JUDGE RICHARD LUSSICK, PRESIDING.

Facts and Procedure

1. On 17 October 2013, the United Nations Appeals Tribunal (Appeals Tribunal) rendered Judgment No. 2013-UNAT-359 in the case of Ademagic et al. v. Secretary-General of the United Nations.[1] The Appeals Tribunal held, inter alia:[2]

> … Because the Appeals Tribunal has legal authority to do so, and has sufficient factual information, the matter is hereby remanded to the decision maker, namely the [Assistant Secretary-General for Human Resources Management (ASG/OHRM)] (rather than to the [United Nations Dispute Tribunal (UNDT or Dispute Tribunal)]) for the ASG/OHRM to consider, in accordance with the relevant statutory provisions and the principles of substantive due process, whether the staff members' fixed-term contracts should be retroactively converted to permanent appointments. There is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give "every reasonable consideration" to those [International Criminal Tribunal for the former Yugoslavia (ICTY)] staff members demonstrating the proficiencies, competencies and transferrable skills which render them suitable for career positions within the Organization.
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> … The ASG/OHRM shall use a process that is fair, properly documented and completed in a timely manner. Given the duration of these proceedings, and mindful of the finite mandate of the ICTY and the stress uncertain contract situations imposes on staff, the Appeals Tribunal directs that the conversion process be completed within 90 days of the publication of this Judgment. Each staff member is entitled to receive a written, reasoned, individual and timely decision9(n, rIi(ew14)7.Tw [n9(n, r s)2t8(. th)7.7(e d)G/OH.4(2(R

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> retroactive effect. This remedy – to a considerable extent – corrects the harm sustained by the staff members. Nevertheless,the Appeals Tribunal is persuaded that an award of damages is merited for the breach which occurred and, in all the circumstances, awards compensation in the amount of 3,000 Euros to each of the Respondents/Appellants. The Appeals Tribunal further holds that payment of compensation shall be executed within 60 days from the date of issuance of this Judgment to the parties. That failing, interest shall be applied, calculated as follows: five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment.

2. On 31 March 2014, six individuals of the original Ademagic et al. group, Mr. Klaus Dalgaard, Mr. Michael Hehn, Ms. Janice Looman-Kerns, Mr. Marcus Richardson, Ms. Laurie Sartorio McNabb and Ms. Smilja Zoric (Dalgaard et al.), filed a "Supplemental Motion for an Order Requiring Respondent to Execute the Judgment to Pay 3000 Euros". The Secretary-General filed his comments on 2 April 2014.

3. By Order No. 178 (2014) dated 2 April 2014, the Appeals Tribunal, inter alia, invited the parties to submit additional briefs on their arguments.

4. On 17 April 2014, Dalgaard et al. filed an "Additional and Supplemental Briefing on Supplemental Motion for an Order Requiring Respondent to Execute the Judgment to Pay 3000 Euros" and the Secretary-General filed his comments on 7 May 2014.

Submissions

Dalgaard et al.'s Motion

5. Dalgaard et al. seek an order pursuant to Article 27 of the Rules of Procedure of the Appeals Tribunal requiring execution of the Judgment in relation to the payment of non-pecuniary damages with interest. The Secretary-General did not raise any objections to granting relief to Dalgaard et al. at any time during the proceedings and are therefore foreclosed from doing so now. Dalgaard et al. ask that the Appeals Tribunal order the immediate execution of the Judgment and specifically, that the Secretary-General immediately pay 3,000 Euros plus the required interest to each of the six individuals.

appointment. The six individuals fall in either or both of the categories. Accordingly, they did not suffer a fundamental breach of their due process rights and the basis for the award of moral damages does not apply to them.

10. The Secretary-General submits that the principle of res judicata does not preclude him from relying on the Schoone Judgment. Until the issuance of the Ademagic et al. Judgment, his position was that the contested decision was properly taken and there was accordingly no basis to award non-pecuniary damages. Moreover, the decision that the six individuals were ineligible for the payment of the non-pecuniary damages was based primarily on the Schoone Judgment. He is therefore not procedurally barred from assessing their eligibility for non-pecuniary damages in light of the Schoone Judgment.

11. The Secretary-General contends that he could not have asked for a revision of the Judgment since the Schoone Judgment did not constitute a new fact for the purpose of a revision request.

12. The Secretary-General claims that the six individuals are not entitled to additional

16. The Secretary-General supplied the following information in his comments filed on 7 May 2014:[5]

(a) Klaus Dalgaard resigned effective 31 July 2011;

(b) Michael Hehn resigned effective 31 May 2010;

(c) Janice Looman-Kerns reached retirement age at the age of 62 on 2 August 2009 and was granted an exceptional extension of appointment beyond retirement age. She retired from service on 31 May 2010;

(d) Marcus Richardson resigned effective 31 July 2011;

(e) Laurie Sartorio McNabb transferred away from ICTY effective 21 November 2010; and

(f) Smilja Zoric resigned effective 23 February 2011.

17. The facts set out in Ademagic et al. relate the history of events leading up to the impugned decision.[6] It is pertinent that in February 2011, ICTY staff were informed that there had been no joint positive recommendations by OHRM and the ICTY on the granting of permanent appointments and that accordingly, the cases had been transferred "to the appropriate advisory body, in accordance with section 3.4 of ST/SGB/2009/10". On 4 April 2011, OHRM, being of the view that the CRBs did not have all relevant information before them, returned the matter to the CRBs, requesting that they review the full submissions of the ICTY and OHRM and provide a revised recommendation. These facts are important to show that at a stage when the CRBs had not reached any final decision, four of the six Dalgaard et al. members had already left the employ of the ICTY. By the time that the impugned decision had been made and staff members had been notified by letters dated 6 October 2011, none of the Dalgaard et al. members were still employed at the ICTY.

18. Moreover, the Dalgaard et al. members could not have been in any doubt that the award of moral damages flowed fr

19. Consequently, none of them could rightfully claim that they were entitled to moral damages as a result of their rights be

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)	(Signed)	(Signed)
Judge Lussick, Presiding	Judge Chapman	Judge Weinberg de Roca
(Signed)		(Signed)
Judge Adinyira		Judge Thomas-Felix

Judge Simón and Judge Faherty append a dissenting opinion.

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar

and would incite dissatisfied parties to consider UNDT Orders as mere guidance or suggestions, with which compliance is voluntary." [14]

6. The Appeals Tribunal Judgment is clear and unambiguous. Yet, the Secretary-General unilaterally decided to refuse payment to Dalgaard et al., in direct violation of the Appeals Tribunal's Order.

7. Furthermore, where a party disagrees with the outcome of an Appeals Tribunal Judgment, there are several avenues open to it to seek review of judgment. These are listed in Article 11 of the Appeals Tribunal Statute and include requests for revision, interpretation and correction:

> … As this Tribunal stated in Shanks and Costa, the authority of a final judgment – res judicata – cannot be so readily set aside. There are only limited grounds, as enumerated in Article 11 of the Statute of the Appeals Tribunal, for review of a final judgment.
>
> … In this respect, the applicant's arguments are irrelevant if they do not meet the requirements clearly established in the Statute to ensure the finality of a judgment. [15]

8. In the present case, the Secretary-General has not sought review of the Appeals Tribunal Judgment under Article 11,[16] but simply decided to disobey the Appeals Tribunal's order. The Appeals Tribunal's consistent jurisprudence established over the past five years is that it may not reconsider its own judgments unless a request for review "fulfills the strict and exceptional criteria established by Article 11 of the Statute". [17] The Appeals Tribunal has no

> … "inherent power to reconsider" to [render] a revision expressly forbidden by the Statute from a rule based on the concept of *res judicata*, designed to avoid litigation *ad aeternum*, particularly applicable to the highest court of a judicial system. [18]

9. From our point of view, the denial of the requested execution implies a consideration of the Appeals Tribunal Judgment outside the framework of Article 11 of the Appeals Tribunal Statute and does so based on facts that the Secretary-General failed to raise during both trial and appeal proceedings and that have not been raised through an admissible avenue for review. The Secretary-General's review is conducted only in response to a request for execution by the present claimants and involves examining again the facts that justified the compensation for moral damages, which were awarded on the basis that the claimants were part of a group of staff members who were not individually considered for conversion. We are of the view that the factual premise, in respect of each of the six applicants, on which the Secretary-General now relies must have been capable of being ascertained prior to the UNDT hearing and indeed the appeal before this Tribunal.

10. Furthermore, revisiting the underlying factual premise effectively results in a de novo consideration of the facts and law without having awe pw-6(e)-.4(d oac)-4.8-i