



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

Judgment No. 2013-UNAT-381

Applicant
**(Respondent/Appellant/
Respondent on Cross-Appeal)**
v.
Secretary-General of the United Nations
**(Appellant/Respondent/
Appellant on Cross-Appeal)**

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Sophia Adinyira
Judge Rosalyn Chapman

Case Nos.: 2013-435 & 2013-488

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Applicant: Self-represented

Counsel for Secretary-General: Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against two Judgments, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi, as well as a cross-appeal, in the case of *Applicant v. Secretary-General of the United Nations*.
2. The first appeal was filed by the Secretary-General on 7 January 2013 against the UNDT Judgment on Receivability, No. UNDT/2012/159 dated 31 October 2012. The answer was originally submitted on 17 January 2013 and completed on 31 January 2013.
3. The second appeal was filed by the “Applicant” on 29 May 2013 against Judgment on the merits No. UNDT/2013/079 dated 21 May 2013. The Secretary-General answered on 19 July 2013. Also on 19 July 2013, the Secretary-General filed a cross-appeal, to which the “Applicant” answered on 28 July 2013.
4. The “Applicant” requests the Appeals Tribunal to grant him confidentiality in view of the private nature of the case. We note that confidentiality was granted to him by the Dispute Tribunal and that the privacy of other persons might be unduly affected were it not to continue. His request is therefore granted. He will be identified as “the Applicant” throughout this Judgment.

Facts and Procedure

Judgment on Receivability No. UNDT/2012/159

5. On the preliminary issue of receivability, the following facts were found to be established by the Dispute Tribunal:¹

... The Applicant’s post with [the United Nations Children’s Fund (UNICEF)], Malawi[,] as Chief of Health and Nutrition was earmarked for abolition on 31 December 2011, the same date on which his fixed term contract was to expire. He was informed of this in May 2011 and began applying for other employment openings. On or about June 2011 the Office of Internal Audit (“OIA”) released its investigation report into an allegation of sexual exploitation filed against the Applicant by a woman (“Ms. H”)[, a

¹ The facts here are taken from Judgment No. UNDT/2012/159, paras. 1, 7-22.

UNICEF staff member who worked as Executive Assistant in Operations, a different section from the Applicant,] with whom he had had a relationship in December 2010.[²]

... On 4 August 2012 the Applicant was offered the post of Chief of Child Survival and Development in Uganda at P[-]5 level. He accepted the offer on 16 August 2011 with an agreed starting date of 19 September 2011.

... The Applicant was to leave Malawi for Kampala on 17 September 2011 to take up his new post. However the Malawi Country Representative declined to approve his travel authorization. In a letter dated 21 September 2011, the UNICEF Officer in Charge (“OIC”), Division of Human Resources (“DHR”) required the Applicant to take a paternity test as a condition for his transfer to his new post in Uganda.

... On 25 August 2011 in response to the June 2011 investigation report, the Director HR issued a reprimand to the Applicant for alleged misconduct. The reprimand also made paternity testing a condition for his re-assignment and promotion to Uganda. The Applicant was informed of this decision on 30 August 2011.

... On 29 September 2011, [the Applicant] requested a Management Evaluation. In his letter he contested the conditions placed on his re-assignment, the issuance of a reprimand, the refusal by [the] UNICEF Country Representative to sign his travel authorization, keeping him on a P-4 contract after he had accepted a P-5 position, the failure to issue him with a notice of abolition of post and non-selection for the UNICEF Tanzania post.[³] [The Secretary-General contests the UNDT’s findings of fact with respect to the content of the Applicant’s request for management evaluation.]

...

... On 25 October 2011 the Recruitment and Staff section of the DHR informed the Applicant that the position of Chief of Health in Tanzania, for which he had applied and been interviewed, had been cancelled.

... In a decision dated 13 November 2011, the Deputy Executive Director (“DED”) who was the head of the Management Evaluation in UNICEF asked the administration to

² According to the investigation report issued by UNICEF’s OIA dated June 2011, the relationship between the Applicant and Ms. H started in August 2009, and resulted in the birth of a child on 1 October 2010.

³ In his request for management evaluation of 29 September 2011, the Applicant requested review of the “administrative decision made by the Division of Human Resources following the investigation of the sexual exploitation case levelled against [him] by [Ms. H]”. He “believe[d] that the decision to make paternity testing a condition for [his] re-assignment and promotion to Uganda [was] unlawful and in violation of the terms and conditions of [his] employment and appointment”. He saw the events including the altercation that [Ms. H] had initiated in his office, the making of the completion of the investigation as a condition for his reassignment, etc. as “a deliberate attempt to block [his] re-assignment and promotion in Uganda” and asked “all these facts ... be given consideration in the management evaluation”. In his view, the paternity testing was made a condition for his reassignment and promotion in Uganda as a result of “these irregularities and the bias”. The Applicant then attached 13 documents and asked that they “form part of [his] request for management evaluation”.

re-issue the reprimand without mention of the paternity test.⁴ Additionally on 16 November 2011 the Applicant was informed that his reassignment and promotion to Uganda had been suspended until the outcome of OIA investigations into recent allegations of assault on Ms. H that had been made against him.

... The Applicant remained in Malawi at the P-4 level between September and December 2011. On 21 December 2011, he was re-issued with another P4 contract running from 1 January to 31 March 2012.

...

... On 9 March 2012, the Applicant was informed by the DED that as a result of the charges of misconduct against him (assault), a decision had been reached to demote him by one level from P[-]5 to P[-]4 with two years deferment of which he would not be eligible for promotion. He was then directed to take up his re-assignment to Uganda on a P[-]4 level.

... The Applicant filed a claim with the [Dispute] Tribunal on 6 April 2012.

...

... In Reply, the Respondent requested the [Dispute] Tribunal to consider as a preliminary issue the receivability of the following matters:

- a. The issuance of a reprimand ...;
- b. Refusal of the UNICEF Representative in Malawi to sign the Applicant's travel authorization to join the UNICEF Uganda Office ...;
- c. Keeping the Applicant on a P-4 contract after he had accepted a P-5 position ...;
- d. Failure to issue a written notice of abolition of post ... and
- e. Non selection for the UNICEF post in Tanzania. ...

6. In its Judgment on Receivability No. UNDT/2012/159, the UNDT disagreed with the Secretary-General on his receivability challenge and concluded that the Applicant had "requested management evaluation of each of the issues and administrative decisions challenged by him", and "[his] challenge to each of the five decisions listed ... above is receivable".

⁴ In the letter of 13 November 2011, the DED advised the Applicant as follows: "I have found enough elements to reverse the contested decision [to require the Applicant to undergo a paternity test before he could be reassigned to Uganda on promotion]. I have instructed DHR to reissue the reprimand dated 25 August 2011, making no reference to the paternity test, while highlighting the importance of all UNICEF staff members to comply with their private obligations and, particularly, their parental duties." In the same letter, the DED advised the Applicant of the suspension of his reassignment to Uganda and promotion to the P-5 post of Chief, Child Survival and Development "[u]ntil there [was] clarity about the outcome of the OIA investigation on the assault allegations".

Judgment on the Merits No. UNDT/2013/079

7. The following facts were established by the Dispute Tribunal concerning the merits of the case.⁵

... The Applicant is a medical doctor. On 6 July 2008, he joined the Malawi Country Office as Chief of Health and Nutrition with UNICEF on a fixed-term contract at the P-4 level expiring on 31 December 2011. In addition to his role as Chief of Health and Nutrition he was also the Office Ombudsperson.

... On 25 January 2010, the Applicant made a formal complaint to the Office of Internal Audit (OIA) that he was being sexually harassed by Ms. H ... He alleged that she made telephone calls and sent text messages to him about her work related stress, insomnia and a mental condition.

... The Applicant told OIA that these text messages and telephone calls progressed from expressions of gratitude for counselling and advice, to polite compliments before changing into messages of a sexual nature. He said that Ms. H began spreading rumours within the office about the two of them having an affair and only discovered what she was saying when he was approached by a colleague and asked if it were true.

... Ms. H was informed of these allegations and responded with a detailed account of events that she said she recorded in her diary, listing meetings between her and [the Applicant between 25 August 2009 and 27 January 2010.

... She alleged that as a result of her relationship with the Applicant, she became pregnant. When she informed the Applicant of that fact he allegedly told her to get an abortion. Ms. H said that as a result of the Applicant threatening her career she had an abortion on 21 November 2009.

... On 16 December [2009],[⁶] OIA commenced an investigation into the actions of the Applicant. The OIA investigators put it to him that they believed he had been intimately involved with Ms. H. He agreed that he had and that it was a mutually agreed arrangement. He told OIA that she started to harass him with the emails and texts after he tried to end the affair.

... In February 2010, Ms. H informed OIA that she was again pregnant and the Applicant was the father. The Applicant adamantly denied this. He said that the relationship had ended on 24 November 2009 and he had not had any sexual relations with Ms. H since then therefore proving that it would be biologically impossible.

... As a result of the developing situation between the two staff members, OIA approached a UNICEF Staff Counsellor in New York to assist. She was asked to help the Applicant and Ms. H to move forward following the end of their relationship and to assist

⁵ *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/079, paras. 12-53.

⁶ It appears that the date here should be 16 December 2009.

Ms. H deal with the situation she was in i.e. being married and expecting a child that she believed was the product of her extramarital affair with a colleague.

... The Counsellor visited Malawi for a week at the end of March 2010. She met individually with the Applicant and Ms. H to try to find a solution to their issues which would be not only in the interests of each of the two staff members but also of the Organization. She separately suggested to them that if the Applicant submitted to a paternity test once the child was born Ms. H would withdraw all allegations against him. Ms. H agreed to this. The Counsellor believed the Applicant also agreed but he denied having made such an agreement.

... Following these meetings the Applicant acknowledged that Ms. H had stopped sending him emails and texts and therefore decided to officially withdraw his allegation of sexual harassment against her. On 9 April 2010, OIA closed that case.

... On 1 October 2010, Ms. H gave birth to a daughter and proceeded to follow up on the paternity test that she believed the Applicant was to submit to as promised by the Counsellor. Ms. H then enquired with the UNICEF Malawi management ... about how she could go about organizing a paternity test. The Counsellor contacted the Applicant by telephone asking him about the agreement she said they had made. His response was that he had never made such an agreement. He reiterated that there was no way he could be the father of the child as the girl was born in October 2010 and his relationship with Ms[.] H ended in November 2009.

... On 6 December 2010, Ms. H contacted the OIA investigator about having the Applicant take a paternity test. The investigator spoke to the Applicant who confirmed he was not willing to take a paternity test unless obliged to by a court. The investigator wrote to Ms. H on 6 December 2010 to advise that UNICEF was not in a position to compel him to do anything against his will. He suggested that she take a legal approach to resolve the matter.

... After the Applicant's refusal to submit to a paternity test, Ms. H filed another complaint on 16 December 2010 with OIA alleging that he had abused his authority in sexually exploiting her by forcing her into having an affair with him, starting in August 2010.^[7]

... In May 2011, he was informed orally that his post with UNICEF, Malawi as Chief of Health and Nutrition would be abolished on 31 December 2011, the same date on which his fixed term contract was to expire. He was not advised in writing.

... The Applicant applied for other vacancies including the post of Chief of Health at the P[-]5 level with the Tanzania Country Office for which he was shortlisted by the Department of Human Resources on 24 May 2011 and interviewed on 29 June 2011.

⁷ According to the investigation report issued by UNICEF's OIA dated June 2011, the relationship between the Applicant and Ms. H started in August 2009.

... OIA issued its investigation report into Ms. H's allegations against the Applicant in June 2011. It made the following findings and conclusions:

a. Both staff members have shown poor judgment in entering into an extramarital affair between colleagues in the same office. There are conflicting stories as to how and who started the relationship and this is a key element of the allegation of sexual exploitation. However, from the attached correspondence provided, Ms. H was an active participant in the relationship up until the point that the Applicant ended it.

b. It is clear that Ms. H made the complaint of sexual exploitation, only after the Applicant declined to submit to a paternity test, which was some months after the relationship ended.

c. Recommends that Department of Human Resource (DHR)/PALS [Policy and Administrative Law Section] consider the evidence and take whatever action that is deemed appropriate.

... On 11 August 2011 the Applicant was offered the post of Chief of Child Survival and Development in Uganda at the P[-]5 level.

...

... He accepted the offer on 16 August 2011 by signing and returning the acceptance form. The contract had an agreed starting date of 19 September 2011.

... On 25 August 2011, having considered the OIA June 2011 investigation report into the allegation that he had sexually exploited another staff member, the Director of HR sent his decision to the Applicant in a letter.

... The Director told him that it was decided that there was not enough evidence to establish that the complainant was in a position of vulnerability or that the Applicant abused his position as an international civil servant, therefore disciplinary proceedings would not be commenced against him. However because he had filed a complaint of sexual harassment against his former partner without disclosing their intimate relationship and because he had not taken the paternity test he had allegedly agreed to, his behaviour was not befitting the standards of an international civil servant.

We thus expect you to honour your commitment to Ms. H and proceed with the test before you resume your new responsibilities in Uganda. ... Please consider this note as a reprimand [...] [First reprimand.]

... Ms. H also received a reprimand in which she was asked ... to facilitate the paternity test process by making her daughter available for testing. The Applicant and Ms. H received these letters on 30 August 2011. The Applicant did not know of Ms. H's reprimand at that time.

... On 2 September 2011, having made an appointment for the paternity test Ms. H went to the Applicant's office. The Applicant says that he was working at his desk when Ms. H burst into his office with her hands raised above her head and slammed the door

behind her. He repeatedly asked her to leave in forceful language and when she didn't he took hold of her clothing near her neck with one hand and tried to open the door with the other to remove her. He said she was fighting and resisting him. Another staff member, hearing the commotion, opened the door to see what was happening. Ms. H left the office. The Applicant said he felt under attack and acted in self-defence. He admitted calling her names in a voice loud enough to be heard by others in the office.

... In preparation for leaving Malawi to take up his new post in Uganda the Applicant ended the rental on his house. He removed all his belongings and handed them over to a shipping company. On 15 September he and his family moved into a hotel pending his departure on 17 September 2011 to take up his new post on 19 September.

... However, the Malawi Country Representative declined to approve his travel authorization after the Uganda Country representative expressed dismay that the Applicant's promotion had gone through without consideration of the reprimand and the on-going investigations into the Applicant's conduct. On 21 September 2011, the OIC of the Division for Human Resources, wrote to the Applicant:

I am hereby inviting you to inform us if and when you are going to take the paternity test required from you in that letter, as per your previous agreement with Ms [H] and the UNICEF's counsellor who assisted in your case ...

...

The current situation, brought about by your own private decisions, requires that you take a paternity test. This is the only way to determine if you have parental obligations with Ms [H's] child and that child's rights vis-à-vis you. This is the test to which you consented in the past.

We, thus, cannot authorize and pay for your departure from Malawi without having cleared this important matter first ...

... [T]he decision to appoint you to Uganda and to allow for your possible promotion at the P-5 level was made without knowledge of the reprimand issued on 25 August 2011. The appointment is thus currently under review. This notwithstanding, no decision withdrawing the offer of appointment has been made at this time.

... On 29 September 2011, the Applicant requested management evaluation of the conditions placed on his re-assignment; the issuance of a reprimand; the refusal by the UNICEF Country Representative to sign his travel authorization; keeping him on a P-4 contract after he had accepted a P-5 position; the failure to issue him with a notice of abolition of post and non-selection for the UNICEF Tanzania post.^[8] [The Secretary-General contests the UNDT's findings of fact with respect to the content of the Applicant's request for management evaluation.]

... On 6 October 2011, the Applicant was told that OIA UNICEF had opened investigations into his alleged assault of another UNICEF staff member. He was placed on three months administrative leave with pay pending the investigation as requested by

⁸ See footnote 3 above.

the Country Office and was told it was neither desirable nor reasonable to reassign him nor redeploy him elsewhere.

... On 25 October 2011, the Recruitment and Staff section of DHR informed the Applicant that “due to evolving changes in our programme interventions in the Tanzania Country Office in Dar-es-Salam, the recruitment process” for the position of Chief of Health in Tanzania, for which he had applied and been interviewed, had been cancelled.

... In a decision dated 13 November 2011, the Deputy Executive Director (“DED”) ... delivered a decision on the Applicant’s request for management evaluation.

... The decision concluded, *inter alia*, that as there was an absence of sufficient evidence that the Applicant had made a previous commitment to take a paternity test the contested decision was reversed. The DHR was instructed to reissue the reprimand letter making no reference to the paternity test although highlighting the importance of all UNICEF Staff members to comply with their private obligations and particularly their parental obligations. ...

... The DHR altered the reprimand letter in line with the MEU directive and reissued it on 22 November 2011. It removed the requirement for the Applicant to proceed with the test before assuming his new duties in Uganda. [Second reprimand.]

... The Applicant remained in Malawi at the P-4 level between September and December 2011. On 21 December 2011, he was re-issued with another P[-]4 contract for his Malawi post from 1 January to 31 March 2012.

... In the meantime, the investigation into the assault proceeded.

...

... OIA issued its investigation report on the Applicant’s case in December 2011...

...

... On 10 January 2012 the Applicant received notice that he had been formally charged with:

- a. Engaging in a physical altercation with Ms H, grabbing and pushing her out of his office[;]
- b. Yelling at Ms H and using inappropriate and offensive language when demanding her to leave his office[; and]
- c. Breaching the standards of conduct expected of a civil servant.

... On 15 February 2012, the Applicant sent a comprehensive response to the allegations of misconduct.

... On the same day, he requested a comparative analysis of the candidates interviewed for the Tanzania post. In response, on 16 February 2012, the Human Resources Specialist informed him that as the interview exercise conducted

did not yield a successful candidate the vacancy was cancelled and due to the unique skill set of the position, would be filled from a direct placement of a candidate picked from the 'talent group[.]' The [Dispute] Tribunal notes that this reason was different from the one given to [the Applicant] on 25 October 2011 by the Recruitment and Staff section of the DHR.

... On 9 March 2012, the Applicant was informed by the DED that as a result of the charges of misconduct against him, it had been decided that the interests of the Organization would be served through an informal resolution approach and that on 30 January his case was referred to the Office of the Ombudsman. He agreed to engage with the Ombudsman's office however no agreement was reached.

... Following consideration of the facts, the DED further informed the Applicant that it was concluded that there was clear and convincing evidence that he had engaged in misconduct but having considered mitigating facts decided that he should be demoted one level with deferment, during two years, of eligibility for consideration of promotion.

...

... In the same letter, the Applicant was then directed to take up his re-assignment to Uganda remaining at the P[-]4 level due to demotion. He did so from the beginning of April 2012.

8. In Judgment No. UNDT/2013/079, the Dispute Tribunal considered the following issues:

- (i) Whether the failure to give the Applicant written notice of the abolition of his post was unlawful;
- (ii) Whether the first reprimand and the refusal to sign the Applicant's travel authorization for the Uganda post were lawful;
- (iii) Whether the Applicant's misconduct was established and if so whether demotion was a proportionate sanction;
- (iv) Whether the facts on which the demotion was based were established by clear and convincing evidence;
- (v) Whether the established facts amounted to misconduct;
- (vi) Whether the sanction was proportionate to the offence;
- (vii) Whether the Applicant's non-selection for the Tanzania post was proper;
and

(viii) remedies.

9. Concerning (i) and (vii), the Dispute Tribunal dismissed the Applicant's claims. In its view, although his rights were breached by the lack of written notification of the abolition of his post, the Applicant was verbally informed of the abolition and suffered no material harm. Consequently, compensation was not warranted. Concerning his non-selection to the Tanzania post, the Dispute Tribunal concluded that the claim was moot because he had been appointed to the Uganda post before he learned of the cancellation of the Tanzania post, and he consequently suffered no prejudice.

10. The UNDT also concluded that the Applicant had engaged in misconduct and the sanction of demotion was proportionate to the offence. However, the two-year demotion period should start on 19 September 2011, when the Applicant was effectively demoted as he was prevented from taking up his P-5 post in Uganda because of the paternity test.

11. While it found that the Applicant's rights were breached by the paternity test being made a condition for assuming the Uganda post, and that the first reprimand, the refusal to issue travel authorization, and the erroneous calculation of the two-year demotion period "were sources of humiliation and anxiety to him", the UNDT concluded that the Applicant "was, to a considerable extent, the author of his own misfortune", and he was therefore "not entitled to any moral damages". However, the Applicant was entitled to a refund of the expenses for hotel, storage and airline penalties in the amount of USD 15,823, which he incurred as a direct result of the unlawful delay to his departure based on the requirement to take a paternity test.

Submissions

Judgment on Receivability No. UNDT/2012/159

The Secretary-General's Appeal

12. The Secretary-General submits that his appeal of Judgment No. UNDT/2012/159 is receivable. The question of receivability is linked in the present case to the requirement of management evaluation and not to the merits of the case.

13. Furthermore, the Secretary-General submits that the Dispute Tribunal erred on a question of law and exceeded its competence by concluding that the other issues of a non-disciplinary nature, including the abolition of post and non-selection for another post, were receivable, even though they did not form part of the Applicant's request for management evaluation. The Secretary-General notes that, in his email of 29 September 2011, the Applicant only requested management evaluation of the requirement of paternity testing, but not any other issue of a non-disciplinary nature.

14. The Secretary-General also submits that it was not reasonable for the Dispute Tribunal to infer that the Applicant had referred to the issues of a non-disciplinary nature either in the text of his request for management evaluation or in the attached documents, because none of those 13 documents relate to the non-disciplinary issues raised by the Applicant. Moreover, the contested decisions, including the refusal to sign his travel authorization, keeping the Applicant on a P-4 post, failure to issue a written notice of abolition of post and his non-selection for the Tanzania post, were taken *after* the Applicant filed his request for management evaluation on 29 September 2011.

The Applicant's Answer

15. The Applicant submits that in his request for management evaluation he clearly identified all the issues, as found by the Dispute Tribunal, including his non-selection for the Tanzania post, the refusal to sign his travel authorization, the first reprimand, the irregularities of the investigation, keeping him on a P-4 post, the abolition of his Malawi post, and the failure to notify him of the abolition in writing.

Judgment No. UNDT/2013/079

The Applicant's Appeal

16. Concerning the Administration's failure to give him written notice of the abolition of his post, the Applicant submits that the Dispute Tribunal failed to exercise its jurisdiction and erred on a question of fact when it based its conclusion solely on the lack of material harm suffered. The Applicant contends that he suffered moral harm and should therefore be compensated.

17. The Applicant submits that the UNDT erred on a question of fact, when it concluded that he had failed to substantiate his allegations about the process and the motivation of the decision-makers concerning the Tanzania post. The Applicant maintains that he submitted substantive evidence, but the UNDT failed to assess it. He believes that he had a “100% chance” to be selected, as he was the “most suitable” and best qualified candidate.

18. The Applicant submits that, contrary to the UNDT’s findings, he did request management evaluation of the second reprimand, which was, in his view, issued in retaliation and retribution after the case had already been closed. Furthermore, the Applicant submits that he was not given an opportunity to comment on the reprimand in violation of administrative instruction ST/AI/292 “Filing of adverse material in personnel records”, nor was he informed of his right to assistance in violation of administrative instruction ST/AI/379 “Procedures for dealing with sexual harassment”. The Applicant thus requests the Appeals Tribunal to rescind the second reprimand and expunge it from his official status file. The Applicant maintains that the UNDT had no legal basis not to award him moral damages after it considered the Administration’s refusal to sign his travel authorization unlawful.

19. Furthermore, the Applicant submits that the UNDT erred in law and fact in finding the facts on which his demotion was based were established by clear and convincing evidence. The UNDT finding was not supported by either the available evidence or its own jurisprudence. It smacked of “double standards and gender-based discrimination”.

The Secretary-General’s Answer

20. The Secretary-General submits that the UNDT correctly concluded that the disciplinary measure of demotion was lawful. Contrary to the Applicant’s assertions, the facts on which the disciplinary measure was based were established by clear and convincing evidence. The Secretary-General notes that during the UNDT’s oral hearing, the Applicant conceded to an altercation in his office and the use of offensive language.

21. The Secretary-General also submits that the Dispute Tribunal correctly concluded that the established facts amounted to misconduct and that the disciplinary measure of demotion was proportionate to the offence.

22. Furthermore, the Secretary-General submits that the Applicant has not established any errors warranting reversal of the UNDT Judgment. The Applicant failed to establish that the UNDT erred in its findings concerning the failure to issue a written notice of abolition of post or his non-selection for the Tanzania post.

23. In respect of the second reprimand, the Secretary-General submits that the UNDT correctly concluded that the Applicant did not request management evaluation of that decision. He notes that the second reprimand was issued on 22 November 2011, whereas the Applicant submitted a request for management evaluation on 29 September 2011, and that there is no evidence indicating any request for management evaluation of the second reprimand filed by the Applicant.

The Secretary-General's Cross-Appeal

24. In addition to reiterating his contention that the UNDT erred in law and exceeded its competence in declaring the non-disciplinary issues receivable despite the fact that the Applicant did not request management evaluation, the Secretary-General submits that the Applicant did not request management evaluation of the matter of the various expenses that he had incurred in the form of hotel bills, storage and airline penalties.

25. In the event that the Appeals Tribunal concludes that the UNDT did have competence to award compensation on this matter, the Secretary-General submits that the UNDT erred in awarding compensation to reimburse the Applicant for the entire amount of his living expenses from September 2011 to March 2012 due to the "unlawful delay" of his departure to Uganda. The Secretary-General notes that during this period, the Applicant was receiving his normal salary, which enabled him to pay for his normal living expenses, including accommodation and food. The Secretary-General is of the view that the UNDT's award of USD 15, 823 should be reduced to cover only any additional expenses that the Applicant incurred beyond his normal living expenses for accommodation and food.

The Applicant's Answer to the Cross-Appeal

26. The Applicant reiterates that, in his request for management evaluation, he identified all the violations that he was challenging and requested a comprehensive review of the issues including his non-selection for the Tanzanian post, the refusal to sign his travel authorization, the reprimand and the decision to keep him on a P-4 post.

27. Concerning the issue of compensation, the Applicant submits that this was rightly awarded. This compensation was, contrary to the Secretary-General's submission, not awarded for his day-to-day expenses, which were not claimed, but for warehouse charges, ticket penalty and hotel accommodation.

28. The Applicant alleges that he had submitted a rental subsidy application for his hotel stay, which was approved and forwarded to the Headquarters, but that he did not receive an answer.

29. The Applicant requests the Appeals Tribunal to dismiss the cross-appeal in its entirety, as the Secretary-General has merely repeated the same arguments that were presented to, but rejected by, the UNDT.

Considerations

Judgment on Receivability No. UNDT/2012/159

30. The Secretary-General's case is that the UNDT erred on the issue of receivability as the non-disciplinary issues contested by the Applicant were never submitted for management evaluation. The non-disciplinary issues contested by the Applicant are: the conditions placed on his re-assignment, the issuance of a reprimand, the refusal by the UNICEF Country Representative to sign his travel authorization, keeping him on a P-4 contract after he had accepted a P-5 position, the failure to issue him with a notice of abolition of post and his non-selection for the UNICEF Tanzania post.

31. The UNDT's finding in relation to the non-disciplinary issues is in these terms:

The Applicant filed a comprehensive request for management evaluation on 29 September 2011 with the Chief PALS/UNICEF. In light of that request and taking into account the Applicant's submissions, the [Dispute] Tribunal finds that the Applicant requested management evaluation of each of the issues and administrative decisions challenged by him, which the Respondent has alleged as not receivable. The Applicant expressly confirmed the scope of his request to the OIC/DHR.⁹

⁹ UNDT Judgment No. UNDT/2013/159, para 27.

32. We note that before the Applicant made his request for management evaluation, he had been advised by the OIC, Division of Human Resources, that: “In order for your request for Management Evaluation to be complete, kindly formally identify the decision you wish to be reviewed”.

33. The Applicant’s subsequent request for management evaluation was couched in these terms:

I would like to request for a management evaluation of the administrative decision made by the Division of Human Resources following the investigation of the sexual exploitation case leveled against me. ... In light of the countervailing evidence that I have provided, I believe that the decision to make paternity testing a condition for my re-assignment and promotion to Uganda is unlawful and in violation of the terms and conditions of my employment and appointment. I have never made a commitment to do a paternity test ... and I have been refuting this ever since the investigation began. I do not believe that I should be required to honour a commitment that I have never made. I am also requesting for evidence to be provided to support the claim that I agreed to do a paternity test that is now the basis the administrative decision [sic] I consider this request to be the ultimate insult and blow to my dignity and basic human rights.

34. The Applicant concluded by asking that all the communications he had made “on this case” together with the investigation file form part of his request for management evaluation.

35. There was no mention in the Applicant’s request for management evaluation of any of the non-disciplinary issues. Moreover, the documents attached to his request were clearly meant to support his request for management evaluation of the decision regarding paternity testing and none of those documents contains a request for management evaluation of any of the non-disciplinary issues.

36. We note that the Applicant did not dispute the outcome of the management evaluation, notwithstanding that such evaluation addressed only the issue of the paternity test. This is not consistent with the Applicant having also challenged the non-disciplinary issues in his request for management evaluation.

37. This Tribunal has held that the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary and that for this goal to be met it is essential to clearly identify the administrative decision the staff member disputes.¹⁰

38. The Applicant's request for management evaluation is clear and unambiguous. It clearly identifies the issue in dispute as the decision requiring him to submit to a paternity test. No reasonable and objective reading of it could lead to the conclusion that the Applicant was challenging any other issue.

39. We find that the UNDT, in deciding that the non-disciplinary issues had been submitted for management evaluation, erred in law and in fact, resulting in a manifestly unreasonable decision. It follows that the UNDT exceeded its jurisdiction in deciding on the merits of the Applicant's application when it was not receivable insofar as it relates to the non-disciplinary issues.

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40. The UNDT's award of USD 15,823 in respect of hotel, storage and airline penalties allegedly incurred by the Applicant, being a non-disciplinary issue which had not been submitted for management evaluation, cannot be allowed to stand.

41. The Applicant challenges the UNDT's finding that the facts on which his demotion was based were established by clear and convincing evidence. The Applicant submits that the UNDT's finding was not supported by either the available evidence or by its own jurisprudence.

42. The UNDT not only reviewed the evidence gathered by the OIA and considered by the decision maker, but also heard evidence from the Applicant, in which he accepted that there was a physical altercation in his office between himself and Ms. H and that he grabbed her in an attempt to push her out of the office. He also admitted using strong language as alleged by the complaint. The UNDT concluded that the facts on which the decision to demote him was based were established by clear and convincing evidence.

¹⁰ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 42.

43. The UNDT also, in a reasoned decision, found that the established facts amounted to misconduct and that the sanction was proportionate to the offence. In the latter regard, although the UNDT was reluctant to interfere with a disciplinary sanction that had been imposed in accordance with proper procedure, it found that the calculation of the sanction of two years' demotion should commence from 19 September 2011 (the date on which the Applicant had been effectively demoted) ending on 19 September 2013, rather than from the time it was imposed on 9 March 2012.

44. The standard of the UNDT's review of the disciplinary sanction imposed on the Applicant was consistent with the jurisprudence of this Tribunal.¹¹

45. The Applicant has not demonstrated that the UNDT committed any error of law or fact. We find his submissions in this regard to be devoid of merit.

Judgment

1. The Secretary-General's appeal and cross-appeal are allowed.
2. The UNDT Judgment on Receivability is set aside.
3. The award of compensation of USD 15,823 for hotel, storage and airline penalties is vacated.
4. The Applicant's appeal is dismissed in its entirety.

¹¹ *Nasrallah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-310; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164; *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar