1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgments No. UNDT/2011/209 and No. UNDT/2012/062, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 December 2011 and 3 May 2012, respectively, in the case of *Shanks v. Secretary-General of the United Nations*. The Secretary-General appealed on 29 June 2012, and Ms. Rebecca Shanks answered on 7 September 2012.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:[1]

> … The following facts are taken from a joint statement of facts submitted by the parties before the hearing as well as evidence given at the substantive hearing by [Ms. Shanks] and her witness, Dr. Alex Moroz, the attending private physician who supervised her rehabilitation at the Rusk Institute of Rehabilitation Medicine, New York University, and by the three witnesses for the Respondent: Dr. Agnes Pasquier Castro, [United Nations Medical Services Division (MSD)]; Mr. Yiping Zhou, [Ms. Shanks'] supervisor and Director, Special Unit for South-South Cooperation (SSC), [United Nations Development Programme (UNDP)]; and Ms. Leonor Lee, then Human Resources Business Advisor, Office of Human Resources (OHR), UNDP.

10 February 2006 letter from Dr. Moroz as she did not consider it important to check the previous medical reports. The reason for her seeing[Ms. Shanks] was because she had exhausted her entitlements to sick leave.

… Dr. Pasquier-Castro did not undertake … Dr.its4 ca.4974 -1.497 Td3>>']TJ]B3 Tw.49dif745f4 TicultJ

… Also on 11 April 2006, after having been informed of the implications of taking a disability allowance by her colleague, [Ms. Shanks] changed her mind and decided instead that she wanted to return to work. She therefore wrote to Ms. Lee at 11:50 a.m., New York time, as follows:

> I know I sent an email regarding [recommendation for disability] yesterday, I just want to confirm that there is absolutely no other option available to me. Is there a possibility that I could return to work on a part-time basis/or with light duties with gradual progression. The only two options that were offered were: Special leave without pay or separation with disability.

… On the same day at 1:22 p.m., [Ms. Shanks] wrote Ms. Lee another email stating:

> I have been thinking about the recommendation for disability and would really like to explore the possibility of gradually returning to work on a

… On 18 April 2006, on the advice from Dr. Pasquier-Castro given on 3 April 2006, [Ms. Shanks] submitted a claim to ABCC for compensation under Appendix D to the Staff Rules for the injuries that she sustained on 27 September 2004. In her claim, [Ms. Shanks] described the nature of the injuries and indicated that "all of the above injuries continue to cause pain and limitations". [Ms. Shanks] explained to the Tribunal that these claims for injuries were made regarding her condition as it was in 2004, immediately after the accident, when she was partly paralysed and could not read or write, and that they were not related to her much improved condition in April 2006.

… On 25 April 2006, having spoken to someone at the UNSPC who told her that her disability was up for consideration the next day, [Ms. Shanks] emailed Ms. Lee, OHR, copying Dr. Sudershan Narula, the then United Nations Medical Director, (the Director), and Dr. Moroz: "I would appreciate your assistance to have my disability hearing postpone[d] until I am able to reach [Dr. Moroz] my doctor at NYU medical center for further clarification on my medical status. Thanking you in anticipation for your urgent assistance."

… In Dr. Narula's email response, apparently of the same date, copied to Ms. Lee and Dr. Moroz, she pointed out to [Ms. Shanks] that the implications of UNSPC postponing its determination would be that, as her sick leave was exhausted, she would be placed on leave without pay and this would have an impact on her health insurance. She said, "I wanted to tell you that before I make a request that we should not present your case tomorrow".

… [Ms. Shanks] immediately responded to Dr. Narula, copying Ms. Lee and Dr. Moroz stating that, "[b]ased on the progress I have made so far, I would like to be given the opportunity to return to work with gradual progression with the possibility of medical re-evaluation within 1 month".

… On the same date, 25 April 2006, Dr. Narula replied by email, copying Ms. Lee and Dr. Moroz, "if your attending physician is now of the opinion that you could return to work part-time, we will have no objection".

… On 26 April 2006, at 11:55 a.m., Dr. Moroz sent an email to MSD stating: "[Ms. Shanks] can return to work with specific time and activity limitations. I will have written recommendations ready by the end of the week".

… However, UNSPC was not asked to postpone its consideration of her disability and, at a meeting later on 26 April 2006, based on the inc 0thE06tabl3 aTw Ts(ci responde08 Tc -00.001531

… [Ms. Shanks] was invited to a meeting on 15 May 2006, with Ms. Lee and Dr. Narula, to discuss the option of returning to work on a part-time basis. Ms. Lee told the Tribunal that she probably knew the outcome of the UNPSC decision before this meeting. Dr. Narula advised [Ms. Shanks] to think carefully about what disability meant, including the protection of her after-service health plan. In Ms. Lee's evidence, she said she did not think the work accommodations suggested by Dr. Moroz were possible, but that she had decided to go back to the SSC to find out the possibility of a return. She did this by sending an email to the SSC director, Mr. Zhou, directly after the meeting.

… On the same day SSC advised OHR:

> Based on Dr. Moroz' medical certification, the management has reservations to provide … this kind of arrangement as this will not be fair for both (the staff member as well as the corporate) as there is no 100 % assurance that [she] will fully recover. The situation might be detrimental in the end, as we cannot ensure that we will always be sensitive to her needs as the work will demand focusing on what we will commit to the Organization and to the Member States.
>
> For your information, most of the function that is [sic] assigned to her would require a lot of computer usage (using the Atlas system budget forecasting to name a few), a lot of telephone dealings, fully blown conference room renovation, and a lot of distribution of publications via website and hard copies.
>
> Since this is becoming to be a HR [sic] issue more than a management one, we would like [OHR] to advice [sic] the [SSC] management on how to move forward given the commitment we are about to report and pledge to the Executive Board and the Member States as well as the pending reprofiling because of the expanded activity set in the vision of the Director.

… On 17 May 2006, [Ms. Shanks] was advised by UNJSPF that the "UNSPC [had] determined [her to be] incapacitated for further service and consequently entitled to a disability benefit".

… On the same date, Ms. Lee advised [Ms. Shanks] that SSC had "reservations" about her wish to return to work on a part-time basis given the limitations imposed by Dr. Moroz as well as the "job requirements" and "work situation/work pressure" at the office.

… On 19 June 2006, [Ms. Shanks] requested OHR to take all necessary steps to arrange her return to work as early as possible in accordance with Dr. Moroz's certification that she was capable of returning to work from 1 May 2006.

… However, in a letter dated 22 June 2006, which was copied to, inter alia, Dr. Narula and Mr. Zhou, Ms. Lee advised [Ms. Shanks] that:

> Since the [UNSPC] has determined that you are incapacitated for further service and you were informed of this decision on 17 May 2006, UNDP as your employer is bound by it and has no other choice than to comply with it. We are therefore proceeding with the implementation of this decision and the termination of your appointment with UNDP for health reasons in accordance

process was she afforded a hearing of her case to enable her to explain the circumstances.

… On 24 October 2006, [Ms. Shanks] was paid compensation from ABCC under Appendix D in the amount of USD 100,435.14. According to [Ms. Shanks], this only partly covered the medical expenses she had paid herself.

… On 28 November 2008, [Ms. Shanks] was offered a fixed-term appointment by the [United Nations Development Fund for Women (UNIFEM)] after a competitive selection process.

… On 6 January 2009, the Coordinator of the Panel of Counsel on behalf of [Ms. Shanks] requested that [Ms. Shanks] be given medical clearance to start her appointment with [UNIFEM]. The new UN Medical Director advised OHR/UNIFEM that he could not issue medical clearance in the absence of new medical information.

… The post which [Ms. Shanks] had encumbered was kept open until February 2009. Mr. Zhou told the Tribunal that he was looking forward to welcoming [her] back. No other person was recruited or assigned against the position.

… In the following months, [Ms. Shanks] underwent further medical testing as required by the UN Medical Director but before this could be completed, on 15 June 2009, UNIFEM withdrew the offer of appointment for lack of medical clearance.

… On 10 July 2009, Dr. Moroz found that at the time of writing there were no medical contraindications to full-time employment within [Ms. Shanks'] occupation.

… On 3 August 2009, [Ms. Shanks] furnished the UN Medical Director with the results of the further medical testing.

… On 24 August 2009, the UN Medical Director informed [Ms. Shanks] that on the basis of the new medical information his Office would favorably consider a future request for medical clearance.

… On 26 April 2010, the UNSPC, upon receipt of new medical reports by MSD, decided to discontinue the disability benefit awarded to [Ms. Shanks] in April 2006.

… Throughout this time, although [Ms. Shanks] was entitled to the disability benefit payable from 1 July 2006 to 28 February 2009, she refused to accept it. [She] told the Tribunal that she would be breaking federal laws if she received disability while being capable of working and that she was applying for other

> positions. Since April 2006, she has held different temporary employments with Colgate-Palmolive, Limited Brands and the United Nations Industrial Development Organization. She also volunteered as a public relations person for congressional events. Currently, she is studying Public Health, but does not hold any paid employment.

3. In its "Judgment on Liability", No. UN DT/2011/209 of 8 December 2011, the Dispute Tribunal acknowledged the complexity of the case as well as the varied medical opinions as to Ms. Shanks' fitness to return to work, and the practical implications of absorbing a person with disabilities in a busy office under renovation. Overall, however, the UNDT agreed with Ms. Shanks that her case demonstrated "a collective failure of officials to act with due diligence". It considered:

> None of these failures appear to have been deliberate or done out of any improper purpose. In fact, it seems that, at all times, the UN officials both in MSD and OHR hoped that [she] would take the disability termination in order to relieve her financial problems and to ensure some security of health care in the future. However, this is not what [she] wanted. She wanted the opportunity to resume work and was prepared to take the risk of receiving no disability benefits.

4.

> f. A systemic failure in the lack of any policy for a gradual return to work … which meant that neither OHR nor SSC ever gave this option proper consideration;
>
> g. Terminating [her] when the medical evidence of her incapacity was inconclusive as Dr. Moroz had already cleared her for resuming her duties albeit with some limitations.

5. Insofar as the responsibility of MSD was concerned, the Dispute Tribunal recalled that its role "in making critical decisions that affect the personal and professional lives of staff members invests it with the responsibility to act in a consistent and coordinated manner in the best interests of staff members and the Organisation" and held that "MSD failed to meet that responsibility ... Its actions and inactions contributed to the failures of the Respondent in this case."

6. Having found in favour of Ms. Shanks on liability, the Dispute Tribunal decided not to immediately rule on remedies. Rather, it stated, "the Tribunal wishes to provide the parties with the opportunity of settling the question of remedies in an amicable manner, given the complexity

by 1 July 2006, she was fit to return to more consistent employment" and concluded that she would have gradually increased her working hours from 50 per cent to 100 per cent. Accordingly, the Dispute Tribunal calculated her pecuniary damages at 75 per cent of the full-time salary she would have obtained had her contract been extended from 1 July 2006 to 31 December 2007.

9. The UNDT accepted Ms. Shanks' evidence that "she suffered considerable frustration and anxiety when she realised that her wishes had been overlooked by [the SPC] declaring her incapacitated when she specifically asked for it not to

arrangement was mutually beneficial and appropriat e". He notes that the UNDP Policy does not permit part-time employment to be approved

and ignoring relevant medical materials". In pa

27. Finally, Ms. Shanks submits that she is entitled to additional non-pecuniary damages for the "exceptional delays" in resolution of her case and "the abuse of process by the Secretary-General in appealing the award".

Considerations

28. As a preliminary matter, the Appeals Tribunal rejects Ms. Shanks' request for an oral hearing. The factual and legal issues arising from the appeal have already been clearly defined by the parties and there is no need for further clarification.

29. The UNDT delivered two separate judgments, the first dealing with the issue of liability (UNDT/2011/209, of 8 December 2011) and the second with the issue of compensation (UNDT/2012/062, of 3 May 2012).

30. Despite the lengthy history of the case, the issue of liability falls within a narrow compass. The crucial question which must be answered on appeal is: was the UNDT correct in finding that Ms. Shanks had a right to return to work? If the answer is yes, the appeal fails and we then proceed to consider the question of compensation. If the answer is no, then the appeal is allowed.

31. The case turns on the medical evidence.

32. The UNDT found that had the UNSPC not proceeded with its determination, Ms. Shanks would more likely than not have been found fit to resume her duties, initially on a part-time basis.

33. The medical evidence available to the UNDT in arriving at this finding was as follows:

Dr. Moroz gave regular medical certificates to the SSC Director and to MSD, including Dr. Pasquier-Castro, in support of extensions of Ms. Shanks' leave. On 10 February 2006, he gave a follow-up report which concluded that: "I expect that [Ms. Shanks] will be ready to return to work by March 29, 2006." Dr. Moroz' report prompted Dr. Oleinikov, Deputy Director, MSD, to inform OHR that "according to medical certific ate received", Ms. Shanks could return to work on 29 March 2006. OHR referred Dr. Oleinik Mames(Dep06 Tw 20oR22n3mes(Dep0Tc 1.383 0 Td7rriLi)3(w -23

did not make any medical evaluation of Ms. Shanks, telling her that she could not do so without Dr. Moroz' assessment. Ms. Shanks explained that she could not get Dr. Moroz' assessment of her capacity to return to work at that time, since he was at a conference and the results of her vocational training program had not yet been finalised.

34. On 4 April 2006, Dr. Moroz stated in his telephone call with Dr. Pasquier-Castro that it was not likely that Ms. Shanks would return to her previous level of health as far as cognitive impairment was concerned and he believed she might be better off going on a disability benefit.

35. On 7 April 2006, Dr. Oleinikov advised the Copenhagen office of OHR that MSD was recommending Ms. Shanks for a disability benefit, and requested OHR to ensure that UNDP forwarded a similar request to the Secretary of the Pension Board.

36. On 10 April 2006, Dr. Moroz advised in writing that he had talked the matter over with Ms. Shanks and they both agreed that the best course would be "the long-term disability". Dr. Moroz expressed the opinion that Ms. Shanks "will not reach her baseline level of functioning and will not be able to perform her duties without limitations".

37. On 11 April 2006, the Copenhagen Office ofOHR submitted a request to UNSPC for an award of a disability benefit under Article 33 of On 10 Apr(ul th)06, the 9openhagen tele

41. On 27 April 2006, after receiving the results from Ms. Shanks' vocational training program, Dr. Moroz reaffirmed her capacity to return to work as of 1 May 2006, subject to certain limitations (which we will come to consider shortly).

42. On 15 May 2006, Ms. Shanks met with Ms. Lee and Dr. Narula to discuss the option of returning to work on a part-time basis. Dr. Narula advised her to think carefully about disability. Ms. Lee, in her testimony before the UNDT in 2011, said e resu

45. The Appeals Tribunal also upheld the determination of the UNSPC that Ms. Shanks was incapacitated. The Appeals Tribunal decided that there was no basis for reversing the decision of the Standing Committee. The Appeals Tribunal noted that by letter dated 20 March 2008, the UNJSPF secretariat advised Ms. Shanks of the need for a medical report on the current state of her health in preparation for the UNSPC review of her eligibility for continued disability benefit. As no new medical information was submitted, the UNSPC deferred the review to

48. Dr. Moroz' limitations imposed on Ms. Shanks returning to work on 1 May 2006 were as follows:

> a. [Ms. Shanks] should begin with reduced schedule consisting of four hours a day, four days a week (total of 16 hours weekly);
> b. Frequent breaks should be incorporated in the workday (15 minutes every two hours) as needed;
> c. A working environment with the least amount of noise and other distractions should be provided;
> d. Assignments with clear directions and a timeframe for expected date of completion should be provided;
> e. A telephone headset should be provided if [her] responsibilities will include using a telephone;
> f. A lumbar rest needs to be attached to her office chair;
> g. One assignment at a time will allow [Ms. Shanks] to focus on the task fully;
> h. [Ms. Shanks] should continue using her hand orthoses when using computer keyboards.

49. Dr. Moroz' clearance was therefore not unconditional. He imposed quite significant
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