



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

Judgment No. 2021-UNAT-1118

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

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge Kanwaldeep Sandhu
Judge John Raymond Murphy

Case Nos.: 2020-1430

Date: 25 June 2021

Registrar: Weicheng Lin

Counsel for Staff Member: Evelyn W. Kamau, OSLA

Counsel for Secretary-General: Maryam Kamali

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Boubacar Dieng (Mr. Dieng) has appealed against Judgment No. UNDT/2020/093 by which the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) partially granted his application, challenging the decision of the Joint Special Representative (JSR) in the United Nations African Union Mission in Darfur (UNAMID) to remove him from his position of Senior Child Protection Advisor and to reassign him as a Senior Political Affairs Officer within UNAMID.¹ In its Judgment, the UNDT also awarded Mr. Dieng compensation for non-pecuniary (moral) damages in the amount of one month's net base salary at the grade he encumbered at the time of the contested decision.
2. In turn, the Secretary-General has cross-appealed against the UNDT Judgment, to the extent that it found the reassignment decision unlawful.
3. On appeal, the United Nations Appeals Tribunal (Appeals Tribunal) partially accepts the appeal and dismisses the cross-appeal.

Facts and Procedure

4. Mr. Dieng joined the service of the Organization on 14 July 2000 as a Human Rights Officer at the P-2 level. On 23 February 2009, he was appointed as a Senior Child Protection Advisor at the P-5 level in the Child Protection Unit (CPU) at UNAMID (the Mission).
5. Between February and March 2017, complaints were made by two UNICEF Sudan staff members to the JSR of UNAMID about Mr. Dieng's communication style. In June 2017, the JSR convened a fact-finding panel pursuant to Administrative Instruction ST/AI/371 (Revised Disciplinary Measures and Procedures) to review the allegations against Mr. Dieng.
6. On 13 November 2017, the JSR informed Mr. Dieng that he had nominated another staff member for an assignment at the Mission because a UNICEF Representative and the United Nations Resident Coordinator/Humanitarian Coordinator (RC/HC) told him they did not want to work with him.

¹ *Dieng v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/093 dated 22 June 2020 (Impugned Judgment).

7. On 10 March 2018, the JSR informed Mr. Dieng that he was dissolving the fact-finding panel following the death of one complainant who had made the allegations against him.

8. On 22 March 2018, the JSR e-mailed the Under-Secretaries-General (USGs) of the Department of Peacekeeping Operations and the Department of Field Service, informing them that he had decided to reassign Mr. Dieng to perform alternative duties within UNAMID. He provided the following explanation for his decision:

a. [Mr. Dieng] had poor behavioral and interpersonal skills which undermined his capacity to discharge the responsibilities assigned to him effectively;

b. [Mr. Dieng] engaged in constant, overly assertive and never ending public and private conflict with the United Nations Country Team (UNCT) partners;

c. [Mr. Dieng's] behavior had alienated him from most of the other Mission Managers and Mission components which had seriously hampered their efforts to work collaboratively with him and his section;

d. [Mr. Dieng] had consistently and over an extended period of time displayed inappropriate, unacceptable and unprofessional behavior towards colleagues and senior managers characterized by bitter and personal attacks; and that

e. [Mr. Dieng] took actions that undermined decisions, guidance and instructions of the senior leadership and senior managers on the need for cooperation.

9. In his justification to the USGs, the JSR also explained that Mr. Dieng's actions would warrant an investigation by the Office of Internal Oversight Services (OIOS) but that "inordinate procedural timelines required by official investigations through those channels would likely result in irreparable damage to the Mission's child protection mandate and to the otherwise excellent working relationship that the Mission enjoyed with UNCT and other partners".²

² Impugned Judgment, para. 14.

10. On 4 April 2018, the JSR informed Mr. Dieng that he would be reassigned from CPU to the Office of the Joint Special Representative as a Senior Political Affairs Officer to work on mediation issues effective 8 April 2018 (the Contested Decision). In so doing, the JSR did not engage in the process outlined under Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) to address the allegations of misconduct. In the 4 April 2018 reassignment notice, the JSR informed Mr. Dieng that he would maintain his current grade and level as well as his contractual status in the new role.

11. Mr. Dieng objected to the reassignment, but the JSR told him that such exercise was within his authority as Head of Mission of UNAMID to ensure effective programme delivery.

12. On 26 May 2018, Mr. Dieng sought medical treatment and his physician advised that he take 16 days of home rest and absence from work because of stress-induced symptoms.

13. On 1 June 2018, Mr. Dieng requested management evaluation of the Contested Decision, and on 17 October 2018, the Management Evaluation Unit (MEU) upheld the decision.

14. Via notice dated 21 October 2018, Mr. Dieng was informed that his Fixed Term Appointment (FTA) will not be renewed after expiration on 31 December 2018.

15. On 7 November 2018, Mr. Dieng filed an application with the UNDT challenging the Contested Decision. On 30 January 2019, the UNDT issued Judgment No. UNDT/2019/014 dismissing the application as not receivable. On appeal, the Appeals Tribunal reversed the Judgment and remanded the case for a trial on the merits.

16. On 22 June 2020, the Dispute Tribunal issued its Judgment finding that although the JSR had the discretion to reassign Mr. Dieng, that discretion was not exercised properly. The tribunal highlighted the communication of the JSR to the USGs in which he elaborated on a series of performance shortcomings on the part of Mr. Dieng was the actual reason for the reassignment. The tribunal concluded that the Contested Decision was performance-related, but proper procedures were not followed in order to address any deficiencies in Mr. Dieng's performance.

17. Notably, the tribunal pointed out that under Administrative Instruction ST/AI/2010/5 (Performance Management and Development System), the First Reporting Officer (FRO) in consultation with the Second Reporting Officer (SRO) must proactively assist the staff member to remedy performance shortcomings. This was not done and yet allegations of unprofessional behavior by Mr. Dieng became the subject of an e-mail to the USGs and became the driver in the decision to reassign him to another office. This, reasoned the tribunal showed a lack of transparency on the part of the Administration and violated Section 10.1 of ST/AI/2010/5.

18. The tribunal noted that even though the allegations were of an “egregious and damning nature,” nothing was done to meaningfully remedy the situation in accordance with ST/AI/2010/5.³ The tribunal thus held:⁴

The mere reassignment of [Mr. Dieng] to another office under circumstances of undisclosed, un-investigated and unresolved egregious and damning allegations such as these can only be ruled to have been arbitrary, and a violation of the [staff member’s] due process rights since he was denied an opportunity to rebut them and clear his record.

19. The tribunal also reasoned that the Administration’s argument based on the general authority of Heads of Mission to reassign staff members within the mission is unsustainable in light of the fact that the reassignment was done within the context of a number of contentious issues, including a failed investigation.

20. Finally, the UNDT also concluded that based on the contents of the JSR’s e-mail to the USGs, the decisions not to forward the matter to OIOS for investigation and to instead reassign Mr. Dieng to another office was geared toward avoiding the formal investigation process and constituted a veiled disciplinary measure.

21. Regarding the remedies requested, the UNDT refused to order reinstatement of Mr. Dieng to his former position of Senior Child Protection Adviser because he had since been separated from the Organization. The tribunal noted that the separation itself was contested and is the subject of other proceedings before the UNDT. Additionally, the tribunal also expressed unwillingness to fashion a remedy ordering reinstatement as it would be tantamount to replacing its decision for that of the Administration.

³ *Ibid*, para. 33

⁴ *Ibid*, para. 34.

22. Regarding Mr. Dieng's request for compensation for economic loss, the tribunal found that because he was reassigned within the Mission at the same P-5 grade and level, he suffered no economic harm.

23. Mr. Dieng also requested compensation for reputational harm as the JSR's e-mail to the USGs had caused damage to his professional reputation and effectively blocked his chances of getting rehired in this area of work, but the tribunal refused and found such claims to be purely "speculative".⁵

24. Finally, regarding Mr. Dieng's request for moral damages, the UNDT awarded him one month's net base salary as compensation for stress and anxiety. The tribunal credited the medical evidence provided by the staff member and found a causal link between the condition he suffered and the Contested Decision.

25. On 19 August 2020, Mr. Dieng filed an appeal against the Impugned Judgment, and it was registered with the Appeals Tribunal as Case No. 2020-1430.

26. On 19 October 2020, the Secretary-General filed his answer and a cross-appeal, and subsequently, Mr. Dieng filed an answer to the cross-appeal on 17 December 2020.

Submissions

Mr. Dieng's Appeal

27. Mr. Dieng submits that the UNDT improperly concluded that he did not provide evidence of reputational harm. This, when in fact the tribunal noted in the Judgment that the nature of the allegations "was such as would put into question the Applicant's credentials as an international service servant."⁶ This finding is thus inconsistent with the conclusion on reputational harm. Additionally, the UNDT was applying the improper evidentiary standard by asking for evidence above and beyond that which was accepted in similar cases.

28. Mr. Dieng further maintains that the UNDT failed to properly consider the totality of the evidence and thus failed to see the unlawful reassignment was intrinsically linked to his subsequent separation, which led to economic loss for him. Although transferred to another

⁵ *Ibid*, para. 43.

⁶ *Ibid*, para. 3.

post at the same level and grade, it was merely a guise and a step towards separating him. Given the reassignment was the first step toward separation, he was entitled to damages for the resulting economic harm.

29. The UNDT failed to apply relevant jurisprudence. It did not consider the relevant law, nor did it explain why and if the jurisprudence was not applicable. The tribunal also did not explain why it only awarded one month's net base salary. Therefore, it failed to give a reasoned opinion.

30. Mr. Dieng claims that, although the UNDT found the reassignment unlawful, it did not order rescission of the Contested Decision or order specific performance and set *in lieu* compensation, as provided for under Article 10 (5)(a) of the Dispute Tribunal Statute (UNDT Statute). This is a failure to exercise jurisdiction. Although the tribunal found the allegations were egregious and damning in nature that would put into question the credentials of an international civil servant, it did not consider the specific remedy requested by the staff member nor issue a reasoned opinion on why it chose not to. The UNDT thus did not address the request that the Secretary-General issues a public apology and that the JSR retract his statements made to the USGs.

31. The tribunal failed to exercise jurisdiction when, *inter alia*, it did not refer the JSR for appropriate disciplinary action for unlawfully reassigning Mr. Dieng, for violating established procedures and for abusing his authority, as well as when it did not address the specific remedy requested regarding the public apology to address the staff member's reputational harm.

The Secretary-General's Answer to the Appeal

32. The Secretary-General contends that the UNDT was correct in finding that Mr. Dieng did not demonstrate reputational harm and that Mr. Dieng's assertions regarding reputational harm were speculative. The only evidence adduced by Mr. Dieng is the internal e-mail by the JSR to the USGs. This is not sufficient because in *Bangoura*,⁷ there was a press release issued for actions which were later proven to be false.

⁷ *Bangoura v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/202.

33. Mr. Dieng's argument that the USGs are hiring managers or have influence, and as such, he would be effectively blocked to apply for any position in his particular field is purely speculative as he did not submit any information as to him applying to certain positions and then not being considered because of the JSR e-mail.

34. In terms of the UNDT finding that Mr. Dieng had not suffered any economic loss, the Secretary-General avers that Mr. Dieng's assertion that his reassignment paved the way for his separation seven months later, leading to his economic prejudice, is without merit. This issue was the subject of another application before the UNDT, which was recently dismissed after the tribunal found that the separation was lawful.

35. He further submits that Mr. Dieng did not discharge the burden that the Judgment is defective and is instead rearguing his case requesting the UNAT to consider the original arguments before the UNDT *de novo* and to come to a different conclusion.

The Secretary-General's Cross-Appeal

36. The Secretary-General submits that the UNDT erred in law in finding that the reassignment was in violation of the applicable law and Mr. Dieng's due process rights. In this regard, the Secretary-General maintains that:

- The staff member was reassigned to a position of same grade and level commensurate with his skills and competencies, and he did not suffer any economic consequences or other negative impacts on his employment contract.
- It is not for the staff member to determine whether a reassignment is in the operational interests of the Organization or not. The staff member was reassigned to other duties in the Mission in order to implement the Organization's mandate in the most efficient manner.
- The UNDT erred in its analysis of ST/AI/2010/5, which in fact provides for the reassignment of a staff member to other functions without first documenting a performance shortcoming as "partially meeting expectations." The Organization can proactively assist staff members during a performance cycle by reassigning them. These actions were not veiled disciplinary actions as stated by the UNDT, but rather legitimate actions which management has at its disposal.

- The UNDT incorrectly linked the decision to reassign the staff member with the allegations of misconduct and the closed investigation. The fact that the Organization decided not to pursue the investigation did not make the reassignment a veiled disciplinary measure.
- There is no right to have allegations of misconduct investigated as this is within the Secretary-General's sole discretion. The staff member suffered no harm from the disbanding of the fact-finding panel.
- The staff member did not show any violation of his rights under ST/AI/371 (Revised Disciplinary Measures and Procedures) and ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).
- The Administration has the right to reassign a staff member whose interpersonal issues made it difficult for UNAMID to successfully implement its child protection mandate. Therefore, the Administration was justified in reassigning the staff member to duties that were more suitable to him. It was a lawful "proactive" step that the Administration could take as part of performance management.
- The performance issues were discussed with the staff member prior to his reassignment, and they even appeared in his performance evaluations by the SRO, who mentioned it briefly.
- The UNDT erred in law when it found that the Administration's reassignment was unlawful and a "veiled disciplinary measure" when it was in fact aimed at improving the Mission's mandates which is a legitimate basis for reassignment and lawful pursuant to Staff Regulation 1.2(c).

Mr. Dieng's Answer to the Cross-Appeal

37. Mr. Dieng submits, *inter alia*, that the UNDT correctly interpreted and applied the relevant provisions of ST/AI/2010/5 dealing with performance management. The UNDT recognized that transfer to more suitable functions is envisioned under the policy, however this must be done after shortcomings have been identified and the measures were taken to "proactively assist the staff member to remedy the shortcomings."

38. The UNDT did not find the reassignment unlawful on the basis of what was in the best interest of the staff member nor did the UNDT find reassignment due to performance concerns unlawful or that it was required to document performance shortcomings before reassignment – what the UNDT held was the process and the context within which the reassignment occurred was unlawful.

39. Further, Mr. Dieng avers that the UNDT correctly found that the reassignment was a veiled disciplinary measure geared toward evading investigation. The UNDT did not suggest that an investigation was mandatory before reassignment or that the absence of the investigation was itself unlawful. What the UNDT said was if the egregious and damning allegations – that were undisclosed, uninvestigated and unresolved – were relied upon by the JSR in making the reassignment decision, then it was arbitrary. The Administration was obliged to follow the performance management process set out in ST/AI/2010/5 and could not undertake the reassignment process in a vacuum, based on a one-sided assessment of the allegations against the staff member.

40. Finally, the UNDT did not incorrectly link the reassignment to the allegations of poor interpersonal skills, the JSR himself admitted to such link as the motivation behind the reassignment decision in his e-mail to the USGs. Therefore, the UNDT was correct in finding that the reassignment was a veiled disciplinary measure geared toward evading an investigation.

Considerations

41. Mr. Dieng appeals the Judgment of the Dispute Tribunal, *inter alia*, on the basis that it erred in law: (a) in not rescinding the reassignment decision or ordering compensation *in lieu* of rescission; (b) in dismissing his claim for compensation for material damages; (c) in restricting his compensation for moral damages, and (d) in failing to refer the JSR for accountability.

42. The Secretary-General cross-appeals on the basis that the UNDT erred in law in finding that the reassignment decision was unlawful.

43. Because of the nature of the cross-appeal, we will firstly address the issues raised therein before considering the appeal.

The Cross-Appeal on the Lawfulness of the Reassignment Decision

44. On cross-appeal, the Secretary-General appears to be restating the claims which he made before the UNDT. However, he has failed to demonstrate that the UNDT committed any error of fact or law in arriving at its decision.

45. We recall the Appeals Tribunal's jurisprudence confirming the Administration's discretion to appoint, transfer and promote staff. The Appeals Tribunal has held that as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion in matters such as staff transfers.⁸

46. Nevertheless, an administrative decision not to appoint, promote or transfer can be challenged on the grounds that the Administration has not acted fairly, justly or transparently. The staff member has the burden of proving such factors played a role in the administrative decision.⁹

47. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the case of the above-mentioned decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance Judge can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Administration.¹⁰ As we stated in *Sanwidi*, when the Dispute Tribunal (and the Appeals Tribunal) conducts a judicial review, it does not engage in a merit-based review:¹¹

⁸ *Yolla Kamel Kanbar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1082, para. 28 citing *Orabi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-884, para.19; *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para 18; *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 59.

⁹ *Orabi* Judgment, *op. cit.*, para. 20; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 26; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32.

¹⁰ *Orabi* Judgment, *op. cit.*, para. 21; *Kule Kongba* Judgment, *op. cit.*, para. 27.

¹¹ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

(...) Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

48. In the present case, the UNDT very thoroughly conducted a judicial review of the administrative decision under challenge. It properly reviewed the legality of the contested administrative decision from any possible angle in accordance with the applicable law and established the critical facts of the case. It was cognizant of the Appeals Tribunal's relevant jurisprudence governing the exercise of discretionary authority by the Administration and applied correctly the right test that the latter had to pass, without substituting its own assessment for that of the Administration.

49. In this context, the UNDT firstly found that:¹²

The evidence on record shows that the impugned decision was indeed based on the complaints levied against [Mr. Dieng]. Such evidence includes the contents of an email from [the JSR] to the USGs of the Department of Peacekeeping Operations and the Department of Field Service informing them that [Mr. Dieng] had poor behavioral and interpersonal skills which undermined his capacity to discharge the responsibilities assigned to him in an effective manner. Further, that he operated as an isolated entity unto itself, and engaged in constant, overly assertive and never ending public and private conflict with UNCT partners, including the Office of the SRSG on Children and Armed Conflict, and with colleagues within UNAMID. Also, that the unit [Mr. Dieng] was leading was dysfunctional, incapable of working in a coordinated manner with key UNCT partners, and unable to effectively and successfully implement UNAMID's Child Protection Mandate. The above evidence answers the question of whether the decision was performance related in the affirmative. The only issue is whether the proper procedures were followed in arriving at the decision.

50. Then, the UNDT went on to hold that:¹³

33. The Tribunal also notes the egregious and damning nature of the allegations in issue. Their nature was such as would put into question [Mr. Dieng's] credentials as an international service servant and yet even when the attempt to investigate them failed,

¹² Impugned Judgment. para.28.

¹³ *Ibid*, paras. 33-35.

nothing was done to bring them to his attention and to meaningfully remedy the situation in accordance with section 10.1 of ST/AI/2010/5.

34. The mere reassignment of [Mr. Dieng] to another office under circumstances of undisclosed, un-investigated and unresolved egregious and damning allegations such as these can only be ruled to have been arbitrary, and a violation of [his] due process rights since he was denied an opportunity to rebut them and clear his record.

35. The Respondent's argument, based on the general authority of Heads of mission to reassign staff members within the mission is unsustainable. The reassignment in this case was done in the context of a number of contentious issues including a failed investigation. It was therefore wrong for the Respondent to act in a business-as-usual manner on the basis of general authority to reassign [Mr. Dieng] to another office.

51. Based on these factual findings, the UNDT came to the conclusion that:¹⁴

[Mr. Dieng's] reassignment was done in violation of the applicable law (ST/AI/2010/5), and it was therefore arbitrary. It was made in bad faith and in violation of the Applicant's due process rights since the complaints which formed the basis for the decisions were not brought to his attention in a timely manner, and through the right process. The complaints were never investigated and so he had no opportunity to rebut them, yet they remain on the record. On the whole, there was unlawful exercise of discretion".

52. In the course of his cross-appeal, the Secretary-General submits that the UNDT erred in law in finding that Mr. Dieng's reassignment was in violation of the applicable law and a violation of his due process rights. He contends that the UNDT erred when it found that "the mere reassignment of [Mr. Dieng] to another office under circumstances of undisclosed, un-investigated and unresolved egregious and damning allegations such as these can only be ruled to have been arbitrary, and a violation of the Applicants due process rights since he was denied an opportunity to rebut them and clear his record." He also asserts there is no right to have misconduct allegations against one investigated, and a reassignment does not require a prior investigation for misconduct. Therefore, as per the Secretary-General, the UNDT incorrectly linked the decision to reassign Mr. Dieng to other duties in the Mission to allegations and complaints against him that the Administration had closed and, therefore, had decided not to investigate for misconduct and potential disciplinary action. Per the Secretary-General, the fact that the Organization had decided not to investigate Mr. Dieng did not make the reassignment a veiled disciplinary measure.

¹⁴ *Ibid*, para. 38.

53. We do not find merit in these submissions. As the UNDT found, and as evinced in the established evidence on file, the primary reason for Mr. Dieng's reassignment was to address concerns about his performance. The Administration concedes this fact but avers that, even so, the reassignment of a staff member to perform other duties on account of this reason can be lawfully made and is a legitimate action which the management has at its disposal.

54. Undoubtedly, as per our jurisprudence, cited to about, it is within the Administration's discretion to reassign a staff member to a different post at the same level. We have also stated that, an accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.¹⁵ In this respect, it falls squarely within the management's discretion to assign a staff member to a different place of work, or assign him or her to different functions as deemed appropriate, taking into account the Organization's best interests, the staff member's adaptability and skills as well as other factors.

55. However, our jurisprudence does not provide a blanket endorsement for the reassignment of staff members by the Administration. As pointed out, the exercise of the discretionary authority of the Administration to reassign staff members has to pass all of the relevant tests governing it, namely such a reassignment is lawful if it is reasonable in the particular circumstances of each case and causes no economic prejudice to the staff member.¹⁶ It must also respect the procedural and substantive rules of law and must not be arbitrary.

56. In the circumstances of the present case, we accept, as did the UNDT, that the allegations in issue, concerning Mr. Dieng's behavioral and interpersonal skills, which allegedly undermined his capacity to discharge the responsibilities assigned to him in an effective manner, were of such nature that could put into question his credentials as an international civil servant. Yet, these performance-related issues were not brought to Mr. Dieng's attention, namely he was not formally and clearly advised of his poor performance, what he needed to do to rectify it, and the consequences of not rectifying it, and, therefore, he was deprived of a meaningful opportunity to rebut them. Instead, these issues constituted the

¹⁵ *Chemingui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-930, para. 40; *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 58.

¹⁶ *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194, para. 3.

central factual basis of the reassignment decision without Mr. Dieng having prior been informed thereof and given the chance to submit his views. Such conduct is wholly inconsistent with the values of the Organization and the policy and principles underpinning the protection afforded to staff members under section 10.1 of ST/AI/2010/5. As such, the administrative action resulted in a breach of the Organization's obligations to respect Mr. Dieng's due process rights, which rendered the decision to reassign him unlawful,¹⁷ as correctly held by the UNDT.

57. The Secretary-General's contention that the UNDT erred when it found that the decision not to investigate allegations of misconduct against Mr. Dieng meant that his reassignment was unlawful, in that there is no right to have misconduct allegations against one investigated, and a reassignment does not require a prior investigation for misconduct, clearly misconstrues the UNDT's relevant reasoning. The Dispute Tribunal did not suggest that such an investigation was a mandatory prerequisite to his reassignment but simply and unambiguously considered the undisclosed and uninvestigated allegations, amongst other particular circumstances of the litigated case and Mr. Dieng's deprivation of his right to be heard, as evidence of his due process entitlements violation.

58. The present case is thus distinguishable from *Lauritzen*,¹⁸ where the Appeals Tribunal found that the staff member had been informed of the pertinent problems between the Organization's staff members stationed in Budapest and where she was given an opportunity to express her views on those difficulties before the impugned decision to reassign her was made, as opposed to Mr. Dieng's case. It is also distinguishable from *Kamunyi*,¹⁹ where the Appeals Tribunal found that the challenged decision to reassign the staff member was reasonable under the specific circumstances of that reassignment, which is not the case here.

59. In light of the foregoing, the Appeals Tribunal does not find any merit in the Secretary-General's cross-appeal, and it is dismissed accordingly.

¹⁷Cf. *Allen v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-951, paras. 36-37; *Jafar Mohammad Hekmat Al Ashhab v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1046, para. 43.

¹⁸ *Lauritzen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-282, para. 37.

¹⁹ *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194, para. 3.

The Appeal on Material and Non-Material Damages

I. The UNDT's Exercise of Remedial Discretion

60. In its Judgment on remedies, the UNDT stated:²⁰

The question of reinstatement is out of the equation since even if it were circumstantially possible to do so, the Tribunal would not be amenable to issue such an order, since that would be tantamount to replacing its decision for that of the Respondent. In this case, however, the Tribunal is aware that [Mr. Dieng] has since been separated from the Organization and so the question of reinstatement is moot. [Mr. Dieng's] challenge of the decision to separate him from the Organization is the subject matter in other proceedings before the UNDT and will be adjudicated in due course.

61. Mr. Dieng submits that the UNDT erred in law in that, though it found that his reassignment was unlawful, it failed to either rescind the decision or order compensation *in lieu* of rescission pursuant to Article 10(5)(a) of the UNDT Statute.

62. Article 10 of the UNDT Statute provides in relevant part:

5. As part of its judgement, 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.

63. As per the plain reading of the applicable provisions, the UNDT therefore has the statutory discretion to order remedies under sub-paragraph (5)(a) or (5)(b) of Article 10 or both, so that, for example, the compensation referred to in sub-paragraph (5)(b) can represent an additional remedy to rescission/specific performance (or mandatory compensation *in lieu*

²⁰ Impugned Judgment, para. 41.

thereof where the issue relates to appointment, promotion or termination) ordered pursuant to sub-paragraph (5)(a). Yet again, compensation under Article 10(5)(b) can constitute the independent sole remedy where the UNDT decides rescission or specific performance of a contested administrative decision is not appropriate or merited. Equally, rescission or specific performance can constitute the sole remedy awarded, save the mandatory requirement to set an alternative compensation under Article 10(5)(a). The decision on remedy is quintessentially a matter for the first instance tribunal, having regard to the circumstances of each particular case and the constraints imposed by its governing statute. The UNDT's discretion under Article 10(5)(a) is constrained by the mandatory requirement to set an amount of compensation (no greater than that provided for in Article 10(5)(b)) as an alternative to an order rescinding a decision on appointment, promotion or termination.²¹

64. It is clear that the UNDT's decision not to rescind Mr. Dieng's reassignment, or award *in lieu* compensation, and award compensation instead was a remedy arrived at in the exercise of its discretion under Article 10(5), after a careful consideration of all the facts. Had the UNDT considered rescission or compensation *in lieu* an effective remedy, the matter could have been dealt with wholly under Article 10(5)(a) of the UNDT Statute. The Dispute Tribunal chose not to go down that route in the circumstances of this case due to the separation of Mr. Dieng from the Organization at the material time.

65. In all the circumstances of the case, this is a correct decision. We are not persuaded by Mr. Dieng's argument that the UNDT erred in law because it was under an obligation to either rescind the decision or order specific performance, or order compensation *in lieu* of the rescission, or because the UNDT did not explain why it failed to do so. The UNDT duly exercised its reasoned discretion not to rescind the reassignment or order compensation *in lieu*, and Mr. Dieng has not established that this is a manifestly unreasonable decision warranting the interference of the Appeals Tribunal. On this ground, the Appeal falls to be dismissed.

²¹ Cf. *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, paras. 53-54.

II. The Dismissal of the Economic-Loss Request for Compensation

66. On the issue of economic loss, Mr. Dieng submits that the UNDT erred in failing to properly consider the totality of the evidence thereby failing to see that the subsequent separation was intrinsically linked with the unlawful reassignment, leading to his economic loss, and he requests that this Tribunal award him two years' net base salary as compensation.

67. In response, the Secretary-General argues that Mr. Dieng has not provided evidence of any harm. Further, the Secretary-General resists Mr. Dieng's arguments, *inter alia*, on the grounds that the issue of Mr. Dieng's separation was the subject of another application before the UNDT, which the UNDT recently dismissed after finding that the separation was lawful. He contends that Mr. Dieng after being reassigned was kept against his original position, and it was his original position, which was being abolished. Therefore, the matter of economic loss arising from that separation is not an issue that the UNDT considered or even could consider in this case on reassignment.

68. As per the Appeals Tribunal's jurisprudence, compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both.²² It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question. If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded.²³

69. In its Judgment on the merits, the UNDT made the following findings with regard to the request for compensation for the pecuniary harm suffered by the appellant:²⁴ "Turning to the request for compensation for economic loss, the Tribunal agrees with the Respondent that

²² *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20; *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 19.

²³ *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, para. 31; *Sirhan* Judgment, *op.cit.*, para. 19; *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277, para. 24.

²⁴ Impugned Judgment, para. 42.

as [Mr. Dieng] was reassigned within the Mission at the same P-5 grade and level, he suffered no economic harm as a result of the contested decision.”

70. We find no reasons to differ from that conclusion, since the findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute (Statute), when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. We have noted Mr. Dieng’s submissions challenging the UNDT finding, but submissions are not evidence. Mr. Dieng fails to point to any relevant evidence which the UNDT overlooked in coming to its decision. It is clear from the UNDT Judgment that none of the evidence before it was capable of supporting his claim for compensation for economic loss on account of his reassignment.

71. Moreover, we do not find merit in Mr. Dieng’s submissions that the UNDT failed to recognize that the reassignment to another post at the same level and grade was merely a guise and a step towards separating him; that he was separated barely seven months after the unlawful reassignment; and that the reassignment had paved the way for Mr. Dieng’s FRO to engineer the abolition of his prior function and then separate him.

72. In this regard, the UNDT’s reasoning that Mr. Dieng’s reassignment, within the Mission at the same P-5 grade and level, did not entail economic harm for him is correct. The irregularity of the reassignment *per se*, having been inconsequential for the purposes of Mr. Dieng’s remuneration at the post he was reassigned to, does not allow for any compensation for pecuniary damages. Even assuming *arguendo* that Mr. Dieng suffered economic losses at a later stage, i.e., that of his separation from service, that would be the result of a possibly unlawful termination and not of the presently contested reassignment decision.

73. We therefore find that Mr. Dieng has not established any justification for the Appeals Tribunal’s interference with the UNDT decision. Accordingly, in line with the law we have mentioned above, his appeal cannot succeed on those claims.

III. The Quantum of the Moral Damages Award

Compensation for Stress and Anxiety

74. Per our jurisprudence, an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical or psychological report 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 and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.²⁵

75. This Tribunal has consistently held that “compensation must be set by the UNDT following a principled approach and on a case by case basis” and that the Appeals Tribunal will not interfere lightly as “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case”.²⁶

76. In the instant case, the UNDT awarded Mr. Dieng compensation for non-pecuniary (moral damages) in the amount of one month’s net base salary for having suffered psychological stress and anxiety caused by the Administration’s unlawful reassignment.

77. With respect to its award of moral damages, the UNDT set out its considerations in paragraph 44 of its Judgment as follows:²⁷

Turning to his request for compensation for stress and anxiety caused by the contested decision, [Mr. Dieng] submitted a medical report dated 26 May 2018. Given the proximity of [Mr. Dieng’s] visit to the Physician to the date of the contested decision and the events leading up to the contested decision, the Tribunal finds a causal link between the [Mr. Dieng’s] medical condition and the contested decision. The stress and anxiety caused to [him] by the contested decision merits a compensatory award. In the instant case the stress and anxiety occasioned to [Mr. Dieng] by the contested decision resulted in the Physician recommending 16 days of home rest and absence from work.

²⁵ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

²⁶ *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 31; *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 15; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, citing *Rantisi Judgment, op. cit.*, para. 71.

²⁷ Impugned Judgment, para. 44.

78. Mr. Dieng requests that moral damages be increased to six months' net base salary. He contends that the UNDT erred on a question of law when it failed to properly consider and apply relevant Appeals Tribunal jurisprudence with regard to the amount to award in compensation. In this respect, he claims that the UNDT did not consider similar cases, or the different types of harm he had raised, or explain if or why the jurisprudence was not applicable in his case. He explains that the UNDT only made reference to compensation for stress and anxiety, and even then did not expound based on jurisprudence on why the tribunal only awarded one month's net base salary contrary to what has been ordered in cases.

79. We hold that the UNDT did not commit any error of law in its assessment of the compensation award for stress and anxiety, which is evidenced in the physician's medical certificate, and we find it to be fair and reasonable. Having regard to all the matters of which the UNDT was apprised in the present case and noting, in particular, the nature of the administrative decision found by the tribunal to be unlawful, we do not find that it erred in law or fact in its assessment of the moral damages to be awarded for stress and anxiety. Mr. Dieng 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 UNDT in the exercise of its discretion and will not lightly disturb the quantum of damages.²⁸

80. In addition, we reject Mr. Dieng's argument that the award in the present case should be compared with awards in similar cases and that the UNDT erred by failing to do so. The criterion for an award of moral damages is the degree of injury suffered by the individual staff member as a result of the unlawful decision. That the type of unlawful decision is the same as in a number of other cases does not establish that the degree of moral damage must be similar in each case. The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the tribunal.²⁹

81. Therefore, this ground of appeal falls to be dismissed.

²⁸ *Ho* Judgment, *op. cit.*, para. 34; *Maslei v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-637, para. 31; *Leclercq v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-429, para. 22, citing *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219.

²⁹ *Ho* Judgment, *op. cit.*, para. 35; *Maslei* Judgment, *op. cit.*, para.32; *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 27, citing *Appleton v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-347/Corr. 1 and cites therein, and para. 30.

Compensation for Reputational Harm

82. On the issue of compensation for reputational harm, Mr. Dieng submits that the UNDT failed to exercise jurisdiction vested in it with regard to remedying the reputational harm that was suffered by him. In particular, he contends that the Dispute Tribunal, while recognizing the unlawfulness of the reassignment decision and noting that the allegations against him were egregious and damning and their nature was such as would put into question his credentials as an international civil servant, it improperly concluded that Mr. Dieng had not provided evidence to demonstrate the reputational harm he had suffered and therefore failed to order the appropriate remedy .

83. The UNDT addressed this issue at paragraph 43 of the Impugned Judgment, wherein it held as follows:³⁰

[Mr. Dieng] seeks compensation for the reputational harm caused by the 22 March 2018 letter. He states that since the JSR had sent the disparaging email to senior officials in sections where his work was most relevant and where he was known, his reputation and professionalism was already tainted. He was thus unable to apply for any job within these areas, since the email recipients would be the hiring managers or remain influential. Also, until the false allegations in the JSR's email are properly addressed and corrected, his chances of obtaining recruitment within the United Nations remain limited if not effectively blocked. At best, however, [Mr. Dieng's] concerns are speculative and do not amount to evidence as required by the UNDT Statute and applicable jurisprudence.

84. We find that Mr. Dieng has a point on this issue.

85. Indeed, the documentary evidence on file reveals, and the UNDT had clearly and correctly found earlier in the Impugned Judgment that Mr. Dieng's reassignment was effected against the background of complaints, which had been raised over his alleged poor behavioral and interpersonal skills. The Dispute Tribunal also had noted the egregious and damning nature of the allegations in issue, which were such as would put into question Mr. Dieng's credentials as an international civil servant. This fact merited due consideration. We hold that the Dispute Tribunal did not pay due regard or attach sufficient weight to the aforesaid factor.

³⁰ Impugned Judgment, para. 43.

86. In so far as the UNDT found that there is no evidence in relation to pecuniary damages in the form of loss of opportunities, i.e., due to Mr. Dieng not being able to apply for any job, this finding has not been meaningfully rebutted by Mr. Dieng. Nevertheless, Mr. Dieng's claim for compensation for his reputational harm relates also to harm in the form of pain and suffering he has experienced in this regard, which is evident and supported by the record before the Appeals Tribunal, and is related to the fact that he has suffered psychologically because of this. The UNDT has not properly assessed this parameter of Mr. Dieng's suffering in awarding moral damages for stress and anxiety.

87. Under these circumstances and also considering the failure to provide prompt and effective redress (the offending statements having not been removed), as well as that this kind of Mr. Dieng's suffering does not go beyond the ordinary psychological one established above,³¹ the Appeals Tribunal finds that Mr. Dieng's claim is well founded in respect of this head and that he suffered damage to his reputation and is therefore entitled to compensation for that harm. Consequently, taking into account that the reputational harm of this kind is one that falls under the rubric of non-pecuniary (moral) damage, pursuant to Article 9(1)(b) of the Statute, we are satisfied that an award of one month's net base salary constitutes an adequate compensation for the harm that Mr. Dieng suffered to his reputation.³² Accordingly, the total award of compensation for moral damages to Mr. Dieng, because of the stress and anxiety as well as the reputational harm he suffered as a result of the breach of the applicable law and his due process rights, amounts to two months' net base salary.

88. The remaining issues under appeal are related to Mr. Dieng's assertions that the UNDT failed to exercise the jurisdiction vested in it and committed errors of procedure: (a) by not considering his request to "direct the Secretary-General to provide a public written apology to the appellant and instruct [the JSR] to address a letter to all the USGs and ASGs withdrawing his earlier statements on the appellant"; and (b) by not referring the case to the Secretary-General for action to enforce accountability.

³¹ Cf. *Civic v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1069, para. 77.

³² Cf. *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-346, para. 23.

89. In terms of Mr. Dieng's first claim, we hold that such a remedy is not within the statutory remit of either the UNDT or this Tribunal. However, in light of our findings above, and to give solace to Mr. Dieng, we hereby direct that a copy of this Judgment be placed in his official status file. This is the best remedy in these circumstances.

90. In terms of Mr. Dieng's second claim, we recall that the exercise of the power of referral for accountability in terms of Article 9(5) of the Statute must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.³³ The wrongdoing in this case was primarily that of Mr. Dieng's manager who seemingly acted, although unlawfully, in the belief that the reassignment, on the basis of poor behavioral and interpersonal skills, fell within the ambit of his discretionary authority. We therefore rule that a referral for accountability is not appropriate.

91. In the premises, the appeal partly succeeds, and Judgment UNDT/2020/093 must be modified accordingly. The Secretary-General's cross appeal is dismissed.

³³ *Cohen v. Registrar of the International Court of Justice*, Judgment No. 2017-UNAT-716, para. 46; *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 37; *Finniss v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-397, paras. 37-38.

Judgment

92. The appeal is partially upheld, and Judgment No. UNDT/2020/093 is modified and substituted as follows:

a) The Secretary-General is directed to pay Mr. Dieng compensation for non-pecuniary damages (moral damages) equivalent to two months' net base salary in total.

b) The award of compensation is to be effected within 60 days of the date of issuance of this Judgment. Interest shall accrue on the compensation award from the date of issuance of this Judgment at the current US Prime Rate until payment is made. If payment is not made within the 60-day period, an additional five per cent shall be added to the US Prime Rate.

c) The Secretary-General shall place a copy of this Judgment in Mr. Dieng's official status file within two weeks of the issuance of the Judgment.

93. The Secretary-General's cross-appeal is dismissed.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 7th day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar