Judgme

Before

Case N

Date:

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Submissions

Dalgaard et al.'s Motion

4. Article 31 of the Appeals Tribunal's Rules of Procedure (Rules) allows the Appeals Tribunal to set aside the Judgment on moral damages in that the Appeals Tribunal "effectively reconsidered [Ademagic et al.] sua sponte without providing [Dalgaard et al.] with an opportunity to be heard on the proposed reconsideration". Accordingly, the impugned Judgment should be set aside and the Ademagic et al. Judgment should be executed. Alternatively, the Appeals Tribunal should permit Dalgaard et al. "to provide evidence and argumentation" to address the Appeals Tribunal's concerns.

5. The Appeals Tribunal made an error of fact resulting in an unreasonable decision when it charged Dalgaard et al. with hiding the facts of their departures from the ICTY. To the contrary, each of the six former ICTY staff members had fully disclosed to the Management Evaluation Unit (MEU) in 2011 and the United Nations Dispute Tribunal (UNDT) in 2012 that they had either separated from service with the ICTY or were employed by another entity, as shown on the attached evidence. Further, the Secretary-General had full knowledge of their personnel files; yet, he failed to address their eligibility before the MEU, the UNDT and the Appeals Tribunal. Finally, the UNDT did not consider Dalgaard et al.'s employment status relevant when addressing the merits of their claims before it. Thus, for the purposes of an appellate proceeding, the matter should not be considered de novo.

6. The Appeals Tribunal made an error of law. Initially, Dalgaard et al. were not found unsuitable for conversion because they were no longer ICTY staff; rather, they were rejected because their service had been with the ICTY. Moreover, as early as February 2010, the Administration announced that ICTY staff were not eligible for conversion. The sham "consideration" procedure continued for 21 months; Dalgaard et al. were part of the sham consideration process from the start, if not at the end. If the process had finished promptly, they would have still been part of the ICTY. As part of the original conversion exercise, Dalgaard et al.'s rights were violated in that they were not fully and fairly considered. The Appeals Tribunal "has conflated eligibility and fair, proper and transparent consideration and ignored that the discriminatory policy and application began while [Dalgaard et al.] were staff members of the ICTY".

The Secretary-General's Comments

7. The Judgment is res judicata and cannot be readily set aside, as set forth in Article 10(6) of the Appeals Tribunal Statute (Statute). Moreover, Article 11 of the Statute provides the only grounds for challenging a

10. This jurisprudence assures that "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."[6]

11. Article 11(1) of the Statute provides, in pertinent part:

> Subject to article 2 of the present statute, either party may apply to the Appeals Tribunal for revision of a judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Appeals Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

12. It is worth noting that Dalgaard et al. do not discuss either Beaudry or Article 11 of our Statute, but instead refer to those authorities solely for the following limited proposition: "While the [Appeals Tribunal] has the 'inherent power to reconsider', this power must be balanced with Article 11's intent to establish res judicata and to avoid litigation ad aeternum." Clearly, this is insufficient.

13. Dalgaard et al. rely instead on Article 31 of our Rules to support their Motion. Article 31(1) provides that "[a]ll matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Appeals Tribunal on the particular case, by virtue of the powers conferred on it by article 6 of its statute". The Appeals Tribunal finds that Article 31 is not applicable. Initially, of course, a rule – even if applicable, which Article 31 is not – cannot supplant a statutory provision, such as Article 11. Moreover, by its language, Article 31(1) of the Rules applies only when there is no other expressly applicable rule. As stated above, Article 11 is a statutory provision, and not a rule.

14. As the Motion "does not fulfil the requirements of Article 11 of our Statute[, i]t therefore becomes manifestly inadmissible".[7] Accordingly, the Motion should not be received ratione materiae.

[6] Ibid., para. 17.
[7] Ibid., para. 20.

Judgment

15. The Motion to "set aside judgment on moral damages and execute original judgment, and, alternatively, motion for reconsideration" of Judgment No. 2015-UNAT-532 is not receivable *ratione materiae*.

Original and Authoritative Version: English

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

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

(Signed)

Judge Lussick

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

(Signed)

Weicheng Lin, Registrar