



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

Judgment No. 2015-UNAT-544

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

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Inés Weinberg de Roca Judge Deborah Thomas-Felix
Case No.:	2014-626
Date:	2 July 2015
Registrar:	Weicheng Lin

Counsel for Mr. Nartey:	Victor Rodriguez/James Ochieng Oduol/ Miller Wanjala Bwire
Counsel for Secretary-General:	Rupa Mitra

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/051, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 May 2014, in the case of *Nartey v. Secretary-General of the United Nations*. On 15 July 2014, the Secretary-General filed his appeal and on 13 September 2014, Mr. Felix Tei Nartey filed his answer and a cross-appeal. The Secretary-General filed his answer to the cross-appeal on 11 November 2014.

Facts and Procedure

2. Mr. Nartey began employment with the Organization on 1 September 1998. Effective 27 March 2006, he joined the United Nations at Nairobi (UNON) as a Procurement Officer, P-3 level. On 6 December 2011, his appointment was converted to a permanent appointment in the Secretariat, with retroactive effect from 30 June 2009.

3. On 2 September 2009, in Case No. UNDT/NBI/2009/67, Mr. Nartey testified before the Dispute Tribunal on behalf of a co-worker (Mr. Mohammed Rizwan Kasmani), who challenged UNON's decision not to renew his appointment.

4. On 16 February 2010, in Case No. UNDT/NBI/2009/67, the UNDT issued Order No. UNDT/NBI/O/2010/025 (Order No. 25) to protect witnesses who testified in the *Kasmani* case from physical or verbal intimidation or threats and "retaliation of any other sort as a result of testifying".¹ Additionally, the UNDT ordered that "the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violation of this Order".²

5. On 9 July 2010, Mr. Nartey was endorsed by the Field Central Review Body (FCRB) for placement on the roster for the position of Procurement Officer at the P-4 level.

6. On 30 March 2012, the Officer-in-Charge of Human Resources (OIC/HR), African Union/United Nations Hybrid Operation in Darfur (UNAMID), sent a letter to UNON's Chief, Human Resources Management Services (HRMS), Division of Administrative

¹ Order No. 25, para. 37.

² *Ibid.* In Order No. 25, the UNDT advised that "any breach of this Order by either the Parties or the Ethics Office may trigger the application of the accountability provision in Article 10(8) of the Statute". (footnote omitted)

Services (DAS), advising him, inter alia, of Mr. Nartey's selection for reassignment on promotion to UNAMID as Procurement Officer at the P-4 level, subject to UNON's confirmation that it would release the staff member within 60 days. This letter was subsequently sent by facsimile to UNON on 11 April 2012.

7. On the same day, UNAMID also advised Mr. Nartey that he had been selected for the position of Procurement Officer at the P-4 level, "subject to medical clearance, issuance of Sudanese Visa, and/or designation (if applicable)". He was further advised that it was a non-family mission.

8. On 13 April 2012, Mr. Nartey inquired of HRMS as to UNON's position on UNAMID's request and to "clarify what return rights [he] would have ie. would [he] have a lien on [his] post." In response, HRMS advised Mr. Nartey that the offer specified that his movement would be on a reassignment (not a temporary assignment) basis, and therefore, he would not maintain any lien on his UNON position.

9. At Mr. Nartey's request, UNAMID revised its offer to UNON and sent another letter on 23 April 2012, requesting the release of Mr. Nartey on "mission assignment" to UNAMID to serve as Procurement Officer "for an initial period of 1 year subject to the extension of the present mandate of the mission". The letter further stated, in part:

[S]ubject to the request of the mission and your concurrence, the mission assignment may be extended up to a maximum period of two years only. We would also like to request your confirmation that the staff member will be reabsorbed upon return from mission assignment in accordance with the procedures and guidelines set out in ST/AI/404 [Assignment To And Return From Mission Detail] ("ST/AI/404") dated 19 May 1995, specifically paragraphs 7, 8 and 9.³

UNAMID asked UNON to respond within seven days.

10. On or about the same day, UNAMID also advised Mr. Nartey that he had been selected to serve as Procurement Officer at the P-4 level, subject to, inter alia, release by UNON "for an initial period of 1 year". UNAMID requested a response from Mr. Nartey within seven days.

³ The Appeals Tribunal finds that the reference to paragraph 8 was an error since Mr. Nartey has a permanent appointment, rather than a fixed-term appointment; thus, he is not covered by paragraph 8.

11. On 29 April 2012, HRMS responded to UNAMID's request, stating:

UNON was prepared to release Mr. Nartey on transfer basis in response to your request of [30 March]. However, it seems that while the request was being discussed, UNAMID decided to send us another request asking for his release on mission assignment. We are unable to meet your second request of April 25 and release Mr. Nartey on one-year mission assignment to UNAMID.

12. In response, UNAMID advised HRMS on 30 April 2012, that the offer would be amended.

13. On 7 May 2012, UNAMID sent its third request to UNON, dated 2 May 2012, this time seeking a "transfer" of Mr. Nartey to UNAMID to serve as Procurement Officer. The letter specifically noted that "[a] transfer is a movement for an indefinite period, with or without a change of duty station, with no right of the releasing office to reabsorb the staff member. It does not require separation from the current appointment." Once again, UNAMID requested that UNON respond within seven days.

14. By letter dated 2 May 2012, UNAMID also advised Mr. Nartey that he had been selected for the position of Procurement Officer at the P-4 level, and that it had requested his transfer from UNON. Mr. Nartey was further advised that "a transfer is a movement for an indefinite period, with or without a change of duty station, with no right of the releasing office to reabsorb the staff member".

15. On 7 May 2012, HRMS notified UNAMID of "UNON's acceptance of the request for [Mr. Nartey's] release on transfer basis".

16. On 14 May 2012, Mr. Nartey asked HRMS for "clarification regarding UNON's final position on the issue of retaining a temporary lien on [his] current position [...] in UNON." Mr. Nartey reminded the Chief of HRMS that he wanted "to maintain the lien due to pressing and overriding family reasons".

17. Mr. Nartey's first reporting officer (FRO) responded to him on the same day, stating:

Since this is a promotion for you, UNON is prepared to release you without any delay. Unfortunately, UNON cannot put a lien on the post for your return. As you know, the Procurement unit is under staffed and we will need to fill the vacancy as soon as possible with a regular appointment. [...]

[...] Since you hold a permanent appointment, you have a right of placement for a suitable P3 position within the UN should this become necessary. It is my hope though that you will aspire for upward career progression and aim for moves from P4 to P5 and so on.

18. On 14 May 2012, Mr. Nartey accepted the offer from UNAMID.

19. On 12 July 2012, Mr. Nartey submitted a request for management evaluation of “UNON’s decision not to grant [him] a lien on [his] post while on mission to UNAMID”. He claimed that the decision: (i) contravened his rights under ST/AI/404 and ST/AI/2010/3; (ii) was a “violation of the right not to be retaliated against”; and (iii) was taken in violation of Order No. 25 issued by the UNDT in the *Kasmani* case.

20. On 1 August 2012, UNON released Mr. Nartey for transfer to UNAMID. However, due to a long delay in obtaining a visa from Sudan, the request from UNAMID was later withdrawn.

21. On 3 August 2012, Mr. Nartey filed a complaint with the Ethics Office alleging, inter alia, retaliation, harassment, and abuse of authority against him by UNON following his testimony in 2009 as a witness in the *Kasmani* case. On 12 November 2012, the Ethics Office advised Mr. Nartey that it could not receive his complaint because “testimony before the UNDT does not constitute a protected activity under ST/SGB/2005/21 [Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations]”.⁴ The Ethics Office also advised Mr. Nartey that complaints of harassment, discrimination, and abuse of authority come within ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and, accordingly, should be submitted to the UNON Director-General.

22. On 28 August 2012, the Under-Secretary-General for Management adopted the findings and recommendations of the Management Evaluation Unit (MEU) to uphold the decision to deny Mr. Nartey’s request for a lien on his post. The Under-Secretary-General found that UNON “validly exercised its discretion in declining to release [him] on mission assignment which would have resulted in maintaining a lien on [his] post and the hiring of temporary staff members in [his] absence”. The Under-Secretary-General also found that his claims of retaliation, abuse of authority and harassment regarding events occurring during

⁴ Footnote omitted.

the period of 2010 to 2012 were time-barred and not receivable and, in any event, the MEU did not have authority to determine whether the impugned decision was motivated by retaliation.

23. On 6 September 2012, Mr. Nartey submitted a complaint to the UNON Director-General alleging that the Director of DAS (D/DAS) had retaliated and discriminated against him, harassed him, and abused his authority. The UNON Director-General did not respond to this complaint prior to Mr. Nartey filing his application before the Dispute Tribunal.

24. On 26 November 2012, Mr. Nartey, represented by counsel, filed an application before the UNDT challenging “UNON’s decision not to grant him a lien on his post while on mission to UNAMID”. In the application, Mr. Nartey also contested a series of “other related actions or decisions taken by UNON” between 14 October 2009 and February 2012, asserting that “[t]he impugned decision should be read in conjunction with all the retaliatory actions taken against [him] since his testimony before the [Dispute] Tribunal”. Mr. Nartey requested rescission of the decision, measures to ensure UNON refrained from actions threatening his career, compensation for material and moral damages, legal costs, and other relief.

25. The UNDT held oral hearings on 23 and 24 September and 26 and 27 November 2013.

26. On 14 May 2014, the Dispute Tribunal issued Judgment No. UNDT/2014/051, finding the application was receivable and granting it. The UNDT concluded that “UNON management abused its authority in [...] denying [Mr. Nartey] the grant of a lien on his post”.⁵ The UNDT found that UNON’s general practice of denying liens to professional staff going on mission is “contrary to the spirit and intent of the Secretary-General as expressed in ST/AI/404”.⁶ The UNDT awarded Mr. Nartey compensation in the amount of six months’ net base salary for procedural irregularities and USD 10,000 for moral damages. The UNDT also referred the Director of the Ethics Office and the D/DAS to the Secretary-General for accountability, pursuant to Article 10(8) of the UNDT Statute.

⁵ Impugned Judgment, para. 216.

⁶ *Ibid.*, para. 175.

27. On 15 July 2014, the Secretary-General filed his appeal, and on 13 September 2014, Mr. Nartey, represented by counsel, filed his answer and a cross-appeal. The Secretary-General filed his answer to the cross-appeal on 11 November 2014.

Submissions

The Secretary-General's Appeal

28. The UNDT exceeded its competence and erred in law by receiving numerous claims in addition to Mr. Nartey's challenge of the decision not to grant him a lien against his post. These claims related to events between 2009 and February 2012, which were not the subject of requests for management evaluation within 60 days of their occurrence. Listing some of these claims in Mr. Nartey's request for management evaluation of the impugned decision was solely to show UNON's bad motive for the impugned decision. The UNDT had no authority to waive the requirement of management evaluation.

29. The UNDT also exceeded its competence and erred in law when it concluded that it could consider the Ethics Office's decision not to accept Mr. Nartey's complaint of retaliation, which was not an administrative decision subject to judicial review. Assuming *arguendo* that such decisions are reviewable, Mr. Nartey did not submit the Ethics Office's decision for management evaluation; thus, it was not receivable *ratione materiae* by the UNDT.

30. The UNDT further exceeded its competence and erred in law when it conducted a *de novo* review of Mr. Nartey's harassment claims and made findings regarding four incidents occurring between February 2008 (more than three years prior to the filing of the application) and July 2011. On 6 September 2012, Mr. Nartey complained to the UNON Director-General about discrimination, harassment, abuse of authority, and retaliation. However, he did not receive a response to his complaint prior to filing his application before the UNDT. Thus, Mr. Nartey's complaints of harassment were not properly before the UNDT for review. Moreover, after Mr. Nartey filed his application before the UNDT, the UNON Director-General closed his case, finding no basis for his complaint of harassment and abuse of authority.

31. The UNDT erred in concluding that the decision not to grant Mr. Nartey a lien on his post was illegal. First, as UNON has a general practice of not granting its professional staff liens on their posts for mission service, there was no retaliatory motive in denying

Mr. Nartey's request for a lien. Second, UNON's general practice does not violate ST/AI/404, which expressly allows the Secretary-General to exercise reasonable discretion in light of the historic difficulties faced by certain duty stations in recruiting qualified candidates. The General Assembly has recognized this difficulty, which is exacerbated when staff members are permitted to maintain liens on their posts, thus requiring their posts to be filled through temporary assignments, which are less stable and less attractive to candidates.

32. The UNDT exceeded its competence and erred on questions of fact and law in concluding that the Ethics Office disobeyed Order No. 25 issued in the *Kasmani* case.⁷ Rather, the Ethics Office properly responded to Mr. Nartey's retaliation complaint and found that testifying before the UNDT was not a protected activity within the meaning of ST/SGB/2005/21 and, thus, was not within the mandate of the Ethics Office. No tribunal has found that the UNDT has authority to expand the Ethics Office's mandate. Moreover, the Ethics Office was established before the UNDT; thus, the Secretary-General could not have intended testifying before the UNDT to be a protected activity within the meaning of ST/SGB/2005/21.

33. The UNDT erred in law and exceeded its competence in referring the D/DAS and the Director of the Ethics Office to the Secretary-General for accountability. As to the D/DAS, the instances of his alleged abusive or intimidating conduct from 2009 [sic] to 2012 found by the UNDT were not properly before the UNDT since they had not been the subject of management evaluation; thus, the UNDT had no competence to consider them. The UNDT also lacked competence to find that the Director of the Ethics Office willfully disobeyed Order No. 25 since the Ethics Office's decision was not before the UNDT.

34. The UNDT erred in awarding compensation to Mr. Nartey based, in part, on claims that were not properly received and which it lacked jurisdiction to consider. As to the claim regarding the denial of a lien on his post, the UNDT erred in finding a breach of Mr. Nartey's rights.

35. The Secretary-General requests that the Judgment be vacated in its entirety.

⁷ The Appeals Tribunal reviewed the UNDT judgment in the *Kasmani* case in *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-305.

Mr. Nartey's Answer

36. The UNDT did not err in receiving all of Mr. Nartey's claims. The Administration committed a series or pattern of harassing acts against Mr. Nartey following his testimony in the *Kasmani* case, which culminated in UNON's refusal to grant him a lien on his post. Not all of these acts were administrative decisions subject to judicial review; thus, Mr. Nartey could not seek management evaluation of each of them.

37. Mr. Nartey's application sought, in part, to secure the enforcement of Order No. 25, which is still alive and enforceable. At the heart of his application is the question of what legal protection a witness can legitimately expect for testifying before a judicial body. The issue is whether the Ethics Office disobeyed an order of the UNDT; not whether the decision of the Ethics Office can be received by the UNDT as a contested decision. Thus, the UNDT did not err in finding the Ethics Office disobeyed its Order.

38. The UNDT did not err in concluding that Mr. Nartey was a victim of harassment, abuse of authority and retaliation, as demonstrated by his testimony, the cross-examination of the Secretary-General's witnesses and documentary evidence.

39. The UNDT did not err in concluding that UNON illegally refused to grant Mr. Nartey a lien on his post. There was no lawful reason to deny his request.

40. The UNDT properly referred the D/DAS and the Director of the Ethics Office to the Secretary-General under Article 10(8) of the UNDT Statute for accountability.

41. The UNDT had jurisdiction to award damages to Mr. Nartey under Article 10(5) of the UNDT Statute. Mr. Nartey's rights and legitimate expectations were egregiously impacted and his career was frustrated; the position offered to him was a higher position with financial gain. The fact that he remains at the P-3 level shows how his career path and reputation have suffered.

42. Mr. Nartey seeks to dismiss the appeal and to have costs awarded to him.

Mr. Nartey's Cross-Appeal

43. Mr. Nartey contends that the UNDT erred in failing to find "exceptional" grounds within the meaning of Article 10(5)(b) of the UNDT Statute. The "exceptional" grounds are

the nature of the prejudice he suffered during the three-year period from 2009 to 2012, as well as the stagnation of his career. The UNDT should have awarded him 24 months' net base salary, instead of six months' net base salary, and moral damages in the amount of USD 40,000, rather than USD 10,000.

44. Mr. Nartey claims that the UNDT erred in not awarding him attorney's fees on an indemnity basis under Article 10(5) of the UNDT Statute. The litigation resulted from the Secretary-General's manifest abuse of the proceedings by failing to comply with Order No. 25, which compelled Mr. Nartey to hire counsel to pursue his claims before the UNDT. Thus, it was grossly unfair when the UNDT denied his request for attorney's fees as costs.

The Secretary-General's Answer to Mr. Nartey's Cross-Appeal

45. There is no legal basis for Mr. Nartey to claim that the award of compensation and moral damages should be enhanced. This is not an "exceptional" case within the meaning of Article 10(5)(b) of the UNDT Statute. Further, the UNDT Statute prohibits punitive or exemplary damages, which is really what Mr. Nartey seeks. Finally, Mr. Nartey's request for increased compensation focuses on claims the UNDT improperly received; thus, there is no merit to the cross-appeal of the amount of damages.

46. Mr. Nartey's claim for attorney's fees as costs is unfounded. There is no right to costs in proceedings before the UNDT. Rather, Article 10(6) of the UNDT Statute allows for costs only when a party has manifestly abused the proceedings, and there was no manifest abuse of process in this case. Mr. Nartey has not shown that the UNDT erred in not awarding him attorney's fees or costs.

Considerations

Secretary-General's Appeal of the UNDT Judgment

Did UNON violate Administrative Instruction ST/AI/404?

47. Mr. Nartey claimed UNON's decision not to grant him a lien on his post was unlawful in that it: (i) violated his rights under ST/AI/404; (ii) violated his right not to be retaliated

against; and (iii) violated Order No. 25 issued by the UNDT in the *Kasmani* case. The UNDT agreed with Mr. Nartey on all three grounds. On appeal, we consider each ground separately.

48. In 1995, the Secretary-General issued ST/SGB/277 (Policy Governing Assignment To And Return From Mission Detail), and on 19 May 1995, ST/AI/404 was issued to implement ST/SGB/277 and to set out the procedures and guidelines governing “mission detail”.

49. The purpose behind ST/AI/404 is stated in paragraph 6, which provides, in part:

It should be emphasized that mission detail, as any other assignment in the Organization, is at the discretion of the Secretary-General, as provided in staff regulation 1.2. [...] ⁸In this respect, all internationally recruited staff members can be assigned to missions as deemed necessary by the Secretary-General. At the same time, without prejudice to this tenet, voluntary service on mission is encouraged and preferred. The Organization’s policy is thus to invite qualified candidates to volunteer for mission service, and to encourage parent departments/offices to release such qualified staff subject to the guidelines detailed in paragraphs 7⁹ to 9¹⁰ below.

⁸ Staff Regulation 1.2(c) states: “Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations.”

⁹ Paragraph 7 of ST/AI/404 provides:

Consistent with the intent of paragraph 6 above, it is most important that staff in the Professional and General Service and related categories proceeding on mission detail be assured that they can return to their current post. Accordingly, for a period of up to two years, in conjunction with a staff member’s mission assignment, releasing departments/offices are responsible for ensuring that the posts of detailed staff members holding permanent or long-term appointments are blocked. These posts are to be filled only through temporary recruitment of replacement staff, if necessary, or through temporary staff redeployment [...]. If it is proposed that the mission detail be extended beyond two years, it will not be possible to grant any extension unless there is a specific written agreement to continue blocking the post in the parent department. The implementation of this agreement will be monitored by the Office of Human Resources Management.

¹⁰ Paragraph 9 of ST/AI/404 states:

The demand for qualified staff to serve on field missions has placed a significant burden on departments and on the staff who remain, who must continue to maintain and even enhance productivity in programme delivery. It is for this reason that departments cannot be expected to block posts for more than two years when permanent staff members proceed on mission detail. Every effort will be made to balance their needs with those of the special mission and of the Organization as a

Selection for mission service is made in the light of the needs of the mission concerned. [...] Selection is not an entitlement in any sense or form.

50. Initially, the UNDT found that UNON has a general practice of not releasing professional staff members on mission with liens on their posts. Next, the UNDT found that, based on this general practice, Mr. Nartey's FRO decided not to authorize his release to UNAMID with a lien on his post because it would adversely affect the procurement programme to have his post filled by a temporary assignment, which no qualified person would accept. Lastly, the UNDT concluded that "UNON management abused its authority in [...] denying [Mr. Nartey] the grant of a lien on his post"¹¹ since its general practice of denying such liens is "contrary to the spirit and intent of the Secretary-General as expressed in ST/AI/404".¹²

51. On appeal, the Secretary-General contends that the UNDT erred on a question of law in holding UNON's practice of not granting liens on posts to professional staff on mission is unlawful. The Secretary-General argues that UNON's practice is a reasonable exercise of discretion in view of the historic difficulties UNON faces in recruiting qualified candidates to serve in Nairobi. The Secretary-General notes that the General Assembly has recognized the serious recruitment difficulties of certain duty stations, such as Nairobi, in resolution 53/221 (1999) and resolution 57/305 (2003), for example.

whole. With this in mind, in order to begin building a system of mission rotation that will meet the needs of both programme managers and the mission staff, it has been decided to set an 8 to 10 per cent ceiling as a guideline in determining the percentage of staff that a department or office is expected to release for mission service. Within that ceiling programme managers are expected to ensure equitable opportunities for the release of their staff for mission service. Once a department/office has reached this ceiling, the department/office would not be expected to release additional staff until a corresponding number of staff have returned. This will serve to facilitate the release of staff for both long-term and short-term assignments and will, in turn, give more staff an opportunity to benefit systematically from the assignment. It would also ensure that programme managers will continue to have committed and competent staff carrying out the programmes that have been entrusted to them.

¹¹ Impugned Judgment, para. 217.

¹² *Ibid.*, para. 175.

52. To determine whether the UNDT made an error of law in finding the impugned decision was unlawful, we must consider the language of the controlling Administrative Instruction ST/AI/404. The Administrative Instruction addresses two distinct types of mission service: (i) the Administration's assignment of staff members to missions; and (ii) the staff members' voluntary service on missions. There is no dispute that Mr. Nartey comes within the latter category of voluntary mission service.

53. The Administrative Instruction has broad language encouraging and promoting mission service. Regarding voluntary service on missions, however, the Administrative Instruction does not contain mandatory language requiring a department or office to release its professional staff members on mission or, if they are released, to grant liens to those staff members to retain their posts. Paragraph 6 of the Administrative Instruction specifically and clearly provides that selection for voluntary mission service is "not an entitlement in any sense or form". The UNDT correctly recognized that the policy or intent behind ST/AI/404 is to encourage departments and offices to release their staff members on voluntary mission service. However, it made an error of law when it found that UNON's decision to deny Mr. Nartey's request to grant him a lien on his post was an "abuse of [its] authority" and "contrary to the spirit and intent" of the Administrative Instruction. The Administrative Instruction sets forth a broad policy promoting mission service, but it does *not* require UNON to either release Mr. Nartey on voluntary mission service or to grant him a lien on his post, if released. Paragraph 6 of the Administrative Instruction provides otherwise.¹³

Was UNON's decision in retaliation against Mr. Nartey?

54. Mr. Nartey claimed that UNON's decision to deny his request for a lien was retaliatory and a violation of Order No. 25. In his application, he listed several acts or omissions (from 2008 through February 2012) which he claimed showed a pattern of retaliation. Addressing the retaliation claim, the UNDT found that UNON's illegal refusal to grant Mr. Nartey a lien on his post "in the circumstances served to reveal a state of mind bent on exacting retaliation and forcing [Mr. Nartey] out of UNON".¹⁴

¹³ *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

¹⁴ Impugned Judgment, para. 183. Although the UNDT did not make a specific finding of retaliation in violation of Order No. 25, it is reasonable to draw such an inference from the foregoing findings.

55. On appeal, the Secretary-General argues that the UNDT made an error of law in finding the impugned decision was retaliatory because the evidence clearly showed that the decision stemmed from the application of UNON's general practice of denying liens to all professional staff; thus, there was no bad motive or intent to retaliate directed against Mr. Nartey. Since the decision was based on UNON's general practice, the Secretary-General further argues, Mr. Nartey did not meet his burden to show improper motive.

56. The Secretary-General is correct. Mr. Nartey does not challenge the UNDT's finding that the impugned decision was the result of the application of UNON's general practice to deny liens on their posts to its professional staff who are released on mission. This undisputed finding *a fortiori* precludes the contradictory finding that UNON had a retaliatory motive for making its decision in respect to Mr. Nartey.

57. Moreover, as we recently held, "it was not reasonable for the Dispute Tribunal to conclude, based on the sole fact of the existence of friction" between a manager (the D/DAS) and a staff member (Mr. Nartey), that the impugned decision was retaliatory in nature.¹⁵ This is especially so when the UNDT further found that the impugned decision was made by Mr. Nartey's FRO, rather than the manager Mr. Nartey alleges had the intent to retaliate against him because of his testimony in the *Kasmani* case, the D/DAS.

58. For these reasons, Mr. Nartey did not satisfy his burden to show the impugned decision was based on a retaliatory motive. The Appeals Tribunal determines that the UNDT made an error of law when it concluded that the impugned decision was retaliatory. The UNDT also made factual errors regarding retaliation and these errors resulted in a manifestly unreasonable decision.

Did UNON violate Order No. 25?

59. Having determined that the UNDT erred in law when it concluded that UNON's decision was retaliatory, we also determine that the UNDT erred in law when it inferentially concluded that the decision violated Order No. 25.

¹⁵ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-506, para. 55.

60. The UNDT considered *sua sponte* whether the Ethics Office's decision not to receive Mr. Nartey's report of retaliation in violation of Order No. 25 was correct. In this regard, it found that "testifying before the [Dispute] Tribunal amounts to an 'activity protected by the present policy' within the scope of Section 1.4 of ST/SGB/2005/21"¹⁶ and, accordingly, "the Ethics Office willfully disobeyed the Tribunal's Order" when it did not receive Mr. Nartey's report of retaliation.¹⁷

61. On appeal, the Secretary-General argues that the UNDT exceeded its competence by considering *sua sponte* the Ethics Office's decision since it is not an administrative decision subject to judicial review or, alternatively, Mr. Nartey had not sought management evaluation of the decision. Additionally, the Secretary-General contends that the UNDT erred in concluding that the Ethics Office disobeyed Order No. 25.

62. There is no doubt that the Dispute Tribunal has the inherent power to issue orders to protect witnesses who testify before it from retaliation by a party. Like the contempt power, the power to protect witnesses stems from "[t]he ability to promote and protect the court, and to regulate proceedings before it[; it] is an inherent judicial power. ... [and] it is essential to [...] a tribunal's case management and ability to conduct hearings."¹⁸

63. When the *Kasmani* case was on appeal before us, we held that the UNDT could properly issue an order to protect witnesses who testify before it – as we repeat here – and that the "Ethics Office would only act [on Order No. 25] upon the basis of a report".¹⁹ We did not determine that the UNDT was competent to order the Ethics Office to "be seized" of Order No. 25 to "monitor the situation for further action should there arise allegations of violations" of Order No. 25.²⁰ And we did not direct the Ethics Office to receive a report of a violation of Order No. 25.

64. The Appeals Tribunal determines that the UNDT exceeded its competence in considering *sua sponte* the decision of the Ethics Office. First, Mr. Nartey did not raise any claims against the Ethics Office and did not contest the Ethics Office's decision not to receive his report of retaliation in violation of Order No. 25. It is axiomatic that the Dispute Tribunal

¹⁶ Impugned Judgment, para. 192.

¹⁷ *Ibid.*, para. 196.

¹⁸ *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 31.

¹⁹ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-305, para. 41.

²⁰ *Kasmani v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/049, para. 139 (iv).

is not competent to address a claim that is not set forth in the application.²¹ Additionally, even if Mr. Nartey had challenged the Ethics Office's decision not to receive his report of retaliation, that decision is not an administrative decision subject to judicial review.²² Thus, the Ethics Office's decision not to receive Mr. Nartey's report of retaliation was not properly before the UNDT for review.

Were the referrals for accountability proper?

65. Article 10(8) of the UNDT Statute provides that the UNDT "may refer appropriate cases to the Secretary-General [...] for possible action to enforce accountability". Pursuant to this provision, the UNDT referred the "conduct" of the Director of the Ethics Office "for disobeying the Tribunal's orders" and the D/DAS "for his abuse of authority and acts of intimidation and retaliation against" Mr. Nartey.²³

66. On appeal, the Secretary-General argues that the UNDT erred in making both referrals. The Appeals Tribunal agrees. As stated above, we have determined that the UNDT exceeded its competence in receiving the Ethics Office's decision not to receive Mr. Nartey's report of retaliation. Thus, the merits of that decision were not properly before the UNDT and the UNDT erred in fact and law when it found that the Director of the Ethics Office violated Order No. 25 and referred the Director to the Secretary-General for accountability.²⁴

67. The Secretary-General contends that the UNDT exceeded its competence or jurisdiction by making a *de novo* investigation into Mr. Nartey's claim of harassment under ST/SGB/2008/5 and concluding that Mr. Nartey was a victim of harassment by the D/DAS. This error was one of the bases for the referral of the D/DAS to the Secretary-General for accountability.

68. ST/SGB/2008/5 provides a detailed procedure for investigating complaints of retaliation, harassment, and abuse of authority. The undisputed facts show that: (i) on 6 September 2012, Mr. Nartey made a complaint against the D/DAS to the UNON Director-General under ST/SGB/2008/5, alleging retaliation, harassment and abuse of authority; (ii) the UNON Director-General did not respond to the complaint prior to

²¹ Cf. *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-400, para. 63.

²² *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457, para. 41.

²³ Impugned Judgment, para. 219.

²⁴ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 43.

Mr. Nartey filing his application seeking judicial review of the impugned decision; and (iii) Mr. Nartey did not raise a claim of harassment in his application before the UNDT.²⁵ In light of these facts, the UNDT exceeded its competence or jurisdiction and erred as a matter of law when it found that the D/DAS had created a hostile work environment within the meaning of ST/SGB/2008/5.

69. Since we have concluded that: (i) there was no basis for the UNDT's finding that the impugned decision was retaliatory, and (ii) the UNDT exceeded its jurisdiction in considering any harassment claim by Mr. Nartey, we also determine that the UNDT erred in fact and law when it referred the D/DAS to the Secretary-General for accountability on the grounds of retaliation and harassment. For all these reasons, both referrals for accountability should be vacated.

Was the award of compensation proper?

70. The UNDT awarded Mr. Nartey six months' net base salary as compensation: (i) "for the procedural irregularities occasioned him by the failure of the Administration to follow its own guidelines and its rules and procedures" in denying him a lien on his post; and (ii) for the Ethics Office's refusal to accept his report of retaliation and to take all necessary action to protect him from retaliation.²⁶ Additionally, the UNDT awarded Mr. Nartey moral damages in the amount of USD 10,000 for "stress caused [...] over a period of years by the circumstances of this case and, specifically the conduct of the DAS/UNON".²⁷

71. On appeal, the Secretary-General contends that the UNDT erred in awarding compensation based on findings that were improper. In light of our conclusions that the UNDT erred in finding UNON unlawfully denied Mr. Nartey's claim for a lien on his post and exceeded its competence in receiving the Ethics Office's decision, there was no basis for the UNDT to award compensation to Mr. Nartey and we should vacate that award. Similarly, we should vacate the award of moral damages to Mr. Nartey since his rights were not breached,

²⁵ Mr. Nartey cited ST/SGB/2008/5 in his application, but solely for the definition of abuse of authority (paragraph 1.4 of ST/SGB/2008/5).

²⁶ Impugned Judgment, para. 217.

²⁷ *Ibid.*, para. 218.

he presented no evidence of stress²⁸ and, more importantly, the UNDT exceeded its competence in receiving a harassment claim regarding conduct by the D/DAS.

Mr. Nartey's cross-appeal

72. On cross-appeal, Mr. Nartey contends that the UNDT erred in failing to find “exceptional” grounds within the meaning of Article 10(5)(b) of the UNDT Statute to award him 24 months’ net base salary, instead of six months’ net base salary, and moral damages in the amount of USD 40,000, rather than USD 10,000. He argues that the “exceptional” grounds are the nature of the prejudice suffered by him, especially the resultant stagnation to his career and the period of oppression he suffered from 2009 to 2012. Additionally, Mr. Nartey contends, the manner in which he was publically humiliated must be considered. The Appeals Tribunal finds no merit to Mr. Nartey’s cross-appeal in light of our determinations that the awards of compensatory and moral damages were without legal bases.

73. Article 10(6) of the UNDT Statute provides for the award of costs “[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it”. Article 10(6) does not allow the UNDT to award costs to the prevailing party, as a matter of course.²⁹

74. On cross-appeal, Mr. Nartey contends that the UNDT erred in refusing to award him attorney’s fees as costs since the Secretary-General manifestly abused the proceedings by failing to comply with Order No. 25. As a result, he claims he was required to hire counsel to pursue his claims since the nature of the litigation before the UNDT was complex. Mr. Nartey’s argument misses the mark. It addresses the reasons why he hired counsel to file an application before the UNDT; not the Secretary-General’s conduct *during* the legal proceedings. The UNDT did not find any ground to award costs to Mr. Nartey, and we find that decision was not erroneous. Thus, Mr. Nartey’s cross-appeal should be denied.

²⁸ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518, para. 41, citing *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114, para. 18.

²⁹ *Machanguana v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-476, para. 12.

Judgment

75. The appeal is granted and Judgment No. UNDT/2014/051 is vacated.

The referrals of the Director of the Ethics Office and the Director of DAS of UNON to the Secretary-General for accountability are vacated.

The cross-appeal is denied.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar