UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-742

Kallon

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge Rosalyn Chapman Judge John Murphy Judge Dimitrios Raikos Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2016-935
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Kallon:	George G. Irving
Counsel for Secretary-General:	Carla Hoe

JUDGE JOHN MURPHY, DRAFTING FOR THE MAJORITY.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2015/126 (Judgment on Liability) and Judgment No. UNDT/2016/027 (Judgment on Relief), rendered by the United Nations Dispute Tribunal (UNDT) in New York on 31 December 2015 and 1 April 2016, respectively, in the cases of *Kallon v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 31 May 2016, and Mr. Alpha Kallon filed his answer on 14 June 2016. After initial consideration by a panel of three Judges, it was decided in terms of Article 10(2) of the Appeals Tribunal Statute to refer the case for consideration by the whole Appeals Tribunal.

Facts and Procedure

2. In July 2010, not long after the devastating earthquake in Haiti, Mr. Kallon was appointed from a roster of pre-approved candidates as the Chief Procurement Officer (CPO) at the P-4 level on a fixed-term appointment at the United Nations Stabilization Mission in Haiti (MINUSTAH). He was headhunted into the position by Mr. GB, the Chief of Mission Support of MINUSTAH (CMS/MINUSTAH) who had worked with him in the past at other mission stations. Mr. Kallon holds a Bachelor of Science (BSc) and a Master of Business Administration (MBA), and is a member of the Chartered Institute of Purchasing and Supplies in the United Kingdom. Prior to his appointment at MINUSTAH he worked for the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) as a Procurement Officer at the P-4 level, where he received, in April 2009, from the Assistant Secretary-General of the Office of Central Support Services (ASG/OCSS and OCSS, respectively) the required designation to perform procurement functions as a CPO, in accordance with the Secretary-General's Bulletin ST/SGB/2005/7 (Designation of staff members performing significant functions in the management of financial, human and physical resources).

3. On 24 February 2012 and 30 May 2012, respectively, Mr. Kallon's electronic performance appraisal system (e-PAS) reports were completed for the 2010-2011 and 2011-2012 periods. For 2010-2011 he was rated as having successfully met expectations and in 2011-2012 as having exceeded them. He was appraised as fully competent in all core values, core competencies and managerial competencies; and, with respect to 2011-2012, he was rated "outstanding" in the managerial competencies of professionalism, planning and organization. Mr. Kallon's first reporting officer described him as an outstanding procurement professional while his

second reporting officer and Director of Mission Support of MINUSTAH (DMS/MINUSTAH), Mr. GS, evaluated his performance as good in a difficult environment. In his testimony before the UNDT, Mr. GB described Mr. Kallon's performance as "extremely good".

4. In mid-2012, Mr. GB, who was then the CMS of the United Nations Interim Security Force for Abyei (UNISFA), sought to recruit Mr. Kallon as his CPO in Sudan. On 17 July 2012, Mr. GB notified the DMS/MINUSTAH that Mr. Kallon had been selected for reassignment to the post of CPO in UNISFA, subject to *inter alia* receiving designation under ST/SGB/2005/7 to perform procurement functions.

5. On 25 July 2012, the Headquarters Committee on Contracts (HCC), an oversight and advice body that reviews certain categories of proposed procurement actions, sent a four page note (the HCC Note) to the ASG/OCSS highlighting procedural and substantive concerns and deficiencies regarding five procurement cases from MINUSTAH between 10 May 2012 and 11 July 2012, which it felt warranted managerial review and follow up. The five issues were summarized in the UNDT's Judgment essentially as follows:

> (a) MINUSTAH had invested USD 1.9 million in improvements to a site it had leased from a local landlord and the procurement section was uncertain whether the United Nations could claim reimbursement or obtain a reduction in rent. MINUSTAH had not approached the landlord to discuss the issue but hoped to do so when signing the new lease. The HCC did not believe it was appropriate for the MINUSTAH procurement section to wait until then.
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> (b) MINUSTAH sought to extend a lease for office and warehouse space in Santo Domingo from 2012 to May 2015 despite anticipating that some staff would move back to Port-au-Prince as a result of a retrenchment exercise and that all the space would not be needed. The HCC was of the opinion that it would have been better to have completed the retrenchment exercise and ascertain the requirements for office space before making any durational or special modifications in the lease. The HCC was concerned that there had been no attempt to obtain reimbursement for improvements to the leased premises and no consideration was given to setting off any amount against future rentals. Moreover, no invoice had been submitted to the landlord requesting payment of an amount of USD 26,632.40 which the landlord had already agreed to reimburse.

(c) The HCC was concerned that MINUSTAH was not aware of the relevant Haitian laws or policies regarding the solicitation of armed guard security services. It apparently only became aware at a later stage of the solicitation process that local legislation permitted only Haitian companies to provide such services. The Secretary-General's apprehension was that the misdirected solicitation process, exposing the contract to international competition, resulted in a low response rate.

(d) The HCC was further concerned about an apparent lack of segregation of responsibilities between requisitioning and procurement staff in MINUSTAH in relation to the provision of mobile phone and data services.

(e) MINUSTAH amended a contract for the provision of medical services numerous times and extended its duration in a manner exceeding the delegated authority. The HCC thought this gave rise to concerns about compliance and the ability of MINUSTAH to manage the contract and track expenditure.

6. On 8 August 2012, the DMS/MINUSTAH agreed to release Mr. Kallon on reassignment to UNISFA and confirmed his satisfactory performance and the absence of a misconduct case. The next day, 9 August 2012, the ASG/OCSS wrote to the then Under-Secretary-General of the Department for Field Support (USG/DFS and DFS, respectively) and forwarded to her the HCC Note. In his written communication, the ASG/OCSS expressed the opinion that the deficiency in the management of procurement procedures and operations was a matter of serious concern, as it called into question the capability of MINUSTAH in lawfully performing procurement functions. He requested that the concerns should be resolved in a timely manner and concluded by saying: "in addition to the improvement efforts to be made on the systemic structure and arrangement, I also request for a greater care to be exercised in future assignments of those responsible staff members".

7. On 24 August 2012, the Assistant Secretary-General of DFS (ASG/DFS) forwarded the comments of the ASG/OCSS to the DMS/MINUSTAH, requesting him to address the concerns regarding MINUSTAH's procurement process as spelt out in the HCC note and to inform DFS by 10 September 2012 of the actions to be taken.

8. By e-mail dated 10 September 2012, the DMS/MINUSTAH requested Mr. Kallon to coordinate a response to the HCC Note giving clarification and identifying measures to address the issues. Mr. Kallon prepared a draft response to the USG/DFS on behalf of MINUSTAH and sent it to the DMS/MINUSTAH on 23 September 2012. The draft response is not analysed in the UNDT's Judgment, but the evidence of Mr. Kallon before the UNDT was to the effect that the issues identified in the HCC note arose before he took up the position as CPO, were in some respects outside his control and were not his exclusive responsibility. It is important to emphasise though that his response was not sent to the USG/DFS or any manager other than the DMS/MINUSTAH. Instead, on 8 October 2012, the DMS/MINUSTAH faxed to DFS a response to the concerns outlined in the HCC Note and the steps to be taken to address them. Although the response incorporated some of the content of Mr. Kallon's draft, it was a significantly different document. In it, the DMS/MINUSTAH stated that the steps to be taken would include the appointment of a replacement Officer-in-Charge of the Procurement Section and the reassignment of Mr. Kallon to another mission. The DMS/MINUSTAH obviously had in mind the fact that two months earlier, on 8 August 2012, he had agreed to release Mr. Kallon on reassignment as CPO/UNISFA. What he did not know was the ASG/OCSS had acted to reverse that reassignment a few days earlier.

9. On 4 October 2012, the ASG/OCSS wrote to the Director of the Field Personnel Division, stating that he was not in a position to support Mr. Kallon's designation as CPO in UNISFA in light of the "outstanding issues" raised by the HCC Note. Mr. Kallon was informed by a Human Resources Officer of DFS of this decision on 5 October 2012. The parties have referred to this decision as "the UNISFA decision".

10. On 15 October 2012, Mr. Kallon was tasked with implementing a matrix of actions in response to the HCC Note. The DMS/MINUSTAH, on 18 October 2012, wrote to the ASG/DFS, stating that he had learned that the ASG/OCSS had declined to designate Mr. Kallon for the function of CPO in UNISFA. This decision, he said, impacted the action plan he had outlined in that his entire procurement reform plan hinged on the reassignment of Mr. Kallon. He then proceeded to offer a damning indictment of Mr. Kallon's performance which unquestionably adversely affected his professional prospects.

11. The DMS in his communication to the ASG/DFS expressed the belief that retaining Mr. Kallon at the helm of the procurement section would impact MINUSTAH's ability to make the required changes in procurement at MINUSTAH. He added that Mr. Kallon's working

relationship with the majority of his subordinates and other stakeholders in the procurement process had deteriorated to the point that it would be challenging for him to continue functioning in his current position. In view of this appraisal, which was at significant variance with all his prior performance appraisals, the DMS noted that Mr. Kallon's "non-designation" for UNISFA casted doubt on his designation as CPO for MINUSTAH, which is a larger and more complex mission. He therefore recommended that Mr. Kallon's designation as CPO for MINUSTAH be reviewed and that he be reassigned to a function that did not require his designation as CPO. He added that the replacement of Mr. Kallon was fundamental to making the improvement expected from MINUSTAH. In passing, it is worth noting that on 17 July 2010, shortly after Mr. Kallon took up his position at MINUSTAH, the then Officer-in Charge of the Headquarters Procurement Division, who had known Mr. Kallon in the Congo, wrote to him informing him that he had been misled as to the nature of Mr. Kallon's assignment. He had apparently expected Mr. Kallon to be assigned to MINUSTAH as a "temporary help". The Officer-in-Charge bluntly apprised Mr. Kallon that had he known the true facts he "would have had different recommendations for you and for the CPO candidature". Thus already at the outset there was opposition to the appointment of Mr. Kallon as CPO at MINUSTAH.

12. On 25 October 2012 and 9 November 2012, Mr. Kallon wrote to the Field Personnel Division, DFS, to request information regarding the denial of his designation for CPO/UNIFSA. He filed a request for management evaluation of the UNISFA decision on 3 December 2012. On 28 November 2012, the ASG/OCSS wrote to ASG/DFS communicating that he had decided to withdraw Mr. Kallon's designation as CPO/MINUSTAH. On 30 November 2012, the USG/DFS informed DMS/MINUSTAH of the ASG/OCSS' decision. Mr. Kallon was notified of the decision to withdraw his designation as CPO/MINUSTAH (the MINUSTAH decision) on 5 December 2012. He filed a request for management evaluation of the MINUSTAH decision on 12 December 2012.

13. Mr. Kallon was reassigned to the Office of the Officer-in-Charge, Administrative Services in early December 2012. He was reassigned as Officer-in-Charge, Staff Counselling Welfare Unit in March 2013. On 10 June 2013, the DMS/MINUSTAH wrote to Mr. Kallon informing him that his fixed-term appointment, which was due to expire on 30 June 2013, would not be extended and that he would be separated from the Organization. This did not transpire. He received monthly extensions until April 2015 and at the time of the hearing before the UNDT was employed as a P-3 Administrative Officer on a temporary appointment.

14. Mr. Kallon filed two applications before the UNDT, one for each decision, on 28 March 2013. By Order No. 151 (NY/2014), dated 18 June 2014, the cases were combined or consolidated. The UNDT ordered the parties, by Orders No. 206 and No. 207 (NY/2013) dated 20 August 2013, to file a joint statement with a consolidated list of agreed facts and legal issues, and indicating whether they were amenable to resolving the matter informally through mediation or *inter partes* discussions. The Secretary-General informed the UNDT, on 3 September 2013, that the Management Evaluation Unit (MEU) remained seized of the matter. The parties informed the UNDT in joint requests filed in each case that they had begun *inter partes* discussions aimed at reaching an informal resolution and requested an extension of time to comply with the Orders. In response to several further joint requests, the UNDT granted seven extensions of time. At some point during the *inter partes* discussions, the MEU became directly involved. It had not prior to that formally responded to Mr. Kallon's requests for management evaluation. By joint submission, dated 30 April 2014, the parties informed the UNDT about the involvement of the MEU, a process of reconsideration of the decisions by the Organization's management and their agreement that Mr. Kallon had not been accorded his formal due process right to respond in his personal capacity to the observations of the HCC prior to withdrawal of his designation. They informed the UNDT that Mr. Kallon was given an opportunity to respond to the observations and "a further decision concerning his designation has been taken by the Administration".

15. On 19 May 2014, the Under-Secretary-General of Management (USG/DM) addressed a letter to Mr. Kallon. This document has assumed cardinal importance. In it, the USG/DM placed on record that the MEU had noted that Mr. Kallon's involvement "in the review of the procurement cases HCC highlighted is not well documented". It was realised that the response which Mr. Kallon had prepared to the HCC concerns on behalf of the MINUSTAH procurement section, "addressing the points made by HCC in detail by explaining the context of each case", might not have been given full and proper consideration by the Administration. In order to correct this, the MEU recommended that OCSS review the matter after affording Mr. Kallon an opportunity to present his views. The letter further recorded that Mr. Kallon, in the period January-March 2014, had made submissions through his counsel presenting his views and submitted supporting documentation on the issues raised. The ASG/OCSS on 16 April 2014 had submitted a memorandum to the MEU containing the outcome of the review, which basically upheld the ASG's original determinations in both decisions. The USG/DM outlined his view of the then prevailing position as follows:

> After reviewing OCSS's memorandum and your comments on the review, the MEU concluded that OCSS provided a reasoned basis for its determination, addressing the salient concerns with the procurement cases in question, while specifically addressing those concerns in light of your submissions.
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> ...
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> The MEU considered that, while the initial decision to remove your designation as Chief ... Procurement Officer may have lacked a step insofar as it was taken without affording you the opportunity to comment in your individual capacity, this was fully remedied by the aforementioned review. As the MEU found no basis to question the lawfulness or integrity of that review, it recommended upholding the outcome.
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> ...
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> In light of the foregoing consideration of your case, the Secretary-General has decided to endorse the findings and recommendations of the MEU and to uphold the contested decisions.

16. In short, in so far as the two designation decisions were tainted by procedural unfairness or impropriety, the Secretary-General took the view that the defect had been cured or remedied by the process of review and reconsideration. No decision was taken at any stage to rescind or suspend the original decisions and to maintain or restore the *status quo ante* pending the review. Rather, both designation decisions were allowed to stand and after having the benefit of further submissions and documentation, the Secretary-General decided to "uphold the contested decisions".

The proceedings before the UNDT

17. In their pre-trial joint submissions, the parties identified the issues for trial before the UNDT to be whether the contested decisions were proper exercises of discretionary authority. In its Judgment, the UNDT stated that in addition to the procedural issues it was necessary "to consider whether the contested decisions were justified" and to determine "whether, in addition to being procedurally defective, the contested decisions were substantively unfair or improper".[1] Stated more concisely, the issues were simply whether the decisions were substantively reasonable (justifiable) and procedurally fair.

[1] Impugned Judgment on Liability, para. 74.

18. It will be helpful to the ensuing analysis of the UNDT's Judgment to interpose at this point a brief exposition about review on grounds of unreasonableness. Mutual trust and confidence between the employer and the employee is implied in every contract of employment. And both parties must act reasonably, fairly and in good faith. In *Sanwidi*,[2] this Tribunal held that an assessment of the validity of the Secretary-General's exercise of discretion in administrative matters involves determining if the decision is legal, reasonable, rational, proportionate and procedurally correct. Reasonableness is an open-ended review ground, subsuming within it elements of rationality and proportionality, as well as the substantive standard expressed in the value judgment formulated in the English case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corporations*[3] that administrative action is reviewable if it is so unreasonable that no reasonable decision-maker could have taken it. The concept of reasonableness, like fairness, hence, by its very nature, defies rigid definition. What is reasonable in a particular case depends on the circumstances and various factors relevant to the inquiry, such as: the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on those affected by it. This confirms the inherent variability of the concept and the need for flexibility in its application. It also points to the need for appropriate deference by requiring a prudential (cost-benefit) balance to be struck between a range of competing interests or considerations by decision-makers with technical expertise and insight, and implies flexibility and variation in the application of the standard. This is what is meant when reasonableness is referred to as being "context specific".

19. Issues of rationality and proportionality fall under the broad rubric of reasonableness as a ground of review, albeit introducing a more dialectical assessment than a standard of substantive reasonableness. Rationality as a review ground requires only that a decision be rationally connected to the purpose for which it was taken and be supported by the evidence. The decision must also further the purpose for which the legislative power was given to the administrator. Though variable, substantive reasonableness is typically a higher standard calling for a more intensive scrutiny of the administrative action, touching in some instances on the merits of the decision. A rational basis test is deferential because it calls for rationality and justification rather than the substitution of the court's opinion for that of the functionary on the basis that it finds the

[2] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40-42.
[3] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporations*, [1947] 2 All ER 680 (CA).

decision substantively incorrect. It seeks a condition of rationality in the relationship between the method and outcome of decision-making. By similar token, the principal aim of proportionality review is to avoid an imbalance between the adverse and beneficial effects of an action or measure by balancing the necessity for the action with the suitability of the means deployed to achieve the purpose.

20. The UNDT heard evidence over five days between 27 and 31 July 2015. A number of witnesses gave evidence. The evidence of Mr. FE, the former Chairman of the HCC, was of some importance, since, as the UNDT pointed out, the HCC note was the catalyst for both the contested decisions. The HCC is an advisory rather than a decision-making body. Administrative Instruction ST/AI/2011/8 (Review committees on contracts) states that the purpose of the HCC is to provide written advice and to act as an advisory body to authorized officials in discharging their procurement-related responsibilities under the financial Regulations and Rules of the Organization. When asked about his reason for submitting the HCC note to the ASG/OCSS, Mr. FE testified that he expected senior management to request their counterparts in the mission to look into what was happening. He recognized that there was serious understaffing at MINUSTAH, and thus extenuating circumstances. He also conceded that the HCC lacked sufficient information to make a definitive finding of wrongdoing or malfeasance and that the HCC had merely sought to flag the issues based on the limited information before it so that personnel who have accountability and responsibility at higher levels would look into improving the situation. The HCC note did not make any definitive findings in regard to MINUSTAH or Mr. Kallon. It merely raised concerns that required follow-up by senior management.

21. Other witnesses, including Mr. Kallon, gave evidence in relation to the issues raised in the HCC note. Mr. Kallon, as mentioned earlier, basically testified that the issues raised in the HCC note were as a result of developments outside his control or knowledge. He was appointed CPO on 2 July 2010, not long after the earthquake of 12 January 2010. Mr. GB who was deployed as CMS/MINUSTAH in March 2010 and later recruited Mr. Kallon as CPO, testified that MINUSTAH had a number of specific concerns and issues with procurement; and that there had been many instances of non-compliance with the rules occasioned by the exigencies of the situation. He said:

> ... many, many activities took place, many decisions were made on the spot – acquisition of land, acquisition of property, rental of property, and a bulk of activities were done – and they were not in accordance as we would know with the normal

> procurement process. ... We tried to cope as much as possible with the rules and when we had to bypass due to the exigencies, we did. Now this is not necessarily related to the cases which are the object of your review ... but I just wanted to specify that ... some of the procurement activities were not totally in line with the way they should have been due to the exigencies and the complexity of the situation.

22. That said, the UNDT, as appears from its Judgment, was mindful of the necessity for appropriate accountability. In terms of Financial Rule 101.1, the Secretary-General delegated authority and responsibility for the implementation of the Financial Regulations and Rules to the USG/DM. Financial Rule 105.13 states that the USG/DM is responsible (which authority has in turn been delegated to the ASG/OCSS) for the procurement functions of the United Nations and shall designate the officials responsible for performing such functions. Section 2.1 of Administrative Instruction ST/AI/2004/1 (Delegation of authority under the Financial Regulations and Rules of the United Nations) states that failure to abide by the terms and conditions of the delegation of authority under the Financial Regulations and Rules may result in its withdrawal. The ASG/OCSS must hold accountable those staff members to whom he has delegated authority through designation and to ensure that they have the requisite qualifications and experience to carry out the functions assigned to them.[4] However, there is a lacuna in the framework relating to the delegation of procurement authority through designation in that there is no specific procedure for holding staff members accountable for non-compliance and to determine whether a designation should be withdrawn. The UNDT adopted a pragmatic approach, correctly in our view, to the effect that in the absence of any specific provision governing the process for holding staff members with designation accountable, the UNDT would rely on the basic principles of administrative law and judicial review. By that we understand that any administrative action in relation to the withdrawal of a designation should be lawful, reasonable and procedurally fair. The UNDT examined the concerns of the HCC and the subsequent actions taken by the Administration from that perspective.

23. Before examining its findings in relation to the substantive and procedural propriety of the decisions, it will be best to consider first the evidence given during the trial about the problems identified in the HCC note. The testimony in relation to the first issue raised in the HCC note established that MINUSTAH leased the land in question, originally 100,000 square meters, in 2006 (four years before Mr. Kallon was assigned to Haiti). MINUSTAH began work on improvements to the land in December 2006. The work included the construction of a

[4] Section 3 of ST/SGB/2005/7.

perimeter wall, watch towers, roads, buildings, internal drainage and the boring of deep wells. The work was completed in November 2007 and cost more than USD 1,9 million. In 2007, the leased area was increased by 140,000 square meters. The lease contained four one-year options which were exercised for four consecutive years until late 2011, when the lease expired. The Secretary-General's criticism of Mr. Kallon is that he failed to ascertain or bring into account the sums expended on improvements when seeking to renew the lease in 2011. In his testimony, Mr. Kallon pointed out that the minutes of the HCC meeting held on 8 August 2006 noted that the initial capital investments of USD 400,000 would be left *in-situ* at the end of the lease term. The investment shaped the rental negotiations and had an impact on the rental agreed in 2006. The HCC minutes also recorded that certain infrastructure such as pre-fabricated buildings, generators, network communications etc. could be removed at the end of the lease. Mr. Kallon gave unchallenged testimony that no records of the improvements existed on the files of the MINUSTAH Procurement Section when he arrived at MINUSTAH and that he had relied on the minutes of the HCC that the investments were either not intended to be recovered or would be removed on expiry of the lease. Moreover, in the response sent by the DMS/MINUSTAH to the USG/DFS on 8 October 2012 dealing with the issues raised in the HCC note, it was noted that recovery was never anticipated either in the lease agreements or in supplementary information submitted to the HCC. Although the UNDT made no explicit finding in that regard, it is clear (on the basis of its finding that Mr. Kallon's "explanations were acceptable"[5]) that it implicitly decided that it was not rational or justifiable to hold Mr. Kallon responsible for the issues related to the non-recovery of capital improvements in the lease negotiations.

24. With regard to the lease of the premises in Santo Domingo, here too the improvements, effected prior to Mr. Kallon arriving at the mission, were not documented in the procurement file. Nonetheless, Mr. Kallon testified, the disbursements for the improvements were in fact recovered. The DMS/MINUSTAH, in his response of 8 October 2012 to the USG/DFS, also explained that the landlord had passed a credit note for the amount of USD 26,632.40 and that the amount had been recovered. More importantly, the uncontested evidence is that the contemplated retrenchment exercise did not take place until 2015, meaning that a reduction of space was not necessary, and in any event the proposed lease extension did not go ahead as MINUSTAH chose to move to different premises. The matter accordingly seems to have been satisfactorily resolved.

[5] Impugned Judgment on Liability, para. 154.

25. The concern of the HCC that MINUSTAH was not aware of the relevant Haitian laws or policies regarding the solicitation of armed guard security services was equally misplaced. Again the accountability for any error in this regard did not rest exclusively with Mr. Kallon. He was unaware of the relevant legal provision and once it came to his notice, he sought legal advice. He testified that he was operating on the basis of the fundamental rule that contracts should be exposed to international competition. The UNDT accepted his explanation and held that the Secretary-General had not shown that Mr. Kallon placed the resources of the Organization at risk or breached the relevant Financial Regulations and Rules.

26. The UNDT considered the concern about an apparent lack of segregation of responsibilities between requisitioning and procurement staff in MINUSTAH in relation to the provision of mobile phone and data services to be somewhat vague, and was unconvinced that Mr. Kallon should be held accountable for the problem, presumably because there was no evidence pointing to any culpability on his part. Mr. Kallon testified that he had provided the requisitioner with guidance on how to interact with the contractor but accepted that there might have been a legitimate concern about the requisitioner's conduct. However, the requisitioner did not report to him and he had not authorised the requisitioner to conduct himself in the manner in which he had.

27. As for the contract for the provision of medical services, which was amended numerous times in a manner exceeding the delegated authority, Mr. Kallon testified that the delay in submitting the case to the HCC for *ex post facto* approval resulted from deficiencies in the technical evaluation of the contract, which were attributable to the Medical Services personnel from the United Nations Headquarters in New York who visited MINUSTAH to carry out the evaluation. No convincing submissions or evidence were presented to the UNDT which showed that Mr. Kallon's explanation was not accurate or acceptable. In fact, the DMS/MINUSTAH advanced the same explanation in his letter of 8 October 2012 to the USG/DFS.

28. After careful consideration of all the evidence, the UNDT found that the UNIFSA decision was "irrational, unreasonable, unfair, and procedurally flawed".[6]

29. The UNDT recognised that while it may be correct that the ASG/OCSS has responsibility for the avoidance and mitigation of appreciable risks and to act with caution in designating officials with procurement authority, any decision he may take, particularly in withdrawing a

[6] *Ibid*., para. 113.

designation, must be at least rational and procedurally fair. At no stage prior to the UNIFSA decision did the relevant officials conduct a full investigation to identify the causes of the problems raised in the HCC note or the responsibility of any specific staff member for them. The Secretary-General failed to produce any written record containing detailed reasons for the decision, or indicating that the ASG/OCSS came to any definitive conclusions or findings. The evidence before the UNDT did not show that the ASG/OCSS engaged in any weighing exercise before making the UNIFSA decision.

30. First of all, the UNDT held that the ASG/OCSS, in his letter of 9 August 2012 to the USG/DFS, evinced an element of pre-judgement in calling for greater care to be exercised in future designations in that he did not take into account that there may have been other valid explanations and extenuating factors for the deficiencies identified in the HCC note. Mr. Kallon was never explicitly informed that his performance was a concern or that consideration was being given to withdrawing his designation. He was not afforded the opportunity to be heard or to make any submissions to the ASG/OCSS in relation to either the issues in the HCC note or the decision to reverse his assignment to UNIFSA. He was not singled out as responsible for the deficiencies, or asked to provide an explanation. Importantly, Mr. GS, the DMS/MINUSTAH, volunteered in his testimony that the concerns raised in the HCC note all related to events that had occurred prior to Mr. Kallon's arrival at MINUSTAH.

31. Moreover, the response in Mr. Kallon's memorandum of 23 September 2012 to the DMS/MINUSTAH was never sent to the ASG/OCSS or the USG/DFS. The ASG/OCSS appears not to have communicated directly with MINUSTAH or with Mr. Kallon prior to making the UNIFSA decision. He also did not wait to receive the response of the DMS/MINUSTAH to the HCC issues before he took the decision. There was no urgency requiring the ASG/OCSS to make the UNIFSA decision without considering the views and submissions of the DMS/MINUSTAH and Mr. Kallon.

32. The UNDT accordingly held that the decision was irrational and procedurally unfair. There was no rational connection between the information before the decision-maker and the reasons for the decision; and, Mr. Kallon had not been afforded an opportunity to comment on the decision, which was likely to materially and adversely affect his rights, before it was taken.

33. The UNDT took a similar view with regard to the MINUSTAH decision. There were no structured discussions of any kind to review the seriousness of any shortcomings or to consider any remedial action that might be required before the MINUSTAH decision was made. In his memorandum sent to the ASG/DFS on 18 October 2012, the DMS/MINUSTAH stated that the replacement of Mr. Kallon as CPO was integral to his plans for the mission and alleged that Mr. Kallon's professional relationships had deteriorated to the point that he could not continue as CPO. Mr. Kallon's uncontroverted testimony is that it was not brought to his attention at any stage that there was any difficulty of this kind. The allegation is also in sharp contradiction with his e-PAS rating six months earlier as having exceeded performance expectations.

34. The UNDT rejected the Secretary-General's submission that the withdrawal of the designation was distinct from a performance appraisal. In its view, the decision was connected to his alleged performance. The requirements of procedural fairness in relation to allegations of failing to meet the required standard of work performance require an investigation to establish the reasons for any unsatisfactory performance. The employee normally should be given an opportunity to respond to the allegations of poor performance and consideration must be given to remedial action for improvement. As the UNDT put it, accountability is meaningless unless staff members know which specific shortcomings they are being held accountable for and, crucially, why.

35. Mr. Kallon was also never confronted with the allegation that he had breached the relevant Financial Regulations and Rules or that he was considered by the ASG/OCSS to have placed the Organization's financial resources at risk. It was never explained to him why he was being held solely responsible for the issues identified by the HCC, most of which, as the DMS/MINUSTAH acknowledged, related to decisions taken before he arrived at MINUSTAH. Mr. Kallon had not been accorded the due process protections that he would have been entitled to under the Staff Rules had a charge of misconduct been laid against him. For those reasons, the UNDT ruled that the MINUSTAH decision was also a disguised disciplinary measure meted out without disciplinary proceedings having been initiated. Mr. Kallon, without due process, was summarily and permanently stripped of his designation and reassigned to new functions, in effect demoted to a position which had no relevance to his qualifications.

36. Mr. Kallon's MINUSTAH designation was thus withdrawn for unsubstantiated reasons without any prior consultation or opportunity to be heard. The Administration, accordingly, in the opinion of the UNDT, had breached its obligation to act reasonably and in good faith, which is

implied in every contract of employment. The MINUSTAH decision was arbitrary and unreasonable in that no reasoned conclusion was reached about Mr. Kallon's culpability, responsibility or specific shortcomings. The UNDT concluded on the question of procedural fairness as follows:[7]

> ... The contested decisions, in combination, and taking into account the effect on the Applicant's professional reputation, and his reassignment to unrelated functions, effectively ended his procurement career within the United Nations. Even if the decisions resulting in such an outcome were justified based on the substantive issues involved, and the Tribunal does not consider that they were, the Organization should have followed a fair and transparent process in making those decisions.

37. Besides finding that both decisions were procedurally unfair and in the absence of a proper evidentiary basis consequently irrational, the UNDT also concluded somewhat superfluously that the decisions could not be regarded as "justified on the merits" notwithstanding their procedural flaws. It in effect held that the basis of the decisions, resting exclusively on the HCC note, was unsupportable and hence unreasonable. Accepting the evidence of Mr. Kallon in relation to the five issues, the UNDT concluded that there was no reasonable basis for holding Mr. Kallon accountable for the deficiencies. In consequence, there were no reasonable grounds for reversing the UNIFSA designation and withdrawing the MINUSTAH designation on that basis. In terms of the *Wednesbury* formulation mentioned above, the decisions were so unreasonable that no reasonable decision-maker could have taken them.

38. Two distinct issues which were raised before the UNDT in relation to procedural fairness are central to this appeal. The first is whether the reconsideration of the decisions by the MEU and the ASG/OCSS cured the earlier procedural defects and the second is the applicability of the so-called "no difference principle". The UNDT addressed the question of curing the procedural defect as a preliminary issue to determine what weight and consideration, if any, it should give to the further decision taken by the ASG/OCSS on 16 April 2014, and the subsequent decision of the Secretary-General to uphold the contested decisions, conveyed to Mr. Kallon by the USG/DM on 19 May 2014. The UNDT held that once an application has been filed before it, any new decision taken by Management, presumably while the application is still pending, particularly when based on new or different information, constitutes a separate administrative decision, which should be

[7] *Ibid*., para. 131.

the subject of new and distinct proceedings if the employee wishes to contest it. An applicant would then be in a position to consider whether to maintain or withdraw the initial application. In the opinion of the UNDT, if the applicant chose to maintain the application, the possibility always existed to consolidate two separate applications should a second application be made in respect of the second decision. This though begs the question, in our view, of whether the second action amounts to a new decision or is merely a reconsideration of the initial decision, a matter to which we revert. The UNDT held that it could not simply consider a new administrative decision, or a reconsideration of a previous decision, as part of an existing case as it could not adjudicate cases involving "decisions of a changing nature".[8] It concluded as follows:[9]

> ... [T]he matters for consideration in this judgment are the decisions dated 4 October 2012 and 28 November 2012, as outlined in para. 2 of this judgment and in the Applicant's requests for management evaluation dated 3 and 12 December 2012. These are the decisions that have been addressed by the parties in written submissions during these proceedings and at the hearing between 27 and 31 July 2015. The Organization's attempts to cure or remedy a breach of due process by initiating, in 2014, more than a year after the contested decisions and long after the Applicant's unanswered requests for management evaluation, a new process for the Applicant to respond to the HCC Note are not properly part of the cases before the Tribunal and will not be considered.
>
> ... In this regard, the Tribunal also notes that although the parties had identified, as one of the agreed legal issues, whether any alleged breach of due process had been remedied by the reconsideration of the designation decision in April 2014, (the Secretary-General) conceded that this second decision was not for consideration before the Tribunal. Therefore, it would be improper and without legal basis to hold that any process or alleged remedy or consequences flowing therefrom should be considered or taken into account by the [Dispute] Tribunal.

39. Before the UNDT, the Secretary-General also relied on the so-called "no difference principle" and submitted that giving Mr. Kallon an opportunity to respond to the issues would have made no difference to the outcome. The rationale of the principle is that a lack of a fair hearing or due process is no bar to fair or reasonable administrative action or disciplinary action provided it appears at a later stage that a hearing would have made no difference. The Secretary-General argued that Mr. Kallon had an opportunity to suggest reasons against discipline first when he made his report to the DMS/MINUSTAH and later in the MEU process. The UNDT was not persuaded that the principle could be applied legitimately in this case. The

[8] *Ibid*., para. 80.
[9] *Ibid*., paras. 81-82.

trial before the UNDT appears to have been the first occasion at which the allegations of misconduct or poor performance against Mr. Kallon were fully ventilated, tested by cross examination and evaluated according to legal principle. In the first instance, when he submitted his report to the DMS/MINUSTAH in September 2012, Mr. Kallon was not responding to any disciplinary charges against him and on the second occasion, in the MEU process and the reconsideration which followed, his submissions were made in the context of informal and settlement discussions during pending litigation. The UNDT accordingly held:[10]

> ... There is also an important difference between [Mr. Kallon] being asked to coordinate a response to the HCC note and suggest measures to address the issues it raised, and him being given an opportunity to respond to a suggestion (...) that he personally had placed the financial resources of the Organization at risk and/or breached the Financial Regulations and Rules and other issuances, and was at risk of losing his designation.
>
> ... Finally, it would be wrong in principle for the Tribunal to condone a breach of the right to due process on the basis that, in the [Secretary-General's] view, it made no difference in the end. In circumventing procedural requirements, the no difference principle would serve to subvert the very essence of the principles of natural justice, in particular the *audi alteram partem* rule. ...

40. The UNDT issued its separate Judgment on Relief on 1 April 2016 in which it deferentially declined to order specific performance reinstating Mr. Kallon's designation but rescinded both the UNIFSA and MINUSTAH decisions; directed that the decisions (together with specific documents related thereto) be removed from Mr. Kallon's official status file and its Judgments be placed therein; and ordered the payment of USD 50,000 in non-pecuniary damages, with interest, for the high degree of non-pecuniary damage caused by the flawed decisions. The UNDT justified its damages award on the basis of the stigmatization and reputational damage caused by the decisions and the resultant effects on Mr. Kallon's career prospects and the stress, anxiety, and moral injury caused by the decisions, including the manner in which they were made, abruptly and without consultation, due process, or adequate reasoning or explanation. It declined to order costs against the Secretary-General as there was not, in its view, a manifest abuse of proceedings. It also did not consider it appropriate to refer the cases for accountability pursuant to Article 10(8) of the UNDT Statute, but noted, nonetheless, that there were a number of issues raised that may warrant appropriate attention by the Secretary-General

[10] *Ibid.*, paras. 129-130.

with respect to the lack of clear procedures and policies for fairly managing staff members who are alleged to have failed to exercise their delegated authority appropriately.

41. In his submissions in relation to the question of relief, filed after the Judgment on Liability, the Secretary-General argued that rescission should not be granted because the claim was in effect moot as the original decisions of November and December 2012 had been reconsidered and substituted by the decision of the ASG/OCSS on 16 April 2014. The point essentially added a novel dimension to the Secretary-General's earlier submission that the procedural defects had been cured or made no difference. The UNDT rejected the argument on the basis of its earlier findings that final factual determinations and conclusions were rendered without due process in November and December 2012 and the reconsideration in April 2014 had not resulted in Mr. Kallon obtaining rescission of the contested decisions or specific performance. The UNDT implicitly held that the proceedings before it with regard to the disputed decisions would have practical effect, and events had not placed the matter beyond the law in such a way that resolution of the dispute was deprived of practical significance or rendered purely academic. The UNDT evidently regarded the decision of 16 April 2014 as not resulting in there no longer being an actual controversy between the parties or in any ruling it might make having no actual, practical effect. The controversy did not cease to exist as a consequence of the later decision and the dispute about the administrative decisions remained alive.

Submissions and consideration – mootness

42. The only finding on the merits with which the Secretary-General takes issue on appeal is that in relation to mootness. He argued that the UNDT erred in law by disregarding what it referred to as "the prevailing decision", being the decision of the ASG/OCSS of 16 April 2014, which was endorsed by the USG/DM in his communication to Mr. Kallon on 19 May 2014. He submitted that by not considering the legal consequences and effects of the prevailing decision, the UNDT, cognizant of the outcome of the reconsideration process and the issuance of the prevailing decision, adjudicated claims that became moot on 16 April 2014. He maintained that the Administration conducted a "thorough reconsideration process" of both administrative decisions as "part of the parties' continuing efforts to resolve the matters informally before the MEU". The procedural irregularity identified by the MEU, the complete absence of due process and procedural fairness prior to the withdrawal of the designations and the effective demotion of Mr. Kallon, was the same issue identified by the MEU during the reconsideration process in which Mr. Kallon had "ample opportunity to represent his own interests". The Administration

took account of Mr. Kallon's comments and additional documentation during the reconsideration process and issued a new administrative decision regarding Mr. Kallon's designation to perform procurement functions, namely the prevailing decision, which Mr. Kallon has not appealed and is thus of operative effect; while the two original decisions should be regarded as having no legal effect by virtue of the prevailing decision alone. The Secretary-General relied on two decisions to support his defence of mootness, one of the UNDT, *Gehr*,[11] and one of this Tribunal, *Masylkanova*.[12] The Secretary-General claimed that in *Gehr*, the UNDT found that where the Administration rescinds a contested decision during the proceedings before the Tribunal, the staff member's allegations become moot, while in *Masylkanova* this Tribunal found that a reconvening of a fact-finding panel cured an earlier irregularity. As will appear more fully presently, the submissions made on behalf of the Secretary-General selectively represent the facts and misstate the principles actually laid down in those cases.

43. Mr. Kallon submitted that the assertion that there was a new prevailing decision is misconceived and an attempt to misuse the judicial process to reinstate a perverse decision and unjustly avoid liability. The reiteration or confirmation of the same underlying decision does not represent a new decision. The prevailing decision merely sustained the decision pending review before the UNDT. The Secretary-General's argument is besides logically flawed because it rests on an untrue premise that the only defect in the contested decisions was a procedural oversight which could be corrected by a further internal reconsideration. The UNDT held not only that the contested decisions were procedurally unfair but also that they were substantively unreasonable; and further that the decisions to withdraw the designations were unwarranted by the evidence. The extent of the reconsideration, Mr. Kallon further submitted, is in any event doubtful if only because he was never contacted by the ASG/OCSS for any clarification. There is no evidence that Mr. Kallon's arguments rebutting the allegations were ever considered by the ASG/OCSS, the MEU or the USG/DM. Moreover, the reconsideration was undertaken by the same individual who made the initial decision. And hence, Mr. Kallon in effect submitted, the evidentiary basis for the decisions to withdraw the designations did not rationally support a finding of wrongdoing on his part.

[11] *Gehr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/211.
[12] *Masylkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412.

44. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. The mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions. Just as a person may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency. The doctrine accordingly recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.[13]

45. Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. The defendant or respondent may seek to "moot out" a case against him, as in this case, by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal. And a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct. The essence of Mr. Kallon's rebuttal of the Secretary-General's claim of mootness in this appeal is his assertion that the unreasonable removal of his procurement designations, as well as his effective and continuing demotion, are ongoing injury of sufficient collateral consequence to preclude mootness despite the cessation or partial (albeit disputed) reversal of the direct effects of procedural irregularity and unfairness. Mr. Kallon cares little about the direct source of the consequence he endures, the eradication of its cause is his best and only protection.

46. In *Gehr*, the UNDT evinced a lucid grasp of the doctrine of mootness. The applicant in that case complained, *inter alia*, that the Administration erred in taking into consideration matters which occurred after 1 April 2010 for the purpose of evaluating his 2009-2010 performance, the appraisal period having expired on 31 March 2010. The Administration conceded that the applicant's 2009-2010 performance appraisal initially referred to matters post-dating 31 March 2010; but the evidence showed that in January 2011 a revised performance

[13] See generally Kates and Burke: *Mootness in Judicial Proceedings: Toward a Coherent Theory* 1974(5) California Law Review Vol. 62, 1385.

appraisal would be prepared, and that this appraisal alone would be placed on his official status file. The applicant was provided on 9 March 2011 with the revised appraisal, which did not refer to matters post-dating 31 March 2010. The UNDT held that the applicant's claim in this respect was moot. The UNDT stated:[14]

> ... In cases where the Administration rescinds the contested decision during the proceedings, the applicant's allegations may be moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.

The applicant in *Gehr* was unable to demonstrate to the UNDT how his rights remained adversely affected by a decision, which had been superseded. Nor could he show that he was suffering any injury because of that decision. Likewise, although he was told in November 2010 that he would not be entitled to rebut his performance appraisal, he was informed on 9 March 2011, when he received the revised appraisal that he could submit a rebuttal statement, which he did on 15 March 2011. His claim that he was not entitled to rebut his 2009-2010 performance appraisal was thus moot and he had not proved that he was still suffering any damage as a result of the decision.

47. The position of Mr. Kallon in this appeal is markedly different to the applicant in *Gehr*. The initial decisions to remove his designations resulting in his demotion were irrational and not supported by sufficient cogent evidence of wrongdoing attributable to him. The UNDT correctly found that the decisions were both substantively and procedurally unfair. The reconsideration by the MEU, the ASG/OCSS and the USG/DM did not rescind the irrational decisions and it is doubtful that it cured the procedural defects. The extent of the reconsideration which took place, as the UNDT stated, is uncertain. The reconsideration was undertaken by the same individual who made the initial decision, which carries with it the reasonable apprehension of an element of prejudice and the real possibility that Mr. Kallon's additional documentary evidence and submissions were not seriously considered. Such is borne out by the unsustainable outcome.

48. In the final analysis, the reconsideration by the ASG/OCSS had no impact on the initial decisions. Although the Secretary-General admitted that the contested decisions were procedurally flawed, as just mentioned, he never rescinded them. His assertion that they were in fact rescinded in this case is not accurate and misrepresents the factual situation. The

[14] *Gehr v. Secretary-General of the United Nations*, Judgment No. 2011/UNDT/211, para. 37.

memorandum of 19 May 2014 stated that the decisions were "upheld". If they had been rescinded, as the Secretary-General now alleges, Mr. Kallon would have been reinstated to his former post with his designation restored or would have been assigned to the UNIFSA post while a new enquiry was underway, neither of which occurred. Instead, he was placed in an inappropriate post and then effectively demoted, as the UNDT found, in a manner akin to a disciplinary measure. The premise that the Administration can simply delay a management evaluation and then issue a new decision affirming the same contested decision, with the effect of depriving the UNDT of jurisdiction over a matter pending before it, is untenable and would lead to duplication and the unnecessary proliferation of litigation.

49. The interlocking relationship between the procedural and substantive irregularities tainting the decisions cannot be dissociated. Proper due process might have avoided the irrational decision. Because the evidence was not properly evaluated in accordance with due process early on, there was no rational relationship between the evidence and the decisions. The evidence before the UNDT established convincingly for the first time that the problems raised in the HCC note arose prior to Mr. Kallon's appointment, were in some instances outside his authority or scope of responsibility, or posed no real financial risk. The decisions to remove the designations were accordingly not rationally connected to the information before the decision-maker and the purpose of the empowering provision. In consequence, Mr. Kallon still suffered the collateral effects of the procedural irregularity when the matter was heard by the UNDT which astutely refused to "moot out" the dispute on formalistic grounds. In so doing it acted in the interests of effective judicial review and in furtherance of the universal fundamental right of access to an appropriate tribunal for the legal resolution of a dispute.

50. Most importantly, Mr. Kallon is right to say that the Secretary-General's submission, were it to be accepted, would lead to anomalous and unacceptable results by authorizing the Secretary-General to remove a dispute from the jurisdiction of the UNDT through the simple expedient of delaying a management evaluation, then taking a fresh decision upholding the original decision, and thus compelling the applicant to commence legal proceedings afresh in relation to the same action. The injustice of such a course is not something with which the office of the Secretary-General ought to be aligned.

51. The UNDT, moreover, properly distinguished *Masylkanova*. In that case, the applicant complained to the UNDT of a fact-finding panel set up to investigate her claim of harassment and abuse of authority being held in abeyance. While the matter was pending before the UNDT,

a new fact-finding panel was convened, which resolved the impugned irregularity. The administrative decision to disable the fact-finding panel was superseded by its reconvening, after being challenged by the applicant. Thus, at the administrative stage, the alleged illegality was solved after the judicial procedure had begun, rendering the latter unnecessary, as the specific remedy sought was reached. The applicant still had the opportunity to pursue her original complaint about abuse of authority and harassment. There was no continuing injury flowing from the reversed irregularity. The UNDT distinguished that case from the present, noting correctly that Mr. Kallon in this appeal had been subjected to a final factual determination without due process and did not obtain the remedy of rescission which he sought. The UNDT accordingly did not err in holding that the application was not moot.

52. Our finding should not be interpreted to mean that proper reconsideration of irregular decisions will not cure procedural defects. It is by no means an absolute rule that where an initial decision has been reached in violation of due process that it cannot be corrected at a later stage by a process of reconsideration. On the other hand, a complainant is normally entitled to fairness at all stages of the decision-making process. A complainant has a vested interest in a fair primary decision irrespective of the existence of the possibility of reconsideration at a later stage of the process. There are two reasons for that. Firstly, there is the difficulty that in the reconsideration hearing the complainant will be burdened with displacing an adverse decision which for lack of due process ought never to have been reached. The taint of the finding reached unfairly in the primary process is inevitably carried forward to the reconsideration hearing. Secondly, the form of reconsideration available or the procedures and powers of the administrator tasked with reconsideration may be inadequate for the purpose of properly correcting the effects of a denial of due process. It may be practically difficult to undo the distorting effect of the unfairness.

53. Nonetheless, as just said, there is no clear and absolute rule on the question whether defects in due process in the original hearing can be cured through reconsideration. The situations in which the issue arises are too diverse. Thus, in the final analysis, it depends upon the circumstances of each case. Where the procedural errors are technical, formal procedural irregularities of no material consequence to the overall fairness or reasonableness of the action, they usually will be curable by reconsideration. Similarly, where the reconsideration is a full and proper re-hearing of the merits by a different impartial tribunal or administrator, thereby avoiding a reasonable apprehension of prejudgment, the defect may more likely be remedied. A hearing *de novo* can effectively cure the initial unfairness by starting from scratch, collecting new

evidence and weighing it impartially. A narrower reconsideration by the same decision-maker restricted to the existing record, even if supplemented, is less likely to displace the adverse taint of the earlier decision arrived at unfairly. Furthermore, some deviations from the principles of natural justice are so profound that there may be no defective hearing capable of remedy.

54. Finally, the UNDT was also correct not to apply the so-called "no difference" principle. The rationale of the principle, as mentioned earlier, is that a lack of a fair hearing or due process is no bar to fair or reasonable administrative action or disciplinary action provided it appears at a later stage that a hearing would have made no difference. The principle would normally apply in exceptional cases where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct. But even then, the employee should know the ambit of the charge against him and be given an opportunity to suggest reasons why discipline should not follow. If the facts known to the employer at the time of the disciplinary action made it reasonable or fair to discipline or act adversely without a hearing, then the action normally will be fair. But if the facts did not then indicate that a hearing would be "utterly useless" then the employer could not have acted reasonably or fairly in taking adverse action, no matter how substantial the underlying reason eventually appears to be.[15]

55. There is little to support the proposition that proper due process at the initial stage would have made no difference in this case. The trial of the issues before the UNDT, at which the evidence was examined properly for the first time, revealed that the allegations of misconduct or poor performance against Mr. Kallon were pointedly challenged and could by no measure be described as irrefutable. This is precisely the kind of case in which a hearing could not be dispensed with. A hearing was indispensible precisely in order to ascertain the extent and gravity of the alleged malfeasance and the proper attribution of blame. The hearing before the UNDT demonstrated convincingly that Mr. Kallon had been irrationally and unfairly made culpable. The facts known at the time of the decisions did not warrant the action taken. A proper hearing would have shown that. The no difference principle may be applicable in some cases, but this is not one of them.

56. In the premises, the UNDT did not err in its finding that the contested decisions were substantively and procedurally flawed and that Mr. Kallon was entitled to relief.

[15] *Polkey v. AE Dayton Services* [1987] 1 All ER 974 (HL).

Submissions and consideration - compensation

57. It will be recalled that the UNDT awarded Mr. Kallon compensation in the amount of USD 50,000 as "non-pecuniary damages" for moral injury. The Secretary-General avers that it erred in doing so because there was insufficient evidence of moral injury justifying an award of compensation. This appeal therefore raises the question of what constitutes moral injury justifying an award of compensation and what kind of evidence is sufficient or necessary to prove such injury.

58. Article 10(5) of the UNDT Statute provides:[16]

> As part of its judgment, the Dispute Tribunal may *only* order one or both of the following:
>
> > (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
> >
> > (*b*) Compensation *for harm, supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

59. The italicized or emphasized words in Article 10(5) of the UNDT Statute were introduced by amendment in Paragraph 38 of General Assembly resolution 69/203 on 18 December 2014. The purpose of the amendment of Article 10(5)(*b*) of the UNDT Statute was to ensure that compensation may only be ordered for harm and that the existence of such harm must be proved or supported by appropriate evidence. In a letter dated 29 October 2014 addressed by the President of the General Assembly to the Chair of the Fifth Committee (A/C.5/69/10), the rationale for the amendment was explained as follows:

> ... Some delegations expressed concern that in some cases the Tribunals had awarded compensation for moral damages even though there had been no evidence to substantiate such damage, based on the Tribunals finding that an entitlement to compensation arises simply because the Tribunals considered the breach of the staff member's rights to be of a fundamental nature. ...

[16] Emphasis added.

60. Accordingly, compensation may only be awarded for harm, supported by evidence. The mere fact of administrative wrongdoing will not necessarily lead to an award of compensation under Article 10(5)(*b*) of the UNDT Statute. The party alleging moral injury (or any harm for that matter) carries the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.

61. It is trite that not all rights are of a patrimonial nature. An infringement of the fundamental right to dignity or reputation does not result in damages in the sense of a direct diminishing of the patrimonial estate of the complainant. The injury sustained consists, in whole or in part, in harm to personality or social position, resulting usually in emotional distress or a loss of reputation, social standing or personal advancement. The impairment affects an interest beyond the scope of the complainant's patrimony. The law regards such personality rights as worthy of protection. The loss of a positive state of emotional gratification or emotional balance is harm deserving of compensation. By contrast, breaches of contract lead to awards of damages only where there is actual harm in a patrimonial sense. Contractual damages aim at putting the successful plaintiff in the same position as if the contract had been performed, but only in respect of economic loss directly attributable to the breach. The notion of compensation used in Article 10 of the UNDT Statute is different from and wider than damages. The latter refers to the recompense of economic loss while "compensation" may include such loss but is not restricted to it.

62. The authority conferred by the UNDT Statute to award compensation for harm thus contemplates the possibility of recompense for non-economic harm or moral injury. But, by the same token, Article 10(7) of the UNDT Statute prohibits the UNDT from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of Article 10(5)(*b*) of the UNDT Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be

attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.[17]

63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation.[18] Much will necessarily depend on the evidence before the UNDT.

64. Conscious of the amendment and its purpose, the UNDT in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the UNDT was guided by the principles pronounced by this Tribunal in *Asariotis*[19] prior to the amendment of Article 10(5)(*b*) by General Assembly resolution 69/203. In that case this Tribunal said:[20]

> ... To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
> >
> > (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly

[17] See generally S. Litvinoff: *Moral Damages* [1977] 38(1) Louisiana Law Review, 1.
[18] *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238.
[19] *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.
[20] *Ibid.*, paras. 36-37, emphases in original, internal citations omitted.

> linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
>
> ... We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

65. The distinction drawn between the two categories of moral injury or non-patrimonial damages in *Asariotis* has two dimensions. On the one hand, it speaks to the kinds of moral damage ordinarily at issue and, on the other, mentions the kind of evidence necessary to prove each kind of moral damage.

66. The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.

67. It could be argued that the amendment to Article 10(5)(*b*) was aimed at precluding awards of moral damages of the first kind identified in *Asariotis*. But that would be too far-reaching an interpretation. The purpose of the amendment was merely to introduce an express requirement that compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred. As such, it is a prudent and legitimate reminder to judges that harm should not be too readily assumed on an insubstantial factual basis, whatever the nature of the harm and the damages in issue, be they patrimonial or non-patrimonial.

68. The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence;[21] or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(*b*) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

69. Our colleagues in the dissenting and concurring opinions to this appeal (Judge Thomas-Felix, Judge Chapman, Judge Lussick and Judge Knierim) are of the view that evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise) affirming that moral harm has indeed occurred. We are unable to agree. While obviously corroboration will assist the applicant in meeting his or her burden of proof, and thus ordinarily will be required, such evidence is not required in all cases. There is no basis in law, principle or policy which precludes a tribunal from relying exclusively on the testimony of a single witness, be it the applicant or another witness, to make a finding of moral harm. In accordance with universally accepted rules of evidence, the testimony of a single witness must be approached with caution but if it is credible, reliable and satisfactory in all material respects, it may well be sufficient to discharge the evidentiary burden.

70. The second kind of moral injury identified in *Asariotis* is that of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights. Harm of this nature is associated with the insult to *dignitas* but refers to injury of a particular kind as evidenced by the manifestation of mental distress or anguish. Its presence in the applicant may confirm the violation of personality rights, but in addition might justify a higher amount as compensation. Evidence of this kind of harm speaks to

[21] *Dia v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-553.

the degree of injury and the issue of aggravating factors. Many who are affronted in their dignity may be of a personality type better able to withstand it, others are more vulnerable. And delictual principles (the so-called "thin skull rule") teach that we are obliged to take our victims as we find them. The best evidence of this kind of harm and the nature, degree and ongoing quality of its impact, will, of course, be expert medical or psychological evidence attesting to the nature and predictable impact of the harm and the causal factors sufficient to prove that the harm can be directly linked or is reasonably attributable to the breach or violation. But expert evidence, while being the best evidence of this kind of injury, is not the only permissible evidence. This Tribunal accepted as much in *Asariotis* when it explicitly stated that such harm can be proved by evidence produced "by way of a medical, psychological report *or otherwise*".[22] There is no absolute requirement in principle or in the rules of evidence that there must be independent or expert evidence. In some circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient.

71. Finally, this Tribunal should always give deference to the UNDT in the exercise of its discretion and will not lightly disturb the quantum of damages.[23] The UNDT is best placed to conclude from the evidence, records, or otherwise, whether or not a claim for moral damages is established and to calculate an appropriate award.[24] Compensation must be determined following a principled approach and on a case by case basis and the UNDT is in the best position to decide on the quantum of compensation given its appreciation of the case.[25]

72. The UNDT identified the moral injury sustained by Mr. Kallon as that arising from the breach of procedural fairness and the resultant irrational decision in relation to his designation. Mr. Kallon testified about the impact of such unreasonableness on his reputation, professional image, career prospects and work experience, including the non-pecuniary and psychological aspects of his employment. The descriptions of him in his earlier performance appraisals as fully competent and as an "outstanding procurement professional", he testified, have been rendered naught and he has lost career mobility in not being able to move to other missions. He produced

[22] *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36 (emphasis added).
[23] *Maslei v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-637, para. 31.
[24] *Finniss v. Secretary-General of the United Nations,* Judgment No. 2014-UNAT-397, para. 36; *Andersson v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-379, para. 20.
[25] *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2015-UNAT-528, para. 71.

documentary evidence that he had applied for more than 80 positions within the Organization at the P-3 and P-4 level without any success. He maintained that in light of his qualifications, skills and experience, and the fact that he had previously succeeded in competitive processes, a legitimate and reasonable inference may be drawn that his professional reputation has been harmed as a consequence of the arbitrary and irrational removal of his designations and *de facto* demotion. He testified further that he and his family had suffered emotional distress as a result of his unfair treatment. Mr. Kallon maintains that he has sustained a considerable injury as a consequence of a fundamental breach of his terms of employment. In his view, the substantive and procedural breaches identified by the UNDT (and supported by the evidence) of themselves merit an award of moral damages because of the harm caused by subjecting him to an improper process and disguised disciplinary measure.

73. The UNDT agreed with Mr. Kallon. In its view, the sworn testimony given at an oral hearing by the applicant and/or other witnesses, subjected to cross examination, may provide sufficient evidence to support a claim provided it is credible and reliable. It held on the basis of its observation of Mr. Kallon when he gave evidence over several hours, including his demeanour, that he was a credible and reliable witness. It concluded as follows:[26]

> ... The [Dispute] Tribunal is convinced from the submissions of the Applicant and his sworn testimony, and in light of all the circumstances of these cases, including the manner in which the contested decisions were made, and the record of the unsuccessful job applications that he has submitted, that the contested decisions resulted in stigmatisation and serious reputational damage to the Applicant, which affected his future career prospects, particularly within the field of procurement. He has applied for at least 21 positions within the United Nations directly related to procurement, as well as numerous others related to contract and risk management, without success. Although the Applicant has continued in employment with the Organization, he has been unable to gain employment in the specific field of procurement, even at a lower grade. To add to his predicament, the [Dispute] Tribunal is unable to grant him specific performance.
>
> ... The [Dispute] Tribunal further finds that the Applicant suffered real and significant stress and anxiety as a result of the contested decisions, and the way in which they were made. Although the Applicant was generally cogent and composed during his testimony, it was clear during several passages of his testimony that he was emotional and that the contested decisions have caused him significant stress and anxiety, even at the time of the hearing. The [Dispute] Tribunal finds that both the content of the Applicant's sworn testimony – directly addressing the effect of the decisions on his wellbeing – and

[26] Impugned Judgment on Relief, paras. 63-64.

> the obvious emotion and distress exhibited by the Applicant, constitute evidence that he suffered real and genuine moral injury as a result of the contested decisions.

74. The UNDT accordingly ruled that Mr. Kallon was entitled to compensation for "non-pecuniary damages" for the stigmatization and reputational damage caused by the contested decisions and the resulting effects on his career prospects; and for stress, anxiety and moral injury caused by the contested decisions, including the manner in which they were made, that is, abruptly, without consultation, due process, or adequate reasoning or explanation.

75. The Secretary-General argued before this Tribunal firstly that the UNDT erred in law in awarding damages for the resulting effect of the decisions as, in his view, there was no evidence establishing that, absent the procedural irregularity, Mr. Kallon would have retained his designations. He again relied on the unsustainable proposition that the so-called "prevailing decision" established that both decisions were justified; and, notably that Mr. Kallon had not appealed it. He argued further that after the procedural irregularity was supposedly remedied in the reconsideration process, Mr. Kallon was placed in the same position as he would have been had the Organization complied with its contractual obligations. Thus, the Secretary-General submitted, no compensation should have been ordered.

76. The Secretary-General contended secondly that the UNDT erred when it linked the compensation not to the procedural irregularity but to the substance of the resulting effect and awarded compensation for stress, anxiety, stigmatization and reputational damage caused by the decisions' substance and resulting effect. He maintained that Mr. Kallon had not produced evidence to prove that he suffered stress and anxiety as a result of the procedural irregularity and the evidence does not support his claims of stigmatization and serious reputational damage. He suggested that the fact that Mr. Kallon is currently employed by the Organization in a position for which he applied is an indication to the contrary.

77. For the reasons already discussed, the premise of the Secretary-General's first argument is wholly misplaced. There was no rational basis for the decisions and they were not taken in accordance with the precepts of natural justice. The flaws in the initial decision were not remedied by the reconsideration process. Once again, were this Tribunal to uphold an argument of this nature, it would allow the Secretary-General to circumvent the legal process and undermine the UNDT's jurisdiction by simply taking a second decision in relation to a pending matter, substituting the initial decision with the second affirming it, and then requiring the complainant to start afresh the proceedings in relation to the exact same action.

78. The Secretary-General's second argument misconstrues the finding of the UNDT. The decisions and the harm they caused cannot be reduced to a technical procedural irregularity. Mr. Kallon's rights to reasonable and procedural administrative justice were substantially infringed in a manner causing him real moral injury. There can be no denying that he was arbitrarily deprived of his procurement designation, demoted to a position where he could not apply his experience and specific skills, humiliated before his colleagues and publicly condemned to misgivings about his propriety on the basis of no evidence and without the benefit of a fair hearing. The reputational harm is self-evident, while the evidence of his diminished employment prospects stands uncontroverted. The *prima facie* evidence of Mr. Kallon's diminished career prospects, adduced by Mr. Kallon during his oral testimony, shifted the evidentiary burden to the Secretary-General to adduce evidence in rebuttal. It failed to do so, and the UNDT implicitly and appropriately considered Mr. Kallon's evidence as sufficient evidence of that incident of harm. The fact of his continued employment by the Organization is little consolation. He holds qualifications, skills and experience as a procurement specialist. He is being denied the opportunity to pursue them and achieve the personal fulfillment he would prefer.

79. It is true that Mr. Kallon failed to adduce expert or independent evidence in support of his allegations of stress and anxiety. Unlike our colleagues in the concurring and dissenting opinion, we do not consider that such evidence was essential in this case. Such evidence will ordinarily be required but it is not necessary in all cases. The evidence of the applicant, the egregious nature of the violation of Mr. Kallon's substantive and procedural rights, the self-evident damage to his professional reputation and his career as a procurement specialist, and the uncontroverted evidence of his diminished job prospects, together provide a sufficient and convincing basis for the reasonable inference that he suffered a significant degree of stress and anxiety.

80. As explained earlier, this Tribunal noted in *Asariotis* that moral damages may arise where there is evidence produced to the UNDT by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to an employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights so as to merit a compensatory award. The UNDT carefully and fully considered the evidence before it to assess whether the breach of Mr. Kallon's rights had caused him stress and anxiety. It observed Mr. Kallon over several hours giving testimony under oath in the witness box. Although Mr. Kallon was generally cogent and composed, he was at times emotional, felt unduly victimized and has continued to suffer anxiety and stress. Given the unfair manner of his treatment, it is

hard to imagine otherwise. In any event, no evidence was presented to counter the *prima facie* evidence given by Mr. Kallon that he had indeed suffered significant mental anguish, and thus it may be considered to be sufficient, especially when evaluated in the light of the egregious unfairness of Mr. Kallon's treatment and lack of proof of any failing or wrongdoing on his part.

81. There is, moreover, no principled reason to reject Mr. Kallon's evidence under oath before the UNDT that he suffered mental distress as a result of the decisions. Provided his evidence was credible and reliable, which the UNDT found it to be, and there was no evidence in rebuttal casting serious doubt upon it, which was also the case, the UNDT was obliged to admit, accept and weigh that evidence. To repeat: the manner of his treatment self-evidently caused him harm in the form of stigmatization, reputational damage and emotional stress, and this is further supported and borne out by his failed job search efforts and his evident emotional state as observed during his testimony. The UNDT inferred correctly that stress naturally would have resulted from the manner in which the decisions had been taken and communicated, their total lack of rational foundation and Mr. Kallon's emerging realization of his diminished job prospects. The UNDT weighed this evidence with the essentially common cause facts affirming the unfair and irrational conduct of the Administration and concluded that the evidence in its totality supported a finding that moral injury had occurred justifying an award of compensation. We can find no error with the UNDT's approach to the evidence or in its conclusions based upon it. The approach it followed is consistent with this Tribunal's jurisprudence subsequent to the amendment of Article 10(5) of the UNDT Statute.[27]

82. The Secretary-General submitted that by awarding compensation at the top end of the current scale of awards for the resulting effects of the decisions, the UNDT ordered compensation to punish the Organization for withdrawing Mr. Kallon's designation to perform procurement functions, rather than to compensate him for the procedural irregularity it found. The award, the Secretary-General contended, is, therefore, punitive in nature and unlawful under Article 10(7) of

[27] See for example *Gueben et al. v. Secretary-General of the United Nations,* Judgment No. 2016-UNAT-692, paras. 50-53; *Ademagic et al. v. Secretary-General of the United Nations,* Judgment No. 2016-UNAT-684, paras. 60-63; *Dube v. Secretary-General of the United Nations,* Judgment No. 2016-UNAT-674, paras. 68-70; *Maslei v. Secretary-General of the United Nations,* Judgment No. 2016-UNAT-637; *Aly et al. v. Secretary-General of the United Nations,* Judgment No. 2016-UNAT-622; *Dawas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2016-UNAT-612; *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2015-UNAT-587; and *Dia v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-553.

the UNDT Statute which prohibits exemplary or punitive damages. The submission is lacking in factual foundation and again fails to appreciate that more than a procedural irregularity was at issue. The well-reasoned Judgment on Relief of the UNDT leaves no doubt that the basis of the award was the nature and extent of the moral injury sustained by Mr. Kallon over a long period of time as a consequence of the unreasonable and unfair conduct of the Organization. The award is not punitive but compensatory of a substantial moral injury. The UNDT confined consideration to the actual distress and moral damage suffered by Mr. Kallon and focused principally on the manner in which he had been treated, the impact of the treatment on his career and state of well-being. It had regard to the case law of this Tribunal, carried out a notional benchmarking of the awards and concluded that an award of USD 50,000 was appropriate. It moreover declined to award Mr. Kallon pecuniary damages for loss of earnings occasioned by his demotion, which he quantified at USD 36,000. There was accordingly no error by the UNDT in its award of damages.

83. Mr. Kallon has requested costs of the appeal in the amount of USD 5,000. This Tribunal may award costs in terms of Article 9(2) of the Appeals Tribunal Statute if it determines that a party has manifestly abused the appeals process. It accordingly does not have the authority to award costs as a matter of course on the basis that costs should follow success. It may only do so in the event of manifest abuse. Although the appeal is manifestly without merit and based on insubstantial grounds, it cannot be described as an abuse of the process. The question of mootness and the evidentiary issues related to the proof of harm were worthy of consideration and the Secretary-General properly limited the appeal to those questions. The Secretary-General's prosecution of the appeal is not beyond the bounds of reasonableness. There is hence no basis for making a costs award in favour of Mr. Kallon.

Judgment

84. The appeal is dismissed and Judgment No. UNDT/2015/126 and Judgment on Relief No. UNDT/2016/027 of the UNDT are affirmed.

Original and Authoritative Version: English

Dated this 31st of March 2017 in Nairobi, Kenya.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy	Judge Raikos	Judge Knierim

(Signed)

Judge Halfeld

Judge Thomas-Felix, Judge Lussick and Judge Chapman append a joint partly dissenting opinion.

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Concurring Opinion by Judge Sabine Knierim

1. I am in the delicate position of agreeing with Judge Thomas-Felix, Judge Lussick and Judge Chapman on the requirements of compensation for harm under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute and with Judge Murphy, Judge Raikos and Judge Halfeld on the outcome of the present case.

2. Like my colleagues Judge Thomas-Felix, Judge Lussick and Judge Chapman, I think that the harm for which compensation is requested must be supported by evidence and that a staff member's testimony alone is not sufficient to present evidence supporting harm under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute. It is important to point out, in the interest of providing a clear rule on this crucial issue, that this is the opinion of the majority of the Appeals Tribunal. In this respect, I would like to emphasize that I do not agree with paragraphs 57 *et seq*. of Judges Murphy *et al.*'s opinion. Rather, I follow and endorse the arguments presented by my colleagues in their dissenting opinion. I would like to add the following:

3. I respectfully dissent from paragraph 68 of the Judgment which states:

> ... And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(*b*) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

In my opinion, even the most shocking breach of due process rights cannot, after the amendment, lead to a presumption of harm in the person of the staff member or to a shift of the burden of proof to the Secretary-General. Whatever the nature or degree of a breach of due process rights and regardless of how disrespectful and outrageous the Organization's behaviour has been, a staff member who requests compensation under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute always has to prove that harm was caused to him or her by the unlawful actions of the Administration.

4. I also respectfully dissent from paragraph 69 of the Judgment which states:

> ...While obviously corroboration will assist the applicant in meeting his or her burden of proof, and thus ordinarily will be required, such evidence is not required in all cases. There is no basis in law, principle or policy which precludes a tribunal from relying exclusively on the testimony of a single witness, be it the applicant or another witness, to make a finding of moral harm. In accordance with universally accepted rules of evidence, the testimony of a single witness must be approached with caution but if it is credible, reliable and satisfactory in all material respects, it may well be sufficient to discharge the evidentiary burden.

In my opinion, evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred. Coming from a civil law system, I cannot easily acknowledge the allegations of an applicant as "evidence" under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute as, in such system, the applicant is not regarded as a witness. More importantly, I understand that the General Assembly, by the amendment, tried to abolish the *Asariotis* jurisprudence and aimed for a stricter and more objective approach. To admit the complainant's allegations as evidence for harm would, in my view, run counter the General Assembly's intentions.

5. Consequently, I would solve the present case as follows:

6. As Mr. Kallon's testimony was the only evidence presented to support his allegation of emotional stress and anxiety, the UNDT committed an error of law in stating that it alone is sufficient to sustain an award of compensation under 10(5)(*b*) of the UNDT Statute.

7. However, in my opinion, the UNDT did not err in accepting Mr. Kallon's loss of reputation as non-pecuniary harm allowing for compensation under 10(5)(*b*) of the UNDT Statute. This finding is not based on Mr. Kallon's testimony alone, but Mr. Kallon has presented additional evidence to prove that he actually incurred this harm: Apart from the fact that he was not entrusted with any procurement functions by the Organization after the impugned administrative decisions of October and December 2012, Mr. Kallon also produced documentary evidence that he had applied for more than 80 positions within the Organization at the P-3 and P-4 level without any success. It is a reasonable inference that this lack of success in his applications was caused by damages to his reputation as a result of the impugned administrative decisions.

8. It is legally possible to uphold the UNDT's award of compensation on appeal as the UNDT did not award specific amounts of compensation for stress and anxiety on the one hand and loss of reputation on the other hand, but instead set a total amount of compensation for "non-pecuniary harm". For the loss of reputation alone, a compensation of USD 50,000 can and should be awarded. In this regard, it is crucial for me that the UNDT did not only find procedural flaws but stated that the impugned administrative decisions were unlawful on the merits as the evidence showed that Mr. Kallon was neither responsible nor accountable for the irregularities and deficiencies at MINUSTAH set forth in the HCC 25 July 2012 note. As the Secretary-General has not questioned the UNDT Judgment in this respect, the Appeals Tribunal is bound by this finding. To award compensation in the amount of USD 50,000 under these circumstances is neither excessive nor punitive but rather fair and proportionate.

Original and Authoritative Version: English

Dated this 31st of March 2017 in Nairobi, Kenya.

(Signed)

Judge Knierim

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Joint Partial Dissent by Judge Deborah Thomas-Felix, Judge Richard Lussick and Judge Rosalyn Chapman

1. We respectfully dissent from the majority Judgment for the following reasons.

2. General Assembly resolution 69/203 which was adopted on 18 December 2014 amended Article 10 of the UNDT Statute. Article 10(5) of the UNDT Statute now states in relevant part:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> ...
>
> (*b*) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

3. This is the current law on compensation for harm and it is the law which the UNDT is duty bound to apply. The Dispute Tribunal is a creature of statute and its remit is defined by the provisions of that Statute. It stands to reason that the UNDT must operate within the confines of the law and cannot step outside of its remit and change the provisions of its Statute.

4. The purpose of the Appeals Tribunal rendering a full bench decision in any of its cases is to clarify significant questions of law.[1] Indeed, it is our view that the question of compensation for harm is a significant issue, more so since the amendment of 2014. There have been different approaches by the UNDT to the application of the amendment which we believe requires proper directions from the Appeals Tribunal.

5. In our view, the judgments of the Appeals Tribunal should be well-structured, clear and precise in order to enable the parties to understand the reasoning and guidance which they provide. Unfortunately, it appears from the opinion of Judges Murphy *et al.* that the issue of compensation for harm is more clouded than before. Their opinion has basically reverted to the ruling in *Asariotis* which the General Assembly took pains to abolish in its amendment in 2014.

[1] See Article 10(2) of the Appeals Tribunal Statute and Article 4(2) of the Appeals Tribunal Rules of Procedure. See also *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment N0. 2016-UNAT-673, para. 2; *Featherstone v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-683/Corr.1, para. 2; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-393, para. 11.

6. The opinion of Judges Murphy *et al.* has now revived the old approach to moral damages, which is that compensation can be awarded by virtue of a mere procedural breach without requiring any supportive and substantive evidence of harm. The opinion has also introduced a new element to the award of damages, namely, non-patrimonial damages - a concept which is not a part of our jurisprudence and which confuses the issue even further.

7. From a literal interpretation of the provisions of the amended Statute, one can only conclude that the law as it now stands states that a mere procedural breach is not a ground for compensation for harm and that compensation for harm must be supported by evidence.

8. In the full bench decisions of *Ademagic et al.*,[2] *Featherstone*,[3] and *Marcussen et al.*,[4] the Appeals Tribunal stated as follows:

> We vacate the awards of moral damages, concluding that the UNDT erred in law by not applying the UNDT Statute as it existed at the time the Dispute Tribunal rendered its judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law. Since the staff members did not present evidence to sustain an award of moral damages, as required by the amended statute, the UNDT made an error of law.

9. In *Gueben et al.* we emphasized that "[p]ursuant to the amendment, compensation for harm can only be awarded when supported by evidence".[5]

10. In *Maslei*, the Appeals Tribunal ruled *inter alia*:[6]

> We find that the award of moral damages was supported by the evidence before the Dispute Tribunal and was not manifestly excessive based on the evidence. The Secretary-General has not demonstrated any error of law or manifestly unreasonable factual findings on the part of the Dispute Tribunal. In such circumstances, the Appeals Tribunal gives deference to the Dispute Tribunal in the exercise of its discretion and will not lightly disturb the quantum of damages.

[2] *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684, para. 63.
[3] *Featherstone v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-683/Corr.1, para. 51.
[4] *Marcussen et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-682/Corr.1., para. 70.
[5] *Gueben et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-692, para. 50.
[6] *Maslei v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-637, para. 31.

11. In the instant case, we find that the UNDT erred when it awarded compensation for "stress and anxiety" and "stigmatisation and reputational damage"[7] although Mr. Kallon did not present an iota of evidence, apart from his own testimony, to prove that he suffered "stress and anxiety" as a result of the procedural irregularity and also there is no evidence to support his claims of "stigmatisation and serious reputational damage".

12. We find further that Mr. Kallon has not attained the threshold required for proof of harm to receive an award of compensation in accordance with the provisions of Article 10(5) of the UNDT Statute. While there may be some exceptions, generally speaking, the testimony of an applicant alone is not satisfactory proof to support an award of damages. It is our finding that this standard of proof has not been met in the present case and therefore non-pecuniary damages should not be awarded.

13. We would vacate the UNDT's order of an award for non-pecuniary damages and otherwise dismiss the appeal.

[7] Impugned Judgment on Relief, paras. 63-66.

Original and Authoritative Version: English

Dated this 31st of March 2017 in Nairobi, Kenya.

(Signed)	*(Signed)*	*(Signed)*
Judge Thomas-Felix	Judge Lussick	Judge Chapman

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar