



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CIVIC

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Daniel Trup, OSLA

**Counsel for the Respondent:**  
Steven Dietrich, AAS/ALD/OHR

## **INTRODUCTION**

1. The Applicant, a former staff member of the United Nations Mission in Liberia (UNMIL), filed an application on 24 May 2017 contesting her “constructive dismissal” due to her supervisor’s decision to “deprive her of all her core functions”.

2. The Respondent filed a reply on 23 June 2017 and an amended reply on 15 July 2019 in which he argued that the application is moot because the Applicant had received the relief she had requested, i.e., the Organization had ensured extension of her appointment until she took up another employment.

3. The Applicant subsequently amended the remedies sought in her application, from rescission of the impugned decision to a grant of compensation for loss of opportunity and moral damages.

4. The Tribunal held a hearing between 7 and 10 October 2019 to hear oral evidence on the issue of compensation. In support of the Applicant’s case, evidence was given by: the Applicant; Mr. Erich Ball, the then Dep. Director of Mission Support, UNMIL; Mr. Douglas Hansen, former Judicial Affairs Officer, UNMIL; and Ms. X who was also in the Rule of Law Pillar. In support of the Respondent’s case, evidence was given by: Ms. Chhaya Kapilahrjami, the then Director of the Field Personnel Division, Department of Field Support (FPD/DFS) and Mr. David Penklis, the then Director of Mission Support (DMS), UNMIL.

## **FACTS**

5. The facts below are based on the parties’ pleadings and additional submissions and oral evidence given by witnesses during the hearing.

6. The Applicant joined UNMIL in 2015 as the D-1 Senior Advisor to the Special Representative of the Secretary-General (SRSG) and the Deputy Special Representative of the Secretary-General (DSRSG)/Rule of Law, Mr. Waldemar Vrey, with a subject matter expertise in rule of law. Mr. Vrey was her supervisor and First Reporting Officer (FRO). She managed two separate judicial affairs

positions, the corrections advisory service and the security sector reform unit. Approximately 75 personnel reported to her.<sup>1</sup>

7. UNMIL established the Rule of Law and Security Institutions Support Service (ROLSISS) on 1 July 2016 to streamline its activities in security sector reform, judicial affairs/justice and corrections.<sup>2</sup> The Applicant's functional title became Principal Rule of Law Officer, D-1, and head of ROLSISS.<sup>3</sup> She was responsible for coordination and oversight of ROLSISS' activities and management of its staff members.<sup>4</sup> Her supervisory/managerial roles did not change with the establishment of ROLSISS.<sup>5</sup>

8. The Security Council, by its resolution 2333 (2016) of 23 December 2016, redefined and extended UNMIL's mandate for a final period until 30 March 2018 and requested the withdrawal of all uniformed and civilian components, except those required for liquidation, by 30 April 2018. The resolution shifted UNMIL's justice and security functions from capacity-building<sup>6</sup> to strategic advice and emphasized the need to accelerate the transfer of UNMIL's tasks in human rights monitoring, rule of law, national reconciliation and security sector reform to the government and the United Nations Country Team.

9. The Applicant's evidence was that after the SRSG introduced the new mandate to the leadership meeting on 30 December 2016, Mr. Vrey informed her of his intention to abolish ROLSISS and all posts in ROLSISS, including hers, and told her that maybe "out of the goodness of his heart, he might keep [her] or others on for a little longer". In January 2017, Mr. Vrey cancelled the Applicant's completed e-PAS for the 2015/2016 performance period in Inspira. This was the only performance document she had at the time. Additionally, Mr. Vrey failed to complete her 2016/2017 e-PAS.<sup>7</sup>

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<sup>1</sup> Applicant's oral evidence on 7 October 2019.

<sup>2</sup> Application, para. 4.

<sup>3</sup> Applicant's oral evidence on 7 October 2019.

<sup>4</sup> Reply, page 2; application, p. 1.

<sup>5</sup> Applicant's oral evidence on 7 October 2019.

<sup>6</sup> S/RES/2239 (2015), para 9.

<sup>7</sup> Applicant's oral evidence on 7 October 2019.

10. In line with S/RES/2333, the Under-Secretary-General for Peacekeeping Operations (USG/DPKO) instructed UNMIL on 19 January 2017 to: adjust its staffing structure, reporting lines and personnel numbers to reflect the implementation of the new mandate; discontinue non-mandated functions by 31 March 2017; discontinue all mandated tasks by 31 March 2018; and ensure full closure of the mission by 30 June 2018.<sup>8</sup>

11. By email dated 13 February 2017, Mr. Vrey informed the Applicant of the discontinuation of ROLSISS, in accordance with S/RES/2333 and the USG/DPKO's directive.<sup>9</sup>

12. On 25 March 2017, Mr. Vrey instructed the Applicant to complete the closure of ROLSISS by 31 March 2017 and to transfer the justice, corrections and security sector reform components to his office and to the United Nations Police (UNPOL).<sup>10</sup> According to Ms. Kapilahsrami, although the functions of ROLSISS were abolished in March 2017, the mission decided to extend the appointments for all staff members in the section, including the Applicant's, until 30 June 2017, which was the end of the budget cycle.<sup>11</sup> Consequently, the Applicant's contract was extended from 1 April to 30 June 2017.<sup>12</sup>

13. The Applicant was removed as the head of ROLSISS on 31 March 2017.<sup>13</sup> The Applicant's evidence was that while she retained her functional title, she was assigned no formal duties after ROLSISS was disbanded. She volunteered for assignments as she could find them, but they were never formally assigned to her. She included these assignments in her 2017/2018 e-PAS after the fact just to have an e-PAS.<sup>14</sup> On this issue, the Respondent's case is that the Applicant's 2017/2018 e-PASes are proof that she had been assigned formal duties by the mission.<sup>15</sup>

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<sup>8</sup> Code cable number 0102 dated 19 January 2017.

<sup>9</sup> Reply, annex R3.

<sup>10</sup> Reply annex R4.

<sup>11</sup> Ms. CK's oral evidence on 9 October 2019.

<sup>12</sup> Amended reply, p. 3.

<sup>13</sup> Applicant's oral evidence on 7 October 2019.

<sup>14</sup> Ibid.

<sup>15</sup> Amended reply, annex R10.

14. Between 25 March and 10 April 2017, there was communication between the Applicant and Mr. Vrey as to the best way to utilize her expertise between April and June 2017.<sup>16</sup> This communication ceased following the Applicant's complaint of retaliation against Mr. Vrey to the United Nations Ethics Office (UNEO) on 3 April 2017 and, on 7 April 2017, her request for management evaluation of Mr. Vrey's 25 March 2017 decision. The impugned decision was upheld after review by the Management Evaluation Unit.<sup>17</sup>

15. On 1 May 2017, the UNEO informed the Applicant that she had established a prima facie case of retaliation. The UNEO referred the complaint to the Office of Internal Oversight Services (OIOS) for investigation.<sup>18</sup>

16. On 16 May 2017, the UNEO informed the Secretary-General that it had found a prima facie case of retaliation and recommended that the administration undertake remedial actions for the Applicant.<sup>19</sup> In this context, FPD/DFS was directed to: (i) facilitate the extension of the Applicant's appointment pending completion of the OIOS investigation; and (ii) identify a different FRO for the Applicant's e-PAS completion and for the Applicant to be assigned to a different reporting line.<sup>20</sup>

17. On 11 July 2017, FPD/DFS sought the Controller's approval to implement the UNEO's recommendation to extend the Applicant's appointment until the completion of the OIOS's investigation.<sup>21</sup> The Controller approved the creation of a general temporary assistance funded position at the D-1 level to allow the Applicant's appointment to be extended four times from 1 July 2017 to 30 April 2018.<sup>22</sup> FPD also worked with the UNMIL Director of Mission Support (DMS) to ensure a change in the Applicant's reporting line.<sup>23</sup> The Applicant's new FRO, the

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<sup>16</sup> Reply, annex R5.

<sup>17</sup> *Ibid.* annex R8.

<sup>18</sup> Application, annex 3.

<sup>19</sup> Amended reply, page 3.

<sup>20</sup> Ms. CK's oral evidence on 9 October 2019.

<sup>21</sup> *Ibid.* and amended reply, annex R7.

<sup>22</sup> *Ibid.* and amended reply, annex R8.

<sup>23</sup> Ms. CK's oral evidence on 9 October 2019.

UNMIL SRSG, Mr. Zarif Sharif, completed her 2016/2017 e-PAS on 17 November 2017 and her 2017/2018 e-PAS on 7 April 2018.<sup>24</sup>

18. The Applicant separated from service on 1 May 2018 and returned to her job with the United States' State Department.

19. On 15 October 2018, OIOS submitted its investigation report to the UNEO. On the basis of the OIOS investigation report, the UNEO concluded that the Applicant had engaged in four protected activities and that Mr. Vrey had engaged in retaliatory acts against the Applicant because:

a. He removed her from supervising the Legal Policy Reform Section and the witness protection Quick Impact Project with the aim of punishing, intimidating or injuring her for reporting prohibited conduct on 21 November 2015;

b. He disbanded the Rule of Law and Security Support Section and took steps towards alienating her at least partly with the aim of punishing, intimidating or injuring her for reporting prohibited conduct on 21 November 2015; and

c. He failed to complete her 2016-2017 performance document with the aim of punishing, intimidating or injuring her for her protected activities.<sup>25</sup>

20. The Applicant received the decision of the UNEO on 16 May 2019.

## **SCOPE OF REVIEW**

21. What the Tribunal examines according to its Statute, art. 10.5(b), is whether the impugned decision was illegal, whether there is harm and whether there is causal link between the two.<sup>26</sup> Given the Respondent's acceptance of the UNEO's findings that Mr. Vrey had engaged in retaliatory acts against the Applicant at a case management discussion held on 8 August 2019, the Tribunal

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<sup>24</sup> Amended reply, annex R10.

<sup>25</sup> Applicant's additional submission of 21 May 2019.

<sup>26</sup> *Kebede* 2018-UNAT-874, para. 20.

will not examine or make any findings on the issue of liability for retaliation. Consequently, the Tribunal's review is limited to the issue of compensation.

22. The Counsel for the Respondent posits that the Organization's responsibility towards its employees in situations where retaliation has occurred is set out in ST/SGB//2017/2/Rev1. According to Counsel, the Dispute Tribunal may find the Organization liable for a failure to meet its obligation under ST/SGB/2017/2/Rev.1. Absent such a finding, the Tribunal may not award damages against the Organization. This proposition is incorrect. To require that the right to obtain compensation be effective upon the Organization wronging the staff member twice, i.e., first, by a retaliatory decision and, second, through a lack of a proper response under ST/SGB/2017/2/Rev.1, discloses lack of understanding of the mechanisms under both the Tribunal's Statute and ST/SGB/2017/2/Rev.1. The matter is not about whether the Organization discharged its duties toward an applicant who suffered from a retaliatory administrative decision; rather, the matter is about whether there would be any lasting financial and moral damage resulting from that retaliatory decision. Such damage may persist or not notwithstanding the Organization's acting dutifully or not; it depends on the facts of the case.

23. In accordance with the General Assembly's amendment to art. 10.5(b) of the UNDT Statute,<sup>27</sup> compensation may only be awarded for harm if it is supported by evidence. An applicant bears the burden of proving harm stemming directly from the Administration's illegal act or omission.<sup>28</sup> Illegality of the impugned decision being admitted by the Respondent; the Tribunal will now turn to discuss the remaining elements.

## **ISSUES**

### ***Is the Applicant entitled to compensation for financial damage?***

#### *Applicant's case*

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<sup>27</sup> A/RES/69/203.

<sup>28</sup> *Kebede* 2018-UNAT-874, para. 20; *Asariotis* 2013-UNAT-309.

24. The Applicant submits that she should be awarded compensation for loss of opportunity because she was not fairly considered for posts within COSMOS. The lack of an e-PAS denied her a level playing field in competing for posts. The Administration is responsible for this through Mr. Vrey's actions.<sup>29</sup>

25. The Applicant requests that, absent a basis for quantifying this loss of opportunity, the Tribunal calculate it *ex aequo et bono*.<sup>30</sup>

#### *Respondent's case*

26. The Respondent's case is that the Applicant is not entitled to compensation for loss of opportunity because she has not provided evidence of any economic harm.

27. The Respondent asserts that the Organization met its obligations under ST/SGB/2017/2/Rev.1 by implementing the recommendations of the UNEO. As an interim measure, the UNEO recommended the extension of the Applicant's appointment until UNMIL's closure, completion of her 2016/2017 and 2017/2018 e-PASes and a change in her reporting line.<sup>31</sup> The Applicant's appointment was extended, on an exceptional basis, until 30 April 2018 although UNMIL completed its mandate on 30 March 2018. The Respondent also submits that the Organization undertook reasonable efforts to assist the Applicant in finding alternative employment within the Organization although this was not recommended by the UNEO, through his efforts to laterally transfer the Applicant to another position in Sudan, Kosovo, Afghanistan and Mali.<sup>32</sup> The Respondent relied on documentary evidence and presented two witnesses, Ms. Kapilahsrami and Mr. David Penklis, who gave oral evidence before the Tribunal in respect of the measures taken.

#### *Evidence examined at the hearing*

28. The Applicant's testimony is that her supervisor was actively attempting to undermine her attempts at securing an alternative position by not completing her

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<sup>29</sup> Applicant's closing statement.

<sup>30</sup> Applicant's closing statement.

<sup>31</sup> Memorandum dated 27 September 2019 from the Director/UNEO to the Tribunal.

<sup>32</sup> Respondent's amended reply and closing statement.

performance evaluation for 2016/2017 and erasing the previous one, for the 2015/2016 cycle. The performance evaluation was a critical document when being considered for posts and she was informed by the COSMOS personnel and HR that without an e-PAS, she would not be favorably assessed by missions.<sup>33</sup> She was disadvantaged because she did not have one for many months. So, even though she was in the system, she was effectively and functionally disqualified. She draws the Tribunal's attention to the fact that her performance evaluation for 2016/2017 was completed in November 2017, seven months after its due date, and by a different First Reporting Officer, after the damage to her employment opportunities had already been done. The cancelled e-PAS was never retrieved or replaced, although she admits that she may have retained a hard copy of it. She applied for approximately 50 positions during the period but did not receive any offers. Eventually, she separated from service on 1 May 2018 because there was no place for her in UNMIL and no possibility of an external transfer.<sup>34</sup>

29. Mr. Erich Ball testified on behalf of the Applicant. Mr. Ball served with UNMIL from 25 January 2016 to 15 May 2017 as the Deputy Director of Mission Support. In his career, he has participated in more than 2000 recruitment exercises where he was on the CRB or the chairperson or a panel member. Mr. Ball had a conversation with the Applicant regarding her e-PAS. The cancellation of an e-performance document is not commonly done and he did not see any reason for canceling the Applicant's e-PAS pass the mid-point review.

30. In Mr. Ball's opinion, lack of an e-PAS was a significant impediment given that the Applicant wanted to have a future with the United Nations. In a situation where there are 300-400 applicants for a post, they are shortlisted and reviewed, and once the shortlist is down to a few candidates who are similar, the hiring managers perhaps go back and look at e-PASes to see what is said there about the person and then put those with better e-PASes on the shortlist. If a staff member doesn't have an e-PAS, it immediately cuts them out of the shortlisting process. Later in the process, after testing and interviews, if there are a few applicants who are similar, e-PASes may be used as tie-breaker. Not having an e-

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<sup>33</sup> Applicant's oral evidence on 7 October 2019, email from HR Join bundle p.29.

<sup>34</sup> Applicant's oral evidence on 7 October 2019.

PAS makes it difficult to prove what you have done as a staff member. Also, without an e-PAS, the Applicant stood a greater chance of being downsized.

31. Ms. Kapilahsrami testified on behalf of the Respondent in the capacity of a former Director of FPD, who participated in a high-level meeting committed to deciding interim measures following the *prima facie* finding of retaliation. Her evidence was that there were two issues: extension of appointment pending completion of the investigation and different reporting lines. By then the impugned decision was irreversible because the whole rule of law (RoL) mandate of UNMIL was being eliminated, in accordance with the Security Council resolution. Absent a vacant D-1 post, FPD facilitated the extension of the Applicant's appointment by making a request to the Controller to authorize funding for this extension on a GTA post.<sup>35</sup> The Applicant's appointment was subsequently extended from 1 July 2017 to 30 April 2018. The issue of reporting lines was for the Mission to address. Further, FPD used best efforts to ensure that the Applicant's PHP was visible to missions.

32. In reference to documents in the Joint bundle, Ms. Kapilahsrami testified that the Applicant's profile was uploaded into COSMOS<sup>36</sup> to make her availability visible to all missions, even initially without the e-PAS.<sup>37</sup> In her opinion, notwithstanding the formal requirement of having e-PASes uploaded to COSMOS and the Human Resources officer's advice communicated to the Applicant, the absence of an e-PAS did not impact the Applicant's selection or reassignment. First, pursuant to para. 7.2 of *the Manual for recruiters on the staff selection system*, staff members without performance documents are deemed to have fully met performance expectations. Second, the main thing that a hiring manager would look at would be the Personal History Profile ("PHP") and the relevance of candidate's qualifications for the job. Most e-PASes in the Organization have overall ratings of successfully meets or frequently exceeds

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<sup>35</sup> See also Joint bundle pp. 33, 41.

<sup>36</sup> Ms. Kapilahsrami's oral evidence on 9 October 2019. COSMOS is a platform created in share point to provide missions with a way to upload the lists of their international staff members who are being downsized and need placement. The details of staff members are loaded so that they were visible to all missions. Documents that should be uploaded into COSMOS are: PHPs, most recent ePASes and a screen shot of roster membership.

<sup>37</sup> Joint bundle, pp 158, 29-31.

performance expectations thus more importance is placed on PHPs. Positive or negative comments in an e-PAS would be looked at but e-PASes carry less value than PHPs. Thirdly, the lack of an e-PAS was offset by FPD's advocacy efforts in missions.

33. Further, Ms. Kapilahsrami explained that her team was responsible for managing the Under-Secretary-General/DFS /DFS's authority on lateral placements. Based on the regulatory framework, there is priority in placing staff according to the type of appointment, i.e., permanent or continuing, and length of service, thus, there is an obligation to make best efforts in this order. The Applicant had a fixed-term appointment. This also played into the Applicant not being able to find a post. In this respect, while Missions were encouraged to fill positions through lateral transfer<sup>38</sup>, the Under-Secretary-General/DFS could not override the Mission's choices having had lateral placement authority only for downsized staff members with permanent or continuing appointments. Placement of field staff members with the Department of Political Affairs (DPA) and DPKO would require the agreement of the hiring managers, and, with DPA, the USG/DFS would have to also consult with the USG/DPA

34. The delegation of authority for selection up to D-1 is with the head of mission so while Ms. Kapilahsrami's team was facilitating the process, the selection decision lay elsewhere. Starting in March 2017, however, even before including the Applicant in COSMOS, FPD approached the missions in Kosovo ("UNMIK"), Afghanistan ("UNAMA"), Mali (MINUSMA) and South Sudan (UNMISS) for a new relevant assignment for the Applicant. UNMIK responded that the Applicant had been considered in a previous round and found not suitable and this position did not change<sup>39</sup>; her e-PAS was not a concern. The post, in any event, was subsequently reclassified and upgraded to D-2, and the original job opening was cancelled.<sup>40</sup> UNAMA requested that HR share the Applicant's PHP with the hiring manager. Subsequently, UNAMA responded that the D-1 RoL post was abolished in the 2018 budget and the job opening was cancelled.<sup>41</sup>

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<sup>38</sup> See e.g. code cables Joint bundle p 21, p 35.

<sup>39</sup> Joint bundle pp 182-183, 92-93.

<sup>40</sup> Joint bundle, p 112.

<sup>41</sup> Joint bundle, pp. 90-91, 115.

MINUSMA did not respond, however, the Applicant's profile had been shared with the Head of Mission directly.<sup>42</sup> At UMISS there were two posts: Principal Security Advisor and Chief of Service. Ms. Kapilahsrami's team emailed the mission to alert them that the Applicant had applied to the positions. There was already a recommendation for Chief of Service that was pending with the ASG. The Principal Security Advisor post was a recruitment being run by UNDSS in NY. The Applicant was rejected after screening, based on her PHP.<sup>43</sup>

35. As concerns applications for other posts, Ms. Kapilahsrami commented on documentary evidence as follows: MINUJUSTH was going through a drawdown and adopted a strategy not to use lateral transfer but to fill all the positions through competitive review.<sup>44</sup> UNAMI found the Applicant not suitable for the post of Chief, Political Affairs for want of required experience, an assessment done on the basis of the PHP alone, before the placement on COSMOS.<sup>45</sup> Similarly, the Applicant's application for the post of Principal Political Affairs Officer in DPKO, NY, was rejected by the Inspira career portal based on information supplied in the PHP regarding her command of a second official language.<sup>46</sup> The Applicant was deemed not suitable for Senior Sector Security Advisor in Yemen because she did not submit a General Assessment Test.<sup>47</sup> Regarding Chief of Service, Human Rights at UNSOM, the Applicant was on the long list but was deemed not to have the desirable work experience that was used to create the short list for the interview.<sup>48</sup> As concerns DFS P-5 Senior Programme Officer, the Applicant did not pass the written assessment. The assessment date was 9 March 2017, which means that although the Applicant had no e-PAS in the system at the time, she had been invited to take the test.<sup>49</sup> As concerns DPA P-5 Senior Political Affairs Officer, the transmittal memo to the CRB for this post and the Inspira screen shot demonstrate that the Applicant scored below the required minimum in the written test. The test date is 13 August

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<sup>42</sup> Joint bundle, p. 88-91.

<sup>43</sup> Joint bundle, p.199-200.

<sup>44</sup> Joint bundle, pp 61-69.

<sup>45</sup> Joint bundle, p.114.

<sup>46</sup> Joint bundle, pp 115-116.

<sup>47</sup> Joint bundle p. 133.

<sup>48</sup> Joint bundle, p.142.

<sup>49</sup> Joint bundle, p. 190.

2018, where the Applicant had no e-PAS in the system, and yet she had been invited to take the test.<sup>50</sup>

36. Altogether, according to Ms. Kapilahsrami, the difficulty in placing the Applicant in another mission was due to the fact that, starting in late 2016, peacekeeping experienced a decline in budget and the number of missions, as a result, there were several missions that were closing or downsizing. Particularly at the senior level, it was more difficult to find positions in a downsizing environment due to budget cuts and changing mandates, and there was also more competition for these positions.

37. Mr. Penklis testified on behalf of the Respondent as former Director of Mission Support at UNMIL. His evidence was that the Applicant approached him for assistance with posts for which she had applied. Her situation was one of many situations in UNMIL at the time of downsizing. Mr. Penklis was of the opinion that the absence of an e-PAS did not have impact on the Applicant's chances in finding other employment with the Organization. The initial screening in Inspira does not exclude an applicant because they did not attach an e-PAS. Thus, one should be screened in if the criteria is met. The COSMOS system indeed required that people have performance reports, however, at the same time, FPD was working with staff members to find ways that they could find suitable positions for them, it was not just a matter of one document, it was about a considerable push to find suitable roles.

38. In support of the Applicant's applications, Mr. Penklis reached out to the heads of mission support in other missions with the underlying message that he was providing a personal endorsement of the Applicant's candidacy.<sup>51</sup> None of the missions expressed concern about the Applicant's lack of an e-PAS. The assessment process is not just about performance reports but is also about looking at the suitability and the criteria put forward in the JO (e.g. years of experience, languages, etc.), which is the main filter. People from outside the organization are considered in the same way; among them the Applicant had been recruited into UNMIL from outside the United Nations, without a performance report thus

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<sup>50</sup> Joint bundle, p. 154.

<sup>51</sup> Joint bundle, p. 27.

having been selected on a competitive basis. The question of performance reports would surface after suitability has been assessed. This is shown by the fact that the Applicant was invited for interviews and tests, which meant she was not screened out as such just because she had no performance report.

39. In Mr. Penklis' opinion, the Applicant was unable to secure another assignment because: UNMIL was not the only mission downsizing and at the D-1 level there are few posts with a lot of candidates competing who have significant experience.

### *Considerations*

40. There is no dispute regarding the fact that the Applicant did not suffer financial harm as her fixed term appointment was kept up well beyond the life of ROLSISS and even beyond the closure of UNMIL. The dispute is about the claimed damage through the loss of opportunity. In this respect, it is established jurisprudence that such damage is compensable.<sup>52</sup> The question is whether the Applicant has shown that, if not for the irregularity, she would have had a "significant chance"<sup>53</sup> or "realistic prospect" of securing other employment with the United Nations.

41. In this respect, the Tribunal finds that the burden of proving such significant chance or realistic prospect was not discharged. The Tribunal agrees fully with Ms. Kapilahsrami and Mr. Penklis, that the main criterion that a hiring manager would look at would be the PHP and the relevance of that PHP for the qualifications for the job. It also agrees that most e-PASes in the Organization have overall ratings of "successfully meets" or "frequently exceeds performance expectations", therefore, more importance is placed on PHPs. What the witnesses testified about transpires also from cases before the Tribunal – of which the Tribunal informed the parties - in non-promotion and non-selection disputes.

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<sup>52</sup> ILOAT Judgment nos. 17-19 and 21, 1955; Judgment of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, ICJ Reports 1956.

<sup>53</sup> *Vangelova* 2011-UNAT-172, para 19; *Bofill* 2011-UNAT-174, para 28; *Chhikara* 2017-UNAT-723, para 46, quoting *Bofill*; *Pinto* 2018-UNAT-878, para 24.

42. This is not to say that the testimony of Mr. Ball is rejected as untrue. Rather, its lack of persuasion is found in the generalization of his opinion. Mr. Ball appeared to have predominantly relied on his experience at the CRB, where indeed the e-PAS is a significant component of the review of personnel to be retained or downsized, which differs from the mechanisms in recruitment exercises. Moreover, Mr. Ball's opinion seems to be more relevant for practice in less senior recruitments and in more generic situations, as evidenced, for example, by his mention that without an e-PAS, the Applicant had less chance in the downsizing exercise, which is obviously not relevant *in casu*. Regarding recruitment for Director's positions, the Tribunal agrees with the Respondent's witnesses that the scrutiny in such cases does not concern itself primarily with formalities such as e-PASes, rather, the primary concern is the merits criteria, with emphasis of specific experience and reference checks. Job openings at this level, especially such as RoL, Judicial Affairs, Political Affairs, are only a few, and, in addition to the requirement of experience in the general field, tend to have theatre-specific focus, which is not obvious to match. As such, in this Tribunal's opinion, even had the Applicant retained all the ROLSISS management function throughout 2017, and notwithstanding being formally qualified through placement on relevant rosters, her profile, with barely two years with the Organization, was in all likelihood not competitive enough in the recruitment exercises for the posts for which she had applied.<sup>54</sup>

43. The above is fully confirmed by the results of thirteen recruitments discussed *supra*. In the most relevant ones, the FPD ensured the Applicant's visibility by contacting the relevant entities directly. In none of them had the lack of an e-PAS arisen as an issue and in none of them did the Applicant dispute her non-selection. The Applicant does not demonstrate any other recruitment where she would have been rejected for the lack of e-PAS, or where e-PAS would have been even requested. Undisputedly, moreover, from November 2017 onward, the Applicant was again in possession of an e-PAS, which does not seem to have changed her standing on the Organization's job market.

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<sup>54</sup> For relevance of length of service for the loss of opportunity see *Haroun* 2019-UNAT-909; *Nakhlawi* UNDT/2016/204.

44. In conclusion, while the irregularity of cancelling the Applicant's e-PAS and the failure to promptly issue another one is obvious and regrettable, the Tribunal is not satisfied that the Applicant would have otherwise had a significant chance or realistic prospect of retaining another employment with the Organization.

**Should the Applicant be awarded compensation for moral damage?**

*Submissions*

45. The Applicant seeks moral damages of six months' net base salary for the harm suffered because of Mr. Vrey's actions against her. The causal link has been established because there is no doubt that Mr. Vrey's actions of stripping her of her duties and prematurely abolishing her post led to her isolation, stress and anxiety. She submits that the OIOS investigation, the memorandum dated 16 May 2019 and the three witnesses she proffered during the oral hearing are adequate corroborative evidence, as required by *Kallon* 2017-UNAT-742, of the harm inflicted upon her by Mr. Vrey. She requests compensation of six months' net base salary.

46. The Respondent asserts that the Applicant is not entitled to moral damages because she has not provided evidence of moral harm directly linking any harm suffered to a breach or violation on the part of the Organization. Notably, the Applicant did not proffer expert medical or psychological evidence attesting to the nature and impact of any harm.

*Oral evidence given on behalf of the Applicant at the hearing*

47. The Applicant's evidence was that, although she retained her functional title, she was not assigned any formal duties after ROLSISS was disbanded. Instead, she sat alone in a room and volunteered for assignments. For example, she volunteered to head up the handover of UNMIL's remaining duties to the government and the UNCT, but Mr. Vrey told her that it was already being handled and she was not needed. She also learned that Mr. Vrey was in charge of creating an UNMIL lessons learned book that included interviews with the SRSG and all the substantive D-1s, except her. She had to seek special permission from

the SRSG to be part of these interviews. Her contracts were being extended *post facto* pending the OIOS investigation. This resulted in her being blocked from accessing the UNMIL compound, the computer system, etc.

48. She became acutely depressed with physical manifestations, including hair loss and chronic headaches. She was diagnosed with an autoimmune condition that was correlated with stress. The doctor prescribed antidepressant medications for her. She cried several times in the presence of colleagues due to the marginalization she was experiencing. The depression and abject sadness put a strain on her relationship with her life partner of 20 years. She feels bad that she was marginalized, retaliated against and forced out of a United Nations career because she reported misconduct. She feels this injustice every day.

49. Ms. X gave evidence based on her observations during the period when she worked in ROLSISS. The working relationship she observed between Mr. Vrey and the Applicant was “very dry”. Mr. Vrey was difficult to deal with and sometimes he was rude to people, including the Applicant, during meetings. She witnessed Mr. Vrey being aggressive/intimidating towards the Applicant. She noticed the applicant wasn’t well and asked her if she needed help/support but the Applicant was initially very reluctant to talk about it. Later, she opened up and confided that she was unwell because Mr. Vrey had: cut her out of the decision-making process for her pillar; acted very unprofessionally with her; harassed and bullied her; refused to let her speak and when he allowed her to do so, he told her to “not be a child”. In 2015, the Applicant was a healthy, happy and very motivated person. As the Applicant’s relationship with Mr. Vrey worsened, her physical and emotional wellbeing deteriorated. It got to the point where the Applicant was no longer emotionally healthy and Ms. X was worried about her. Sometimes she would cry on the way home and in the office; this became an almost daily occurrence. The Applicant started getting sick and each time it was something different. Her hair started falling out, her face lost all colour, she got malaria, colds, headaches and yellow fever many times. She stopped smiling and said she was not sleeping well. She developed a problem with her right arm. It was visible that her arm was unwell. The Applicant went to the United Nations

doctor frequently and took sick leave outside of the mission area to seek medical assistance. The Applicant attributed her poor emotional state to acts of Mr. Vrey.

50. When the Applicant was moved from the RoL pillar, she suffered because she was not being respected by the UNMIL leadership. The whole process was very shameful for the Applicant because the whole mission knew she had been sidelined. The staff of the RoL pillar initially heard through rumors that the Applicant had been removed as the director. They never received formal communication explaining why the Applicant was removed, but she was removed from the building at the same time when she was removed from her functions. Towards the end of the mission, the Applicant was put in an office with no role, no work plan and no specific work even though she wanted to work. The Applicant told her that she had been removed because allegedly UNMIL no longer had a RoL mandate and there was no work for her anymore. This was puzzling because although resolution 2333 had been issued, the RoL staff continued performing the same functions as before. The whole component remained with the sole difference that they were no longer reporting to the Applicant. Instead they all reported directly to the D/SRSG. The situation was very weird. At a certain point the whole component was engaged in the lessons learned project but the Applicant was being ignored, which was a passive aggressive approach. Ms. X personally also felt that the Applicant was not well-treated and had been disrespected and treated unprofessionally. At the end of the Mission, the Applicant's wellbeing improved and she stopped crying.

51. Mr. Douglas Hansen worked in Legal Affairs and for a period, in ROLSISS. the Applicant was also his neighbor in his apartment complex. His evidence was that when they first met, the Applicant appeared happy, interested and engaged with her work. Although he had a good working relationship with Mr. Vrey, he knew he could be very direct and demanding. The pillar meetings that he attended with Mr. Vrey and the Applicant did not seem acrimonious. The Applicant, however, told him several times about her unhappiness, sense of marginalization and exclusion in working with Mr. Vrey. She described Mr. Vrey as having been "mean" and she felt targeted by him. She complained that she was being circumvented, was not being given the authority to act and attend to

programs, and her subordinates were being given direct orders by Mr. Very, eventually she lost her mandate. His sense was that her new portfolio wasn't designed to be substantive or a core function. It seemed to be a way to maintain employment pending an ongoing investigation.

52. According to Mr. Hansen, the Applicant seemed profoundly unhappy, she cried most of the time, which must have been difficult to do in front of a junior colleague. She had malaria several times and was on sick leave several times. He didn't know the cause of her illnesses. She seemed deflated and there was a general disillusion about the Organization itself. On at least one occasion, she commented that it was impossible for her to believe that somebody who had acted like Mr. Vrey had, could work for the Organization, that it was not consistent with the core values of the United Nations. She was disappointed, shocked and saddened by the fact that he was employed by the Organization and that this was allowed to happen.

53. Mr. Erich Ball's evidence was that the Applicant sought his advice in early 2016 about the conflict between her and Mr. Vrey. When she returned from sick leave in September/October 2016, she told him that her job had been restructured and her supervisory/managerial functions had been removed. She was also concerned about the cancelled e-PAS and the impact it would have on her future with the United Nations. Since she was recovering from major surgery, she was quite fragile and either cried or was on the verge of tears several times. She wondered what was coming next for her professionally and dwelled on this during their conversations. She was concerned about the impact of the removal of her functions and supervisory roles on her future with the United Nations, and she was worried because of the lack of e-PAS.

### ***Considerations***

54. As stated by the Appeals Tribunal ("UNAT") in *Asariotis*<sup>55</sup>, to invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an

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<sup>55</sup> *Asariotis* 2013-UNAT-309.

exact science and such identification will necessarily depend on the facts of each case. With this respect, the jurisprudence of UNAT requires corroborating evidence, expert or otherwise, in addition to the testimony of an applicant to sustain a claim for moral damages.<sup>56</sup>

55. In this regard, the Tribunal notes that submissions from both parties go slightly off point. On the one hand, the Applicant's contention that the OIOS investigative material and the UNEO finding of retaliation are proof of injury is inaccurate. These documents demonstrate illegality of actions of the administration, their improper intent, thus the cause of a potential injury; they however do not prove the result.<sup>57</sup> On this basis, injury could only be presumed as a probable consequence to an average person placed in the same situation<sup>58</sup>, which, however, would not be sufficient under art. 10.5(b) of the UNDT Statute. On the other hand, the Respondent misrepresents *Kallon* in implying that it necessarily requires expert evidence, such as medical or psychological expertise. What happened in *Kallon*, was that three Appeals Tribunal Judges ruled that "[t]here is no absolute requirement in principle or in the rules of evidence that there must be independent or expert evidence. In some circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient"<sup>59</sup>; three Appeals Tribunal Judges ruled that "[w]hile there may be some exceptions, generally speaking, the testimony of an applicant alone is not satisfactory proof to support an award of damages [emphasis added]"<sup>60</sup>; and one Appeals Tribunal Judge opined that "evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred"<sup>61</sup>. It was only in the subsequent jurisprudence that the Appeals Tribunal gradually adopted the more restrictive "independent evidence (expert or

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<sup>56</sup> *Ross* 2019-UNAT-926, para. 57; *Kebede* 2018-UNAT-874, para. 22; *Langue* 2018-UNAT-858, para. 20; *Hamdan* 2018-UNAT-839; *Auda* 2017-UNAT-787, para. 64; *Zachariah* 2017-UNAT-764 para 37; *Kallon* 2017-UNAT-742.

<sup>57</sup> *Israbhakdi* 2012-UNAT-277 para.24; *Charles* 2013-UNAT-283, para. 21; *Ivanov* 2015-UNAT-572 para. 29; *Diatta* 2016-UNAT-640, para. 35.

<sup>58</sup> *Massabni* 2012-UNAT-238 para 32.

<sup>59</sup> *Kallon* 2017-UNAT-742. para. 70.

<sup>60</sup> *Ibid.*, Joint partially dissenting opinion, para 12.

<sup>61</sup> *Ibid.*, Judge Knierim's separate opinion, para 4.

otherwise)” standard.<sup>62</sup> Nowhere, however, is expert evidence required as a matter of law.

56. In the case at bar, the Respondent did not request that expert evidence be called, neither did he request medical certificates (which are presumably in the possession of the Respondent’s medical services) to be presented and discussed in the hearing and he does not contest the credibility of witnesses who testified to the Applicant’s psychological and physical condition. However, this Tribunal finds that expert evidence was not necessary because what the Applicant and the independent witnesses testified about was not atypical under the circumstances, considering the magnitude of the breach with its harming nature, and the extent of the claim. Indeed, in the face of this independent evidence, calling an expert would unnecessarily increase the cost of the proceedings. The descriptions provided by the witnesses of what they had directly observed is fully consistent with what is commonly recognized as of behavioural and physical manifestations of serious and protracted distress. On the basis of the testimony adduced, the Tribunal is satisfied that, as a result of the impugned decisions, the Applicant experienced insult to her *dignitas*, humiliation before her colleagues, including subordinates, impossibility to fully utilize her qualifications, and insecurity of her job. This led to disappointment, demoralization and anxiety, and had a negative impact on her physical health. These constitute compensable non-pecuniary damage.

57. In light of jurisprudence in comparable cases<sup>63</sup>, the requested amount is justified.

## **JUDGMENT**

58. By way of compensation for non-pecuniary damages he Respondent shall pay the Applicant an equivalent of six months’ net base salary.

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<sup>62</sup> *Haroun* 2019-UNAT-909 para.40; *Langue* 2018-UNAT-858 para. 18; compare with *Auda* 2017-UNAT-787, para. 64 *Kebede* 2018-UNAT-874, para. 22 *Ross* 2019-UNAT-926, para. 57 still retaining the “generally speaking “qualification.

<sup>63</sup> *Kallon* 2017-UNAT-742; *Gakumba* 2013-UNAT-387; *Bowen* 2011-UNAT-183; *Eissa* 2014-UNAT-469; *Kasmani* 2013-UNAT-305; *Diallo* 2014-UNAT-430.

59. This amount shall be paid within 60 days from the date this judgment becomes executable. If the sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 31<sup>st</sup> day of December 2019

Entered in the Register on this 31<sup>st</sup> day of December 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi