideration, and award the Appellants compensation for the violation of their rights.
>
> *Compensation*
>
> ... Pursuant to Article 9 of our Statute, as amended by General Assembly resolution 69/203, the Appeals Tribunal may award compensation in appropriate cases for harm supported by evidence, which shall not normally exceed the equivalent of two years' net base salary of the appellant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm supported by evidence, and shall provide reasons for that decision.
>
> ... The cap on compensation which shall normally not exceed the equivalent of two years' net base salary of the appellant does not apply where the violation of a staff member's rights is as egregious as in this case.[32] The facts and circumstances of this case are truly exceptional. This appeal raises fundamental issues of human rights concerning equal pay for equal work and prohibition of discrimination, which reflects negatively on the operations of the Administration in the reclassification process.
>
> ... Article 9(3) of our Statute prohibits exemplary or punitive damages. We will therefore not go too far beyond the cap ceiling.

33. Accordingly, we award compensation equivalent to three years' net base salary to each of the Appellants to be calculated by his salary in effect at the date of separation.

Judgment

34. The appeals are allowed, and Judgment No. UNDT/2015/031 is affirmed, in part, and reversed, in part. More specifically, the order of remand is reversed, and the

[32] *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433; *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

Secretary-General is ordered to pay compensation equivalent to three years' net base salary to each of the Appellants to be calculated by his salary in effect at the date of separation.

35. The compensation is to be paid within 60 days of the publication of this Judgment, failure of which will attract interest at five per cent in addition to the US Prime Rate.

36. All other claims are denied.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Adinyira, Presiding	Judge Chapman	Judge Faherty

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar