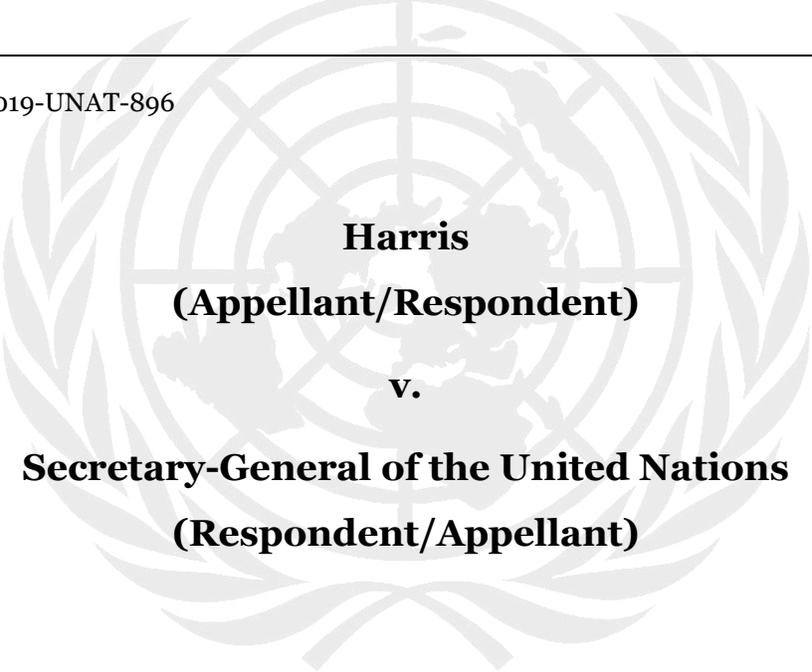




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-896



Harris
(Appellant/Respondent)
v.
Secretary-General of the United Nations
(Respondent/Appellant)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge Deborah Thomas-Felix
Case Nos.:	2018-1142 & 2018-1153
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Mr. Harris:	Self-represented
Counsel for the Secretary-General:	Francisca Lagos-Pola

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against Judgment No. UNDT/2017/094/Corr.1, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 15 December 2017, in the case of *Harris v. Secretary-General of the United Nations*.
2. Mr. Bryan Galakpai Harris filed his appeal on 16 January 2018 and perfected it on 24 January 2018, and the Secretary-General filed his answer on 26 March 2018. It was registered as Case No. 2018-1142.
3. On 13 February 2018, the Secretary-General also filed an appeal against Judgment No. UNDT/2017/094/Corr.1. Mr. Harris did not file an answer. It was registered as Case No. 2018-1153.
4. As the two appeals challenge the same UNDT Judgment, by Order No. 315 (2018), the Appeals Tribunal decided to consolidate them for all purposes.

Facts and Procedure

5. Mr. Harris joined the United Nations Interim Force in Lebanon (UNIFIL) on 23 September 2007 as an information technology assistant at the FS-4 level.
6. On 2 February 2016, Mr. Harris was informed that his contract would not be extended beyond 30 June 2016, due to changes in staffing in the budget for 2016/2017.
7. Starting from 17 March 2016, Mr. Harris did not report to work. Due to medical conditions and a surgery, he was subsequently placed on approved sick leave with effect from 21 March 2016 through 7 October 2016. In the meantime, on 23 June 2016, while on sick leave, Mr. Harris was informed of his promotion to FS-5 and his reassignment to UNIFIL's Sector East. This development rendered the earlier non-extension notice moot.
8. However, Mr. Harris did not report for duty in Sector East after his approved sick leave ended on 7 October 2016, though he attended an internal auditor training between October and November 2016 at UNIFIL's headquarters in Naqoura, Lebanon.

9. A meeting took place on 15 November 2016 between Mr. Harris, the Chief of the Regional Information and Communications Technology Services, the Chief of the Human Resources Management Section (HRMS), in which Mr. Harris was asked to explain and clarify why he did not report to work after 7 October 2016. Mr. Harris gave two reasons: i) he was not medically fit for duty in Sector East; and ii) he alleged that attempts were being made to destroy his career.

10. In a memorandum dated 29 November 2016, the Chief/HRMS, UNIFIL, warned Mr. Harris that his absence from work in Sector East from 16 November 2016 onwards was not authorized and urged him to report for duty immediately and/or provide a plausible explanation for his unauthorized absence. She informed Mr. Harris that his salary payment was being withheld for the period of his unauthorized absence and UNIFIL would proceed to initiate his separation from service for abandonment of post. Mr. Harris responded on the same day, stating that he was unable to work in Sector East. On 8 December 2016, he requested that the decision to reassign him to Sector East be rescinded.

11. Mr. Harris went on approved annual/home leave from 9 December 2016 to 3 January 2017, but again did not report to work thereafter.

12. In another memorandum dated 16 January 2017, the Chief/HRMS, UNIFIL advised Mr. Harris, as a final warning, that his continuing absence was not authorized and urged him to report to work immediately and/or provide a plausible explanation. She informed Mr. Harris that his salary payment had been put on hold effective January 2017 and UNIFIL would move forward with the process of his separation due to abandonment of post, if Mr. Harris failed to respond within 10 working days. Mr. Harris replied on 17 January 2017 expressing the view that he regarded the warning as part of the systematic threats to which he was subjected.

13. The record shows that, from 4 January 2017 to 22 January 2017, Mr. Harris absented himself from work in Sector East, and that he was granted certified sick leave from 23 January to 31 March 2017. However, he did not return to work thereafter. Mr. Harris' salary for January and February 2017 was put on hold for the purpose of recovering an education grant advance (USD 30,624.75) for the school year 2016-2017 and an education grant travel lump-sum payment (USD 1,629), both of which had been disbursed to Mr. Harris in respect of his son, who did not attend the approved school in the United States and did not travel as per the authorized route.

14. According to Mr. Harris, his health insurance policy lapsed effective 1 December 2016. It lapsed because no contributions were being made towards Mr. Harris' insurance premiums after he had been placed on Special Leave without Pay (SLWOP).¹

15. On 8 February 2017, the UNIFIL Administration ceased the proceedings in respect of abandonment of post against Mr. Harris, upon receipt of a medical leave certificate issued by the Medical Services Division (MSD) covering the period from 28 January 2017 to 17 February 2017, subsequently extended through 31 March 2017.

16. Two personnel actions were raised, both dated 27 February 2017, to show that Mr. Harris was retroactively placed on SLWOP from 8 October 2016 to 8 December 2016 and from 4 January 2017 to 22 January 2017 due to unauthorized absence. According to the Secretary-General, the two personnel actions were communicated to Mr. Harris in an e-mail dated 3 March 2017. There was subsequently a recovery of the salary already paid to Mr. Harris for those two periods. It is not clear when the recovery action was taken. But according to the Secretary-General, it could not have occurred before 27 February 2017.

17. After his service was terminated for abandonment of post effective 13 July 2017,² Mr. Harris sought management evaluation, and then filed an application to the Dispute Tribunal. The subject matters of his appeal were the withholding of his salary and the cancellation of his health insurance.

18. In the impugned Judgment, the Dispute Tribunal found that the Organization had lawfully recovered from Mr. Harris the payments made in advance in respect of the education grant and the education grant travel. The UNDT further found that the Organization had lawfully placed Mr. Harris on SLWOP from 16 November 2016 to 8 December 2016 and again from 4 January 2017 to 22 January 2017, as he had absented himself from work in Sector East without proper authorization and failed to heed the advice and requests sent to him regarding his health insurance. However, the UNDT found that it was an error to withhold Mr. Harris' salary

¹In several e-mail messages sent between 16 March 2017 and 20 March 2017, the UNIFIL Administration reminded Mr. Harris that he needed to reactivate his medical and life insurance or he would face the risk of having no insurance coverage. But Mr. Harris did not take appropriate steps to restore his medical and life insurance. According to information, Mr. Harris' insurance was reinstated as of 1 July 2017.

² Mr. Harris also appealed the decision to terminate his service on the ground of abandonment of post to the Dispute Tribunal. On 15 December 2017, the Dispute Tribunal dismissed his application (Judgment No. UNDT/2017/095/Corr.1). Mr. Harris appealed that judgment to the Appeals Tribunal. See Judgment No. 2019-UNAT-897, also issued during the 2019 Spring Session.

from 8 October 2016 to 15 November 2016 because his unauthorized absence was effective as of 16 November 2016.

19. Regarding the suspension of Mr. Harris' health insurance, the UNDT found that Mr. Harris had failed to take appropriate steps to reinstate the coverage, thus allowing his health insurance to lapse, "because of his own fault and not because of any unlawful action by the Organization".³

20. The Dispute Tribunal consequently ordered reimbursement to Mr. Harris of his salary withheld for the period from 8 October 2016 to 15 November 2016. It also ordered payment to Mr. Harris of moral damages in the amount of USD 3,000 for the harm that he suffered as a result of the erroneous recovery of his salary. While Mr. Harris did not specifically refer to moral damages as one of his remedies in his UNDT application, the Dispute Tribunal inferred a plea for moral damages from the entirety of Mr. Harris' application, including a medical certificate and the fact that Mr. Harris was self-represented.

21. As noted above, both parties appealed against the impugned Judgment.

22. On 11 April 2018 and 21 May 2018, Mr. Harris filed several motions seeking postponement of the consideration of his appeals, initially for six months, and then further to the Appeals Tribunal's 2019 Spring Session. By Order Nos. 320 (2018) and 324 (2018), the Appeals Tribunal twice granted his motions for postponement to give him time to find legal assistance in further prosecuting his appeals and in adducing additional evidence.

23. On 21 May 2018, the Secretary-General filed a motion requesting that the Appeals Tribunal order Mr. Harris to refrain from outside communication with the Secretary-General's Counsel. In Order No. 325 (2018), the Appeals Tribunal instructed Mr. Harris to refrain from all outside communications with Counsel for the Secretary-General other than by way of submissions to the Appeals Tribunal in the proceedings for the present case among others.

³ Impugned Judgment, para. 19.

24. On 24 January 2019, Mr. Harris filed a motion “requesting in-person hearing for UNAT Case Nos. 2018-1142, 2018-1145 & 2018-1153”. On 20 February 2019, the Registry confirmed to Mr. Harris that his request for an oral hearing was denied as he had been previously advised.

Submissions

Mr. Harris’ Appeal

25. Mr. Harris states that the Dispute Tribunal “erred on the question of facts, and greatly ignored evidence”. Moreover, the Dispute Tribunal failed to assess the “intentional falsification” of Mr. Harris’ attendance records, which led to the contested decisions.

26. The Dispute Tribunal “erred in the interpretation of UNIFIL’s decision to withhold [his] salary” and to suspend his health insurance. Its approach was inconsistent with four UNDT judgments and one Appeals Tribunal judgment.⁴ He was on approved sick leave and had accumulated 43 days of annual leave balance, 28 days of compensatory time off and 195 days of sick leave with half pay. The alleged unauthorized absence was caused by reasons beyond his control and it should have been charged to his accrued annual leave. The contested decisions were the result of the abuse of the Secretary-General’s discretionary power.

27. The Dispute Tribunal’s award of USD 3,000 as moral damages was “disproportionate” to the level of psychological and physical impact on Mr. Harris’ and his family’s lives.

⁴ Mr. Harris cites four UNDT Judgments: *Hersh v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/062 (The UNDT Judgment was appealed. In Judgment No. 2014-UNAT-433, the Appeals Tribunal reduced the Dispute Tribunal’s two-year net base salary as alternative compensation and 16-month net base salary for substantive and procedural irregularities to two years and six months net base salary.); *Appleton v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/125 (On appeal, the Appeals Tribunal affirmed the Dispute Tribunal’s award of USD 30,000 as moral damages, see Judgment No. 2013-UNAT-347.); *Maslei v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/041 (The Dispute Tribunal’s award of six-month moral damages was affirmed in Judgment No. 2016-UNAT-637.); and *Roberts v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/020 (The Dispute Tribunal’s award of USD 10,000 moral damages was affirmed by the Appeals Tribunal in Judgment No. 2016-UNAT-614.) Mr. Harris also cites *Andersson v Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, in which the Appeals Tribunal affirmed the Dispute Tribunal’s award of CHF 4,000 as moral damages.

28. Mr. Harris requests that the Appeals Tribunal hold an oral hearing. He also requests that the Appeals Tribunal “subpoena the Field Personnel Division and other concerned authorities for the detailed record” related to the taking of the contested decisions. Mr. Harris is seeking, as compensation, 24-month gross salary and after-service health insurance.

The Secretary-General’s Answer

29. Mr. Harris has failed to show any reversible error. He makes general assertions without identifying what evidence was ignored, which findings of facts he is disputing, and how they may have resulted in a manifestly unreasonable decision.

30. Mr. Harris’ submissions are a reiteration of the claims that he made before the UNDT. Mr. Harris is not challenging the UNDT Judgment, but he is expressing disagreement with the judgment and seeking a new trial on the merits. His claims fail to satisfy the requirements of Article 2(1) of the Statute of the Appeals Tribunal, as they do not constitute a ground upon which to appeal an UNDT judgment.

31. Mr. Harris has failed to establish that the UNDT’s award of compensation should be increased. In support of a higher compensatory award, Mr. Harris attaches three medical certificates. Only one of them (dated 9 February 2017) was part of the records before the UNDT, whereas the other two (dated 16 January 2017 and 14 April 2017) were not. The medical certificates of 16 January 2017 and 14 April 2017 thus constitute additional evidence. But they may not be admitted, because Mr. Harris has not asked the Appeals Tribunal for leave to submit them. Moreover, he knew of the existence of those two certificates and should have presented them at the time he filed his UNDT application in August 2017, and not at this stage of the proceedings.

32. In support of a higher compensatory award, Mr. Harris cited a number of UNDT and Appeals Tribunal judgments, in which the two tribunals ordered compensation for moral damages higher than USD 3,000. However, he does not elaborate how the Dispute Tribunal’s award of USD 3,000 in his case is inconsistent with those cited judgments. A mere listing of cases does not satisfy his burden to persuade the Appeals Tribunal that the impugned Judgment is defective, and the award of compensation should be increased.

33. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Harris’ appeal.

The Secretary-General's Appeal

34. The Secretary-General's appeal is limited to the issue of moral damages. He does not contest the UNDT order to reimburse Mr. Harris for the salary withheld for the period from 8 October 2016 to 15 November 2016. The appeal may be summarized as follows.

35. The Dispute Tribunal erred in fact and law and exceeded its competence in awarding Mr. Harris moral damages. It did not have jurisdiction to award compensation for moral damages *sua sponte* because Mr. Harris had not made any such request. UNDT's inferring a plea for moral damages from Mr. Harris' application is contrary to the established jurisprudence of the Appeals Tribunal.

36. As he was not notified of a potential award for moral damages, the Secretary-General did not have the opportunity to submit any arguments in response before the Dispute Tribunal. The Dispute Tribunal's award of moral damages in this manner constitutes a breach of the Secretary-General's due process rights.

37. There is no evidence on record to support the Dispute Tribunal's finding of moral harm. The Dispute Tribunal relied on the 9 February 2017 medical certificate, which diagnosed Mr. Harris with major depressive disorder said to be exacerbated by "work related distress" as "sufficient evidence" to prove that the decision to withhold his January 2017 salary as part of recovery of salary payments to Mr. Harris for the period from 8 October 2016 to 15 November 2016 contributed to the extent and severity of the harm that Mr. Harris suffered. That was incorrect. The withholding of Mr. Harris' January 2017 salary was related to the recovery of the education grant advances that Mr. Harris had received on behalf of his son. The decision to place Mr. Harris on SLWOP, on the other hand, was taken on 27 February 2017 and communicated to Mr. Harris on 3 March 2017. As the decision to place him on SLWOP was taken after 9 February 2017, the date of the medical certificate that Mr. Harris submitted to the Dispute Tribunal, his depressive disorder could not have been triggered and exacerbated by the recovery of his salary which could have occurred only after 27 February 2017.

38. The Secretary-General requests that the Appeals Tribunal vacate the Dispute Tribunal's award of USD 3,000 for moral damages.

Considerations

Preliminary issues

Oral hearing

39. Mr. Harris filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. Accordingly, the request for an oral hearing is denied.

Merits

40. The issues to be determined by the Appeals Tribunal in the present opposing appeals are the following:

- i. Did the UNDT err in law or fact resulting in a manifestly unreasonable decision when it found that the decision to withhold Mr. Harris’ salary from 8 October 2016 to 15 November 2016 was unlawful?
- ii. Did the UNDT err in law or fact by finding that the cancellation of Mr. Harris’ health insurance was his failure to do so that had allowed his health insurance coverage to lapse?
- iii. Did the UNDT err in law in awarding Mr. Harris USD 3,000 for moral damages?

The Appeals Tribunal will address these questions in turn.

41. The applicable law on these matters is as follows. Staff Rule 5.1(e)(ii) provides:

Leave may be taken only when authorized. If a staff member is absent from work without authorization, payment of salary and allowances shall cease for the period of unauthorized absence. However, if, in the opinion of the Secretary-General, the absence was caused by reasons beyond the staff member’s control and the staff member has accrued annual leave, the absence will be charged to that leave[.]

42. Staff Rule 5.3 on special leave provides insofar as it is material:

(f) In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization.

(g) Continuity of service shall not be considered broken by periods of special leave with or without pay. However, staff members shall not accrue service credits towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay exceeding one month. Periods of special leave with partial pay or without pay exceeding one month shall not be counted towards accrued years of service for eligibility requirements for a continuing appointment.

43. Staff Rule 6.2(f) and (g) concerning the submission of medical certificates provides:

(f) Staff members shall inform their supervisors as soon as possible of absences due to illness or injury. They shall promptly submit any medical certificate or medical report required under conditions to be specified by the Secretary-General.

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director. When, in the opinion of the United Nations Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule.

44. Paragraphs 9-11 of ST/AI/400 (Abandonment of post) provide:

9. Supervisors must report all unauthorized absences to the relevant executive or administrative officer, or the local personnel office in offices away from Headquarters, not later than the end of the fourth day of such absence. The executive or administrative officer should then endeavour to contact the staff member concerned by telephone or by any appropriate means, failing which a written communication should be addressed to the staff member at his or her last known address requesting him or her to report for duty or to provide a plausible explanation for his or her absence. In cases of claimed illness, the executive or administrative officer should call the staff member's attention to the requirements of subparagraphs (v)-(vii) of staff rule 106.2 (a) ...

10. Unless the executive or administrative officer receives a medical certificate or plausible explanation for the absence within 10 working days he or she shall refer the matter to the appropriate personnel officer, who should address a further written communication, by registered mail, personal delivery, or other appropriate means, calling the staff member's attention to the earlier attempts to contact him or her and the absence of an appropriate response. The communication should remind the staff member of the provisions of staff rule 105.1 (b) (ii), under which payment of salary and allowances shall cease for the period of unauthorized absence. It should allow a further period of up to 10 working days for reporting to duty or submission of a medical certification or plausible explanation and should warn the staff member that failure to do so would be considered abandonment of post and would lead to separation on that ground.

11. It is the responsibility of staff members to inform their supervisors of absences, whether owing to illness or injury or any other cause. It is also the responsibility of staff members to keep the Organization informed of their current address and the person to be notified in case of accident or emergency. If, despite due diligence on the part of the Organization, the staff member cannot be reached or contacted, either in person, by registered letter or other reliable form of communication to the address most recently provided by the staff member, or through family or friends, receipt of such notice will be deemed to have occurred.

45. Paragraph 38 of Information Circular ST/IC/2016/13 (Renewal of the United Nations Headquarters-administered health insurance programme), which came into effect on 1 July 2016, relates to health insurance coverage for staff on SLWOP. It provides:⁵

38. Staff members granted special leave without pay are reminded that they may retain coverage for medical and dental insurance during such periods or may elect to discontinue such coverage for the period of the special leave, under the following conditions:

(a) **Insurance coverage maintained during special leave without pay.** If the staff member decides to retain coverage during the period of special leave without pay, the Health and Life Insurance Section must be informed directly by the staff member in writing of his or her intention at least 31 days in advance of the commencement of the special leave. At that time, the Health and Life Insurance Section will require evidence of approval of the special leave, together with payment covering the full amount of the cost of the coverage(s) retained (i.e. both the staff member's contribution and the Organization's share, since no subsidy is payable during such leave).

⁵ Bold in original.

(d) Re-enrolment upon return to duty following special leave without pay.

Regardless of whether a staff member has decided to retain or drop insurance coverage(s) during a period of special leave without pay, it is essential that he or she re-enroll in the plan(s) through the Umoja employee self-service portal, if a United Nations staff member, or by e-mail with a completed and signed application form, if a staff member of a United Nations agency, upon return to duty. This must be done within 31 days of return to duty. There is no automatic reinstatement of coverage following return from special leave without pay. Failure to reenroll will result in the staff member being unable to resume participation in the insurance plan(s) until the next annual enrolment campaign. The staff member will be allowed to re-enroll only under the health insurance plan and coverage type in which he or she was insured prior to taking leave, in accordance with paragraph 35 (d) above.

46. Section 2 of ST/AI/2011/4 (Education grant and special education grant for children with a disability) provides:

Eligible staff members may claim the education grant when the following conditions are met:

- (a) The child is in full-time attendance at an educational institution at the primary level or above while the staff member is in the service of the United Nations. Education shall be deemed 'primary' for the purposes of this instruction when the child is five years of age or older at the beginning of the school year, or when the child reaches age five within three months of the beginning of the school year. Exceptionally, a lower minimum eligibility age for receipt of the education grant could be accepted if laws at a specific location mandated an earlier start of formal education;
- (b) The entitlement shall terminate when the child ceases to be in full-time attendance at an educational institution or completes four years of post-secondary studies. ...

47. Section 6 of ST/AI/2011/4 provides insofar as it is material:

6.2 Any paid advance shall be considered as due from the staff member until the education grant claim has been received and processed or is recovered from the staff member. Staff members are required to submit their claims for payment of the grant promptly, as required by section 7.1 of the present instruction. Recovery from the staff member's emoluments shall take place after the third and fourth month of the end of the academic year with regard to Headquarters and field staff, respectively, or on separation from service. Similar arrangements will be made for staff on other payrolls.

48. Section 8 of ST/AI/2011/4, which concerns education grant travel, provides:

8.1 Staff members eligible for education grant travel under staff rule 3.9 (g) shall be entitled to travel expenses for the child for one round trip each scholastic year between the educational institution and the duty station, subject to conditions set out below:

(a) The child's attendance at the educational institution is at least two thirds of the school year;

(b) The travel is undertaken during, or immediately before and after the school year;

(c) The child spends at least seven days at the duty station;

(d) Travel expenses may not exceed the cost of travel between the staff member's home country and his or her duty station. ...

Lawfulness of the decision to withhold the salary

49. Before embarking on a consideration of the specific arguments made on appeal in this case, it is apposite to reprise the jurisprudence of the Appeals Tribunal as to how we handle the appellate proceedings.

50. Our Statute provides, in Article 2(1), that the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) exceeded its jurisdiction or competence; (b) failed to exercise the jurisdiction vested in it; (c) erred on a question of law; (d) committed an error of procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision.

51. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal's Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It

follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.⁶

52. On appeal, Mr. Harris appears to be restating the claims which he made before the UNDT. He has not identified any of the above grounds in his appeal and has failed to demonstrate that the UNDT committed any error of fact or law in arriving at its decision.

53. Moreover, we have reviewed the UNDT Judgment and find that Mr. Harris' case was fully and fairly considered; we can find no error of law or fact in its decision. Indeed, in the circumstances, we find that no evidence has been presented to the Appeals Tribunal by Mr. Harris to support the contention that his case was not given full and fair consideration and the decision of the Secretary-General should therefore be rescinded.

54. We uphold the reasoning of the UNDT set forth in its Judgment:⁷

... It is apparent from the foregoing factual findings that the Applicant did not act diligently in ensuring that any absenteeism due to sickness was promptly reported to his managers and supported by the appropriate medical certificates in accordance with staff rule 6.2(f) and section 11 of ST/AI/400. The record shows however that UNIFIL HRMS deemed the Applicant's unauthorized absence to be effective as of 16 November 2016 thus it was erroneous for his salary to be withheld from 8 October to 15 November 2016.

... The record shows that the managers concerned acted appropriately and in accordance with the obligations placed on them by sections 9 and 10 of ST/AI/400 to ensure that the Organization's rules governing absenteeism due to ill health were properly followed. Given the fact that the Applicant absented himself from work in Sector East without proper authorization and failed to heed the advice and requests sent to him, it cannot be said that the Organization acted unlawfully in taking steps to place him on SLWOP. Moreover, it was lawful for the Organization to take steps to recover payments made in advance in respect of education grant and travel in circumstances where such advances were not utilized for the purpose for which they were granted.

⁶ *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30, citing *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15; and *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

⁷ Impugned Judgment, paras. 16-17.

Cancellation of health insurance

55. Further, turning to the cancellation of Mr. Harris' health insurance, the Appeals Tribunal finds no reason to differ from the UNDT's finding that Mr. Harris did not make the appropriate payments to reinstate his health insurance coverage, thus allowing his health coverage to lapse because of his own default and not because of any unlawful action by the Administration. Indeed, as evidenced from the record, although Mr. Harris was advised on 16 and 18 March 2017 by the Administration (HRMS/UNIFIL) that he should take appropriate steps to reinstate his insurance coverage, he did not do so. Hence, the principle of *volenti non fit injuria* applies and he should not blame the Administration for his own fault, since it was incumbent upon him to pay the premiums required.

56. It is obvious that Mr. Harris was not satisfied with the UNDT's decision. He has failed, however, to demonstrate any error in the UNDT's finding that the Administration's decision to withhold his salary from 16 November to 8 December 2016 and from 4 January to 22 January 2017 and the cancellation of his health insurance were lawful, by proffering evidence that these decisions were unreasonable, resulted from an invalid exercise of the discretionary power of the Administration and/or were tainted by improper motives or otherwise unlawful. He merely voices his disagreement with the UNDT's findings and resubmits his submissions to this Tribunal. He has not met the burden of proof of demonstrating an error in the impugned Judgment such as to warrant its reversal.⁸

57. Based on the foregoing, Mr. Harris' appeal is dismissed.

Award of moral damages

58. As to the issue of the award of moral damages by the UNDT, this Tribunal holds that the UNDT erred in law and exceeded its competence by awarding compensation in the amount of USD 3,000 for moral damages without Mr. Harris having made a previous claim for such damage and compensation.

⁸ *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236, para. 37. See also *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 27; *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30.

59. Article 10(5) of the UNDT Statute provides:

As part of its judgement, the Dispute Tribunal may only 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 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, supported by evidence, and shall provide the reasons for that decision.

60. As we held in *Rantisi*,⁹

... The UNRWA DT therefore has the statutory discretion to order remedies under sub-paragraph (5)(a) or (5)(b) of Article 10 or both, so that, for example, the compensation referred to in sub-paragraph (5)(b) can represent an additional remedy to rescission/specific performance (or mandatory compensation in lieu thereof where the issue relates to appointment, promotion or termination) ordered pursuant to subparagraph (5)(a). Yet again, compensation under Article 10(5)(b) can constitute the independent sole remedy where the UNRWA DT decides rescission or specific performance of a contested administrative decision is not appropriate or merited. Equally, rescission or specific performance can constitute the sole remedy awarded save the mandatory requirement to set an alternative compensation under Article 10(5)(a). The decision on remedy is quintessentially a matter for the first instance Tribunal, having regard to the circumstances of each particular case and the constraints imposed by its governing Statute.

⁹ *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 53; see also, *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 24.

61. The Dispute Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings,¹⁰ as well as non-pecuniary damage, procedural violations, stress, and moral injury.¹¹ It is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. Our case law requires that the harm be directly caused by the administrative decision in question.¹² If these other two elements of the notion of responsibility are not justified, only the illegality can be declared but compensation cannot be awarded.¹³

62. The Dispute Tribunal is not competent to award compensation of the specific kind, namely for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury, without a previous claim for such damage and compensation.¹⁴ If no request for such compensation is made, the Dispute Tribunal lacks jurisdiction to award this kind of compensation *sua sponte*.

63. In his submissions to the UNDT and specifically at Section VII of his application, Mr. Harris claimed that: a. “The wrongful execution of the Special Leave without pay at such critical time when I was undergoing severe stress disorder treatment, endangered my life and that of my family, pushing us into financial hardship, hence, further deteriorating my health”; and b. “In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), my rights were grossly violated, not to mention the impact of the physical and psychological impact [I] and my family will have to live with.”

¹⁰ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16, citing *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, and citations therein.

¹¹ *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21, citing *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26; *Nyakossi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-254, para. 18, citing *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 21.

¹² *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21, citing *Diatta v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-640; *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277.

¹³ *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277, para. 24.

¹⁴ *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 20, citing *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 19. See also *Ten Have v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-599, para. 15.

64. Any fair and objective reading of Mr. Harris' submissions clearly shows that he did not seek, by way of relief, any kind of compensation for loss of earnings or moral damages for the alleged illegality to which the Administration had subjected him. He did not even mention, in his pleas before the UNDT, the above stated provisions of the UNDT Statute regarding the specific remedy of compensation. He just pointed to the financial hardships he faced due to the illegality of the Administration's actions and to the harm, physical and psychological, incurred by him and his family therefrom.

65. The UNDT held that:¹⁵

... The Applicant, a self-represented staff member who does not necessarily understand the nuances of drafting pleadings, did not specifically refer to moral damages as one of his remedies in his application. However, taking into account the entirety of his application and the matters raised in Section VII of his application it is clear that he is raising the issue of moral damages for the harm suffered. Any other interpretation will not only be unjustified on the evidence before the [Dispute] Tribunal but it will be placing an unnecessary burden on self-represented staff members. The [Dispute] Tribunal has the duty to construe the application as a whole bearing in mind that it would be unusual for the majority of self-represented staff members to present an application that is a model of fine legal drafting.

66. We do not agree. Under the aforementioned circumstances, regrettable though it is and sad for Mr. Harris, who suffered physically and psychologically from the injustice to his case as a result of the erroneous withholding of his salary from 8 October to 15 November 2016, the UNDT could not supplant, and should not have supplanted, *proprio motu*, the absence of any request for moral damage.

67. As acknowledged by the UNDT, Mr. Harris plainly did not make, at the time of expressing his concrete pleas, any specific request for compensation for moral damages. Any other way of reading Mr. Harris' submissions, namely by expanding the scope of the relief sought through his application to the first instance Tribunal so as to cover a request for damages, as the UNDT did in the present case, would prejudice due process of law, affecting the ability of the opposing party to effectively answer his petition that failed to explicitly refer to the specific kind of damage or request adequate compensation for it.¹⁶

¹⁵ Impugned Judgment, para. 21.

¹⁶ *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 22.

68. Therefore, in the present case, as Mr. Harris had not first requested it, the UNDT did not have, as the Secretary-General correctly argues on appeal, jurisdiction to award compensation for moral damages in the sum of USD 3,000.

69. Accordingly, the Secretary-General's appeal is granted and the UNDT order for compensation for moral damages in the sum of USD 3,000 is hereby vacated for the abovementioned reasons.

Judgment

70. The Secretary-General's appeal is granted and Mr. Harris' appeal is dismissed. We hereby set aside the order in Judgment No. UNDT/2017/094/Corr.1 for an award of moral damages in the sum of USD 3,000. The remainder of the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Thomas-Felix

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar