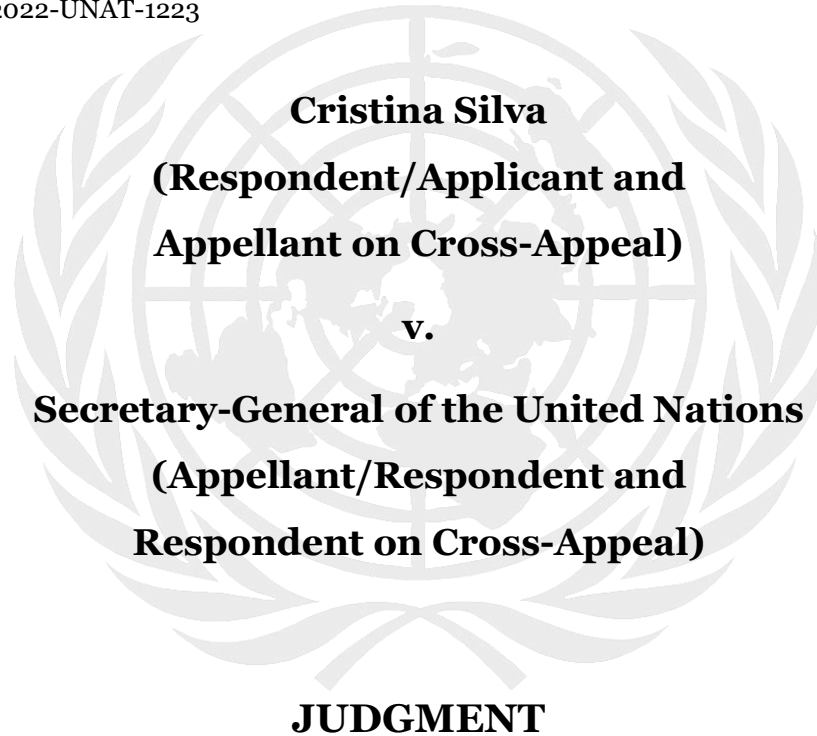




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1223



Before: Judge Sabine Knierim, Presiding
Judge Kanwaldeep Sandu
Judge Dimitrios Raikos

Case No.: 2021-1542

Date: 18 March 2022

Registrar: Weicheng Lin

Counsel for Appellant: Dorota Banaszewska, OSLA

Counsel for Respondent: Noam Wiener

JUDGE SABINE KNIERIM, PRESIDING.

1. The Secretary-General appeals Judgment No. UNDT/2021/006 (the Impugned Judgment), dated 2 February 2021, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal). In addition, Ms. Silva has submitted a cross-appeal of the Impugned Judgment. Both of these matters are before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) for consideration.

2. Before UNDT, Ms. Silva had contested the decision to transfer her from the Administrative and Appeals Section (AAS) in the Administrative Law Division to the Global Strategy and Policy Division (GSPD) of the Office of Human Resources (OHR) at the Department of Management Strategy, Policy and Compliance (DMSPC). In the Impugned Judgment, the UNDT granted the application in part, rescinded the contested administrative decision and awarded Ms. Silva compensation for non-pecuniary harm.

3. For the reasons below, we grant the appeal and dismiss the cross-appeal.

Facts and Procedure

4. Ms. Silva worked for almost seven years as a legal assistant at the G-5 level in AAS until she was selected as Second Vice-President of the United Nations Staff Union (UNSU) in April 2017.¹ During her tenure as Second Vice-President, UNSU which expired on 30 April 2019, she was given full time release to serve in her elected role with UNSU.

5. On 28 March 2019, Ms. Silva met with the Chief of AAS, who explained that Ms. Silva's return to AAS would create a conflict of interest, given her previous role with the UNSU and the cases AAS was addressing on a daily basis, some of which involved the UNSU directly and others on which the UNSU had taken a position. AAS, *inter alia*, acts as Counsel in the Secretariat's cases before UNDT. All AAS staff have unrestricted access to the Section's electronic files and systems.²

¹ Impugned Judgment, para. 5.

² *Ibid.*

6. On 30 March 2019, Ms. Silva contacted the Chief of AAS by text message, expressing her concern about a new assignment. The Chief of AAS responded by requesting Ms. Silva to let her know if she had any preferences as to where in OHR she would like to work.

7. On 12 April 2019, Ms. Silva requested to be placed on special leave with pay for the three days following the end of her official release, and her request was granted.

8. Upon expiry of her tenure with UNSU on 30 April 2019, Ms. Silva was transferred from AAS to SPDS at the GSPD, OHR, DMSPC. By text message dated 3 May 2019, Ms. Silva was instructed by the Chief of AAS to report to the Chief of the Strategy and Policy Development Section (SPDS) at the GSPD, OHR, DMSPC.

9. On 27 June 2019, Ms. Silva requested management evaluation of the decision to reassign her. On 5 August 2019, Ms. Silva was informed that the decision would be upheld. The MEU response reads, *inter alia*:

The Administration stated that in your role as a Legal Assistant, you had access to sensitive information and documents of relevance to the UNSU, which included legal analysis, advice, correspondence and materials prepared for litigation initiated on behalf of, or in relation to, the UNSU. The Administration further noted that the open-plan design of the workspace would render you privy to confidential discussions regarding matters pertaining to the UNSU. The Administration submitted that in order to perform their work, AAS Legal Assistants require unrestricted access to the network/shared drive, Access database and AAS generic email accounts. Also, all team members need to be able to communicate freely and confidently with each other, with their client offices, the Office of Internal Oversight Services (OIOS) and the Office of Legal Affairs, without concerns regarding confidentiality or conflicts of interest.

The Administration noted that AAS represents the Secretary-General in proceedings before the United Nations Dispute Tribunal (UNDT), where it is not uncommon for UNSU matters to arise. In addition, AAS serves as legal advisor to the Assistant Secretary-General for Human Resources on UNSU matters.

Lastly, the Administration noted that you are and/or were the subject of an ongoing complaint and an OIOS investigation, and that you have also filed a complaint of possible misconduct against a colleague who has in turn filed a complaint against you. The Administration noted that it is possible that these disputes could require a response from AAS and/or formal legal advice.

It was for the foregoing reasons that the Administration considered your return to AAS, given your leadership position with the UNSU, to be a conflict of interest presenting both legal and ethical concerns.

10. On 31 July 2019, Ms. Silva filed an application with the UNDT.

11. On 2 February 2021, the UNDT issued the Impugned Judgment.

The UNDT Judgment

12. On the question of whether proper procedure was followed, the UNDT found that Ms. Silva was not provided with any information about her transfer away from AAS before the 28 March 2019 meeting with the Chief of AAS, and rather than a meaningful consultation about the decision, she was therefore presented with a *fait accompli* about the transfer. The consultation, if any, was regarding where she would rather like to work in OHR.³ The UNDT held that, as a matter of good faith and fair dealings, an administrative decision that significantly alters the terms and conditions of a staff member's employment should be notified to this person in a formal written decision, which did not occur.⁴ As Ms. Silva was assigned to another post with a different set of terms of reference which was located in another entity, and she was to report to a new first-reporting officer, the UNDT found that the process surrounding the transfer decision was flawed.⁵

13. On the question of whether there was a conflict of interest, UNDT noted that it was nowhere stipulated in the relevant legal framework governing Ms. Silva's employment with the United Nations Secretariat that a former UNSU representative cannot assume or return to a position with AAS, or, for that matter, to any other specific entity of the United Nations. The UNDT agreed that some conflicts of interest may have arisen in light of Ms. Silva serving a high-level position in the UNSU and therefore it made sense to release her on a full-time basis during her tenure with the UNSU. However, UNDT held that, after her tenure, her return to AAS did not by itself provide an appropriate reason for her transfer. As the UNSU is only involved in relatively few of AAS's cases, and Ms. Silva would only be conflicted in those UNSU cases in which she was involved as Second Vice President, UNDT considered it would be normal procedure to resolve such a conflict of interest by

³ *Ibid.*, para. 19.

⁴ *Ibid.*, para. 20.

⁵ *Ibid.*, para. 21.

preventing the relevant person from access to the pertinent information, using an information barrier or “ethics wall”.⁶ UNDT took judicial note of the fact that it was common for staff members working in the internal justice system to change jobs, even representing opposite parties, and that issues of conflict of interest are typically resolved without any noteworthy operational problems.⁷

14. Concerning pending disciplinary investigation into some affairs related to the Applicant’s tenure with the UNSU, the Tribunal found that the Secretary-General, in his closing statement, had highlighted that this circumstance was only an illustrative example of a conflict of interest and concluded that it was not an independent reason.⁸ It further noted that the investigation report was submitted from OIOS to the Legal Office of UNDP (AAS not being involved), so that the Secretary-General had therefore admitted that any issue of conflict of interest had, so far, been resolved. While the UNDT found that a disciplinary investigation could concern matters of such a serious nature that this would reasonably inhibit a potentially involved staff member from working for AAS, or a similar entity handling questions related to the internal justice system, at least until the case is (possibly) decided in her/his favor, the Secretary-General had not made this submission.⁹

15. Accordingly, UNDT found that the reason provided by the Secretary-General was not proper and led to an unreasonable result.

16. On the question of whether the contested decision was based on bias and improper motivation, UNDT held that there was not sufficient evidence to substantiate any findings that any ulterior improper motive had tainted the contested decision.

17. The UNDT rescinded the decision to transfer Ms. Silva and awarded her USD 3,000 in compensation under article 10.5 of the Dispute Tribunal’s Statute.

⁶ *Ibid.*, para. 33

⁷ *Ibid.*, para. 34.

⁸ *Ibid.*, para. 28.

⁹ *Ibid.*, para. 35.

Procedure before the Appeals Tribunal

18. On 5 April 2021, the Secretary-General submitted an appeal of the Impugned Judgment to UNAT. On 31 May 2021, Ms. Silva filed her answer.

19. On 31 May 2021, Ms. Silva submitted a cross-appeal of the Impugned Judgment to UNAT. On 2 August 2021, the Secretary-General submitted a response to the cross-appeal.

Submissions**The Secretary-General's Appeal**

20. The Secretary-General submits that the UNDT exceeded its competence when it held that the Secretary-General did not have the authority to transfer Ms. Silva. The Secretary-General submits that although the UNDT held that it had the authority to intercede in the discretionary assignment of staff members in cases of bad faith or improper motivation, it proceeded to rescind the contested decision in the absence of either. The Secretary-General submits that there were no safety or security concerns evident which may have limited the Secretary-General's discretion to assign staff members as per Staff Regulation 1.2(c). Similarly, the Secretary-General submits that there was no evidence that the reassignment was arbitrary or capricious, motivated by prejudice or extraneous facts or flawed by procedural irregularity or error of law. The Secretary-General submits that, on the contrary, the evidence supports that the motivation for the assignment was solely concerns about Ms. Silva "being placed in situations in which performing her duties could lead to conflicts of interest". Further, the Secretary-General submits that the UNDT erroneously usurped the authority of the Secretary-General by failing to give deference to that motivation for the lateral transfer of Ms. Silva.

21. The Secretary-General submits that the reassignment fulfilled the requirements set forth in *Rees*¹⁰ and *Chemingui*¹¹, namely that the accepted method for determining whether the reassignment was proper, absent bias or bad faith, is to assess whether the new post is 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. Accordingly, the

¹⁰ *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266.

¹¹ *Chemingui v. Secretary General of the United Nations*, Judgment No. 2019-UNAT-930.

Secretary-General submitted that the UNDT did not apply the standard set forth in *Sanwidi*¹², *Rees* or *Chemingui*.

22. The Secretary-General submits that the UNDT erred in law and in fact by holding that no proper reason was given for Ms. Silva's transfer, rendering the contested decision unreasonable.

23. The Secretary-General submits that the UNDT erred by substituting its judgment for the authority of the Secretary-General under Staff Regulation 1.2(c) when it held that, contrary to his own determination, Ms. Silva's return to AAS would not raise potential conflicts of interest. Specifically, the Secretary-General submits that, while there was neither a specific policy prohibiting Second Vice Presidents at the UNSU from holding administrative positions at AAS nor one which granted a staff member ties to a particular function or assignment that outweighs the authority of the Secretary-General to assign that staff member to any other activities or offices at the United Nations, the relevant policy consideration was under Staff Regulation 1.2(m), the highest source of policy governing personnel matters. The Secretary-General submits that the UNDT incorrectly assumed that the lack of a specific policy prohibiting a return to AAS meant that there were no conflicts of interests and that "[in] doing so, the UNDT usurped the Secretary-General's authority to assign staff members laterally and to determine how to resolve potential conflicts of interest in favour of the interests of the United Nations".

24. The Secretary-General submits that the mere fact that Ms. Silva no longer held her position at the UNSU did not mean that there was no longer a potential for conflicts of interest related to her tenure as an officer of the UNSU.

25. The Secretary-General submits that the UNDT's holding that the decision under appeal would materially hurt the ability of the UNSU to recruit quality staff was speculative and not supported by evidence and was a "usurpation of and wholly irrelevant to the Contested Decision".

26. The Secretary-General submits that the UNDT's holding that no conflict of interest was present was unfounded, both legally and factually and that the UNDT should therefore vacate the UNDT's finding that Ms. Silva's former tenure with the UNSU and her work with AAS did not present a conflict of interest which the Secretary-General could lawfully mitigate by exercising his authority under Staff Regulations 1.2(m) and 1.2(c).

¹² *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

27. The Secretary-General submits that the UNDT exceeded its competence by finding that technical arrangements could address Ms. Silva's conflict of interest, specifically by finding that, through the use of technology, Ms. Silva could be sequestered from certain cases. The Secretary-General submits that by holding that his choice to use one method for addressing conflict of interests over another was unlawful, the UNDT erroneously usurped the authority of the Secretary-General. The Secretary-General submits that, in the process, the UNDT "displayed a lack of understanding of the work of the AAS and based its decision on errors of fact". Recalling *Sanwidi*¹³, the Secretary-General submits that the UNDT has neither the responsibility, under the Charter of the United Nations, for executing the Organization's mandates, nor is it accountable to the Member States for executing such mandates. The Secretary-General submits that UNDT does not have the expertise to instruct him as to how best to resolve conflicts of interest that arise in AAS' work. The Secretary-General notes that the case file does not include, and UNDT never requested, basic information relating to the work of AAS. Further, the Secretary-General takes issue with the UNDT's statement, that there are a limited number of UNSU-related cases and that they would be easy to identify, as speculative and unsupported.

28. The Secretary-General submits that UNDT erred in fact in relation to the most basic aspects of Ms. Silva's reassignment, stating erroneously that Ms. Silva was assigned to another post in another entity, when she was not assigned to another entity, but remained in the same department (DSMPC) and the same office (OHR), reporting to the same Assistant Secretary-General.

29. The Secretary-General submits that the UNDT erred in law and fact when it held that he did not follow the proper procedure before reassigning Ms. Silva. The Secretary-General submits that the UNDT's finding that the terms and conditions of Ms. Silva's employment were significantly altered is a factual flaw, as Ms. Silva continued to serve against the same post, which was moved with her to her new position, and at the same level, and in the same office in the same department.

30. On the UNDT's finding of inadequate consultation, the Secretary-General submits that there is no statutory duty for him to consult with staff members before reassigning them. Noting that UNAT has held that, in certain circumstances, the principles of good faith and fair dealings which apply to reassignment introduce a requirement for consultation prior to reassignment, the

¹³ *Ibid.*

Secretary-General submits that Ms. Silva was consulted regarding her reassignment and whether she had any preferences, but after no input was provided, the decision to assign her to another division was made. The Secretary-General submits that the Administration's conduct was lawful because the determination of whether a conflict of interest had occurred or was likely to occur with within the Secretary-General's authority pursuant to Staff Regulation 1.2(m), and is not a determination which is subject to consultation with staff members.

31. The Secretary-General submits that by holding that he did not adequately consult or inform Ms. Silva of her reassignment, the UNDT added procedural requirements and obligations for the Secretary-General not found in the legal framework, the UNDT exceeded its competence.

32. As remedy, the Secretary-General requests UNAT to vacate the UNDT Judgment, including the award of moral damages, and to uphold the contested decision.

Ms. Silva's Answer

33. Ms. Silva submits that the Secretary-General has failed to demonstrate any grounds upon which the UNDT exceeded its competence or erred, and appears to misread and misinterpret the UNDT's findings.

34. Ms. Silva submits that the UNDT had authority to assess the unlawfulness of her reassignment and did not exceed its competence when doing so. Relying on *Chemingui*¹⁴, *Orabi*¹⁵ and *Rees*¹⁶, she submits that the standard of control of the discretion to reassign staff members is neither unfettered nor limited to an evaluation of whether there has been bad faith or improper motivation on the Administration's part, but also of whether a transfer decision was issued without procedural flaws as well as of whether the Administration acted fairly, justly and transparently towards the staff member and gave the staff member "appropriate" reasons.

35. Ms. Silva submits that the Secretary-General "pretends" that the good faith standard is limited to the reassignment being decided in an arbitrary or capricious manner, or that it was motivated by prejudice or other improper motivation.

¹⁴ See *supra*, footnote 11.

¹⁵ *Orabi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-884.

¹⁶ See *supra*, footnote 10.

36. Ms. Silva submits that the UNDT correctly defined the scope of its competence when evaluating the lawfulness of her reassignment, but that the Administration is “not omnipotent” when reassigning staff and there are certain standards of conduct that must be respected, including “the principle of good faith and good dealings”.

37. Ms. Silva submits that the UNDT could find the reassignment was unlawful as the contested transfer decision was flawed, in particular for lack of an appropriate notification and lack of appropriate reason.

38. Ms. Silva submits that the UNDT correctly held and did not err in law or fact when finding that the Secretary-General did not provide her with an appropriate reason for her transfer, rendering the decision on her reassignment unreasonable.

39. Ms. Silva submits that the UNDT did not exceed its competence or err in law or fact when it assessed the operational reasons given by the Secretary-General as a justification for her reassignment. The UNDT acted within its competence and did not err in fact or law when it held that the alleged conflict of interest did not exist. The UNDT acted within its competence and did not err when finding that the Secretary-General’s contention that mitigating any potential conflict of interest would be operationally challenging was not accurate and, thus, did not constitute a reasonable reason for the transfer.

40. On the Secretary-General’s contention that UNDT did not have the expertise to instruct him on how best to resolve conflict of interest issues that arose in AAS’ work, Ms. Silva submits that the Secretary-General cannot benefit from its own omission to present the UNDT with relevant information.

41. Noting the Secretary-General’s failure to provide information about the number of cases which were related to UNSU matters or why an information barrier could not be established, Ms. Silva submits that the UNDT did not supplant the discretion of the Secretary-General and usurp his authority, but rather evaluated his submissions as inaccurate and unconvincing.

42. Ms. Silva submits that the UNDT correctly held and did not err in law or fact when finding that the Secretary-General did not follow the proper procedure when reassigning Ms. Silva.

43. On the Secretary-General's contention that the UNDT's finding that the terms and conditions of Ms. Silva's employment were altered was an error, Ms. Silva submits that this is inaccurate. Ms. Silva submits that she was transferred to a different entity as she has a new First and Second Reporting Officer and new duties and terms of reference. Ms. Silva further submits that the fact that she is reporting to the same Assistant Secretary-General does not change this.

44. Ms. Silva submits that the Secretary-General's submissions on flaws in the reassignment process are self-contradictory. Noting the principles of good faith and fair dealings, Ms. Silva submits that the UNDT correctly held that notification of a reassignment should be appropriate and that a last-minute, personal text message, or a brief conversation, does not constitute a proper notification.

45. Ms. Silva submits that UNDT correctly assessed that she was entitled to compensation for moral damage as a result of her unlawful reassignment.

46. In terms of remedies, Ms. Silva requests UNAT to dismiss the appeal.

Ms. Silva's Cross-Appeal

47. Ms. Silva submits that the UNDT erred on a question of law and fact in concluding that the reassignment decision was not based on bias and improper motivation.

48. Ms. Silva submits that it is not within the Administration's prerogative to simply dispose of a staff member who is the subject of allegations of misconduct and that such prerogative would be tantamount to a disciplinary measure.

49. Ms. Silva submits that the UNDT failed to assess her submissions and justify why her arguments were insufficient proof of bias and/or improper motivation. In this regard, she submits that she fully met the required burden of proof. Recalling *Simmons*¹⁷, Ms. Silva submits that Tribunals must be prepared to draw inferences from the primary facts when assessing the allegations of bias, which are particularly difficult to prove. She submits that, where the established facts tend to show bias or improper motive, the onus of proof shifts to the Administration and that, in this case, the Administration failed to rebut the primary facts

¹⁷ *Simmons v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/050.

clearly indicating bias and bad motivation towards her. Thus, she submits that the UNDT erred both in fact and law which affected its judgment, in particular with respect to the quantum of damages.

50. Ms. Silva submits that, in the similar case of *Chemingui*¹⁸, UNAT corrected the UNDT's findings with respect to the issue of whether the reassignment decision was tainted by an improper motive. However, in the instant case, UNDT ignored the clear reasons she provided proving bias and bad motivation on the Administration's part.

51. Ms. Silva submits that the UNDT erred on a question of law and fact when designating the quantum of damages. Ms. Silva submits that the award of moral damages of USD 3,000 was inadequate. Ms. Silva submits that in the similar case of *Rees*, UNAT enhanced the UNDT award from four to six months' net base salary for moral damages and that USD 6,000 should be awarded in the instant case.

52. As remedy, Ms. Silva requests UNAT to find that UNDT erred in fact and law when it found that the contested reassignment decision was not based on bias and improper motivation and erred in fact and law when designating the quantum of the compensation in the amount of USD 3,000. Ms. Silva requests UNAT to vacate the Impugned Judgment with respect to the quantum of damages and, instead, to award her moral damages in the amount of six months' net base salary.

The Secretary-General's Answer to the Cross-Appeal

53. The Secretary-General submits that Ms. Silva reiterates the arguments set out in her appeal.

54. The Secretary-General submits that the UNDT correctly held that Ms. Silva did not substantiate any allegations that ulterior improper motives had tainted the decision.

55. The Secretary-General submits that Ms. Silva's reliance on the jurisprudence of *Simmons*¹⁹ and *Chemingui*²⁰ is apposite.

¹⁸ See *supra*, footnote 11.

¹⁹ See *supra*, footnote 17.

²⁰ See *supra*, footnote 11.

56. The Secretary-General submits that *Simmons* provides that, while inferences can be made from the facts to show that bias and improper motives may exist, such inference cannot be made without evidence. The Secretary-General submits that, in the instant case, as in *Simmons*, the UNDT could not have inferred merely from the fact that the decision had been taken that it had been done so as a result of bias or some other ulterior motive. The Secretary-General submits that Ms. Silva “would have had to have shown further evidence to support such a claim, including potentially a string of administrative decisions over the years suggesting a pattern or retribution or untoward animus” against her, which was not done.

57. On *Chemingui*, the Secretary-General submits that Ms. Silva’s argument is misleading. The Secretary-General submits that UNAT held that the UNDT partially erred when it found that the claim of bias was vague and unsupported. UNAT found that the claim, albeit not vague, had not been supported by the evidence and therefore UNAT upheld the UNDT that Mr. Chemingui had not shown that the decision to transfer him was motivated by bias or improper motivations.

58. The Secretary-General submits that the UNDT correctly refrained from awarding higher moral damages, noting that Article 10(5) of the UNDT Statute provides that compensation for harm must be supported by evidence, as supported by UNAT caselaw. The Secretary-General submits that the quantum of compensation is based on damage sustained by a staff member, not the reason for the unlawfulness of the decision. The Secretary-General submits that UNAT has regularly held that it will not interfere with the UNDT’s computation of damages absent compelling circumstances.

59. The Secretary-General requests UNAT to dismiss the Cross-Appeal.

The Secretary-General’s Motion

60. By Motion to File Additional Evidence and Pleading submitted on 15 February 2022, the Secretary-General seeks to admit additional evidence in the form of a letter dated 11 January 2022 from the Assistant Secretary-General for Human Resources, pertaining to an investigation of Ms. Silva and its outcome.

61. The Secretary-General submits that the Motion meets the requirement of exceptional circumstances under the UNAT Statute²¹, relying on *Lee*²² which provided that exceptional circumstances include those where the interests of justice would be served, and the efficient and expeditious resolution of proceedings is enhanced by the inclusion of the additional pleading.

62. The Secretary-General submits that he is seeking to admit additional evidence on the basis of a new fact which is highly relevant to the appeal and which was not available during the consideration of the matter before the UNDT.

63. The Secretary-General claims that his Counsel was not made privy to information about the investigation during its pendency “due to OIOS’s independence and due to the confidentiality of the investigation”. Similarly, the Secretary-General submits that the UNDT could not be provided with information about the particulars of the case. Following the issuance of the 11 January 2022 letter, the subject matter of the investigation has now been shared with the Secretary-General’s Counsel and can now be shared with the UNAT.

64. The Secretary-General submits that the investigation did, indeed, concern matters of such a serious nature they should have precluded Ms. Silva from working at AAS.

65. The UNDT exceeded its competence by deciding that the risk that the matters being investigated were insufficiently severe to justify Ms. Silva’s transfer. The Secretary-General had correctly decided that Ms. Silva could not serve at AAS.

66. The Secretary-General requests the UNAT to accept the additional evidence and consider the argument made pursuant to that new evidence, and thereby rule in his favour.

67. In response to the Secretary-General’s Motion, Ms. Silva submits that, the fact of a pending investigation was well known to Counsel for the Secretary-General, as well as the UNDT, as evidenced by the Impugned Judgment (paragraphs 28, 35, 38, 52 and 53), the Joint Submissions on Facts before UNDT and the Secretary-General’s Closing Submission. Ms. Silva submits that the Secretary-General failed to present a specific legal argument and

²¹ UNAT Statute, Article 2.5.

²² *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 38.

that this does not entitle him to claim the existence of exceptional circumstances before UNAT to make such a submission at this stage of the proceedings.

68. Ms. Silva submits that the outcome of the investigation is not a circumstance relevant to the case at hand which concerns the lawfulness of her reassignment, since the outcome of the disciplinary proceedings was communicated to Ms. Silva in January 2022, almost three years after the reassignment took place.

69. Ms. Silva requests that the Motion be denied. She further requests that the Secretary-General be directed to rephrase its motion so that it fulfils the requirement of the two-page limit and is phrased in a matter that is not prejudicial to her, in particular “so that it does not pre-empt the pleadings and contents of evidence prior to UNAT’s ruling” on the motion. Finally, she requests that the Motion be adjudicated upon by the Duty Judge or a Panel of Judges different from the Panel that will adjudicate upon the merits of the case.

Considerations

Merits of the appeal and the cross-appeal

70. In reviewing the merits of the appeal and the cross-appeal we follow the structure of the UNDT judgment. The crucial issue is whether the reassignment decision was lawful or not. Under our constant jurisprudence, a reassignment decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. It can be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law (*Chemingui*²³, para. 39). The 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 (*Chemingui*, para. 40, and *Rees*²⁴, para. 58).

²³ See *supra*, footnote 11.

²⁴ See *supra*, footnote 10.

Whether the Secretary-General followed proper procedure before reassigning Ms. Silva

71. The UNDT held that the process surrounding the transfer decision was flawed. Relying on our judgment in *Chemingui* (paras. 39 and 45), the UNDT noted that the general principle of good faith and fair dealings dictates that a staff member should typically—and at a minimum—be consulted about such transfer before the final decision is made and priorly be provided with a genuine opportunity to comment thereon. From the Secretary-General’s own submissions, it follows that Ms. Silva was not provided with any information about her transfer away from AAS before the 28 March 2019 meeting with the Chief of AAS, and rather than a meaningful consultation about the decision, she was presented with a *fait accompli* about the transfer away from AAS. The fact that Ms. Silva served as Second Vice-President of UNSU on a full-time basis rather than a half-time basis did not by itself inform her that her tenure with UNSU would subsequently impede her from returning to AAS; this consequence is nowhere stipulated in the relevant legal framework. Nor does it follow from the case record that she had been otherwise apprised about the decision before the 28 March 2019 meeting. The only consultation, if any, which was undertaken with Ms. Silva was regarding where—as a result of the decision to remove her from AAS—she would prefer to work in OHR. The UNDT further found that as a matter of good faith and fair dealings, an administrative decision that significantly alters the terms and conditions of a staff member’s employment should be notified to this person in a formal written decision. This did not occur in the present case. By the transfer decision, Ms. Silva was assigned to another post with a different set of terms of references, which was located in another entity, and she was to report to a new first-reporting officer. This decision was, nevertheless, only communicated to her at the 28 March 2019 meeting (no meeting records are even on record) and then affirmed in a private telephone text message, which does not constitute an appropriate formal written notification.

72. We find that the UNDT committed several errors of law and fact, and the Secretary-General’s decision to reassign Ms. Silva is without procedural flaws.

73. First of all, the UNDT’s reliance on *Chemingui* is misplaced. In that Judgment, we did not state that “a staff member should typically—and at a minimum—be consulted about a transfer before the final decision is made and priorly be provided with a genuine opportunity to comment thereon”. Our Judgment, in relevant parts, reads as follows (footnotes omitted):

39. It is undeniable that the Secretary-General, the [Executive Secretary of the Economic and Social Commission for Western Asia] in the present case, has broad discretion in staff management, including reassignment or transfer. However, such discretion is not unfettered. The principle of good faith and fair dealings still applies. A reassignment decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. It can then be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law.

...

45. Secondly, the present case is analogous to *Rees*. In *Rees*, the Appeals Tribunal reaffirmed the UNDT's finding that there could not have been an adequate position at the time of the reassignment, since there was no post for the staff member to be assigned to, just a name of a position yet to be established. The decision to reassign a staff member under these circumstances was made hastily and without proper planning. When Mr. Chemingui was informally told of a plan to remove him from his post of Chief of the [Regional Integration Section in the Economic Development and Integration Division], in April 2015, there was no post for him to be assigned to, just a name of a position yet to be established. There was no discussion or consultation prior to that informal notification, not to mention the lack of managerial responsibilities in the new post.

74. In *Chemingui*, the crucial point was the lack of post to which the staff member could be assigned. We found that the reassignment decision, under these conditions, was made hastily and without proper planning, and added that there was no discussion or consultation prior to that informal notification. It cannot be concluded from this judgment that the Appeals Tribunal established a need for prior consultation as a procedural prerequisite in every reassignment case.

75. Secondly, the UNDT has an incorrect understanding of the contested administrative decision. By stating, in para. 20 of the Impugned Judgment, that the decision to reassign her was communicated to Ms. Silva on 28 March 2019, it becomes clear that the UNDT regards this 28 March 2019 communication as the administrative decision to reassign Ms. Silva. However, on 28 March 2019, Ms. Silva was not yet reassigned. She was only informed that she could not return to AAS and was given the opportunity to reflect where she could work outside AAS. In her 31 July 2019 application to the UNDT, Ms. Silva challenged the decision to reassign her stating she was notified of this decision on 3 May 2019.

76. Further, the UNDT erred when it held that the reassignment decision should have been notified in formal writing as the terms and conditions of Ms. Silva's employment were significantly altered. Neither the applicable legal and administrative framework nor the jurisprudence of the Appeals Tribunal contains such a requirement. Additionally, there is no evidence that Ms. Silva's terms and conditions of employment were significantly altered. Contrary to the UNDT's findings, she was not reassigned to another post located in another entity. Rather, she remained on her previous post in the same department (DMSPC) and the same office (OHR).

77. Finally, the UNDT erred in holding that Ms. Silva was not consulted before the reassignment. The UNDT has an incorrect understanding of a consultation before an administrative decision is issued. Consultation means the provision of information about the intended administrative decision and an opportunity for the staff member to comment thereon. Ms. Silva was informed about the intended reassignment on 28 March 2019, more than a month before her tenure as Second Vice President, UNSU expired. According to her statement in the 6 October 2020 joint submission she was informed on that day that she could not return to AAS due to the conflict of interest resulting from her tenure as Second Vice President of UNSU, and the operational challenges those conflicts would pose to AAS. By a 30 March 2019 telephone text message she was asked to think about where in OHR she would have an interest in working. Thus, Ms. Silva was informed more than a month before the transfer decision was taken. This period of time gave Ms. Silva ample opportunity to comment on the transfer. The UNDT's holding that there was "no meaningful consultation" as Ms. Silva was presented with a "fait accompli" is erroneous. It is not necessary that, during the consultation, the Administration discusses the reasons for the intended administrative decision in detail with the staff member or even has to be "open" to negotiate and reconsider issuing the administrative decision.

Whether there was a conflict of interest

78. The UNDT found that the reason "conflict of interest" provided by the Secretary-General was not proper and led to an unreasonable result. With regard to the Secretary-General's argument that it would be operationally challenging for AAS to restrict Ms. Silva from access to the cases related to UNSU matters, the UNDT noted that the Secretary-General had not stated how many cases this actually counts for and had also not disputed Ms. Silva's submission that UNSU is only involved in relatively few of AAS's cases. The UNDT further observed that it would only be reasonable to assume that Ms. Silva would only be conflicted

in those UNSU cases in which she was involved as a Second Vice-President and not all UNSU matters in general; also, it should be easy to identify those cases. With regard to the limited amount of relevant UNSU-related cases, UNDT considered that it would be normal procedure in many jurisdictions to resolve a conflict of interest due to an employee's previous employment by preventing the relevant person from access to the pertinent information. UNDT explained that, practically, this is done by establishing an information barrier (an "ethics wall") for the relevant person. While the Secretary-General argued that all AAS staff members have unrestricted access to all information in its IT system, he failed to explain why an exception could not be made in the case of Ms. Silva in relation to the relevant, and relatively very few, UNSU-related cases. The UNDT found the Secretary-Generals averment that while AAS's old procedures apparently allowed for restricting access to certain files but that it was not possible with its current IT system—without further explanation of the technical reasons—unconvincing, because, if anything, newer IT systems are generally more advanced and user-friendly. In this regard, the Dispute Tribunal also took judicial note of the fact that it is very common for staff members working in the internal justice system of the Organisation to change jobs between different entities that sometimes represent even opposite parties in the employment-related cases of the Organisation and that issues of conflict of interest are typically resolved without any noteworthy operational problems.

79. This finding of the UNDT constitutes an error of law. It becomes clear from the reasoning of the UNDT that it agreed with the Secretary-General that a conflict of interest could arise in Ms. Silva's returning to AAS because "it would [...] be reasonable to assume that Ms. Silva would only be conflicted in those UNSU cases in which she was involved as a Second Vice-President". However, as the UNDT assumed it should be easy to identify those cases, and with regard to the limited number of relevant UNSU-related cases, the UNDT found the Secretary-General should rather resolve the conflict of interest by preventing Ms. Silva from access to the pertinent information by establishing an information barrier (an "ethics wall") and rejected the Secretary-General's argument that this was technically impossible.

80. This finding is not in accordance with the Appeals Tribunals constant jurisprudence on the role and competence of the Dispute Tribunal. As we have stated in *Sanwidi*:²⁵

²⁵ See *supra*, footnote 12.

40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal 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 Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary.

81. By advising the Secretary-General how to resolve the conflict of interest arising from Ms. Silva's return to AAS, the UNDT substitutes its own decision for that of the Secretary-General. The UNDT places itself into the shoes of the administration and takes a decision which solely lies within the discretion of the Secretary-General.

82. We find it reasonable that the Secretary-General preferred to employ Ms. Silva in another section of DMSPC after the expiry of her tenure as Second Vice-President, UNSU. Usually, a staff member taking up this function would not be released on a full-time basis but would continue to work in his or her previous function while at the same time exercising the role as Second Vice President, UNSU (Articles 10 and 11 of ST/AI/293 Facilities to be provided to Staff Representatives). However, in Ms. Silva's case, the Secretary-General found she could not take up the function as Second Vice president UNSU and at the same time continue to work for AAS. Instead of reassigning her, in March 2017, to another function where she would have been able to continue working at least on a part-time basis, the Secretary-General decided to release her from her duties in AAS on a full-time basis. It is reasonable of the Secretary-General to assume that the conflict of interest continued even after the expiry of the tenure as Second Vice-President UNSU. As UNSU is involved in some (albeit possibly few) of AAS's cases, and Ms. Silva would be conflicted in those UNSU cases in which she was involved as a Second Vice-President, it was reasonable for the Secretary-General to decide that Ms. Silva should not continue working for AAS but be reassigned to another section of DMSPC.

Whether there was bias and/or improper motives on the part of the Administration

83. The UNDT, relying on and applying the jurisprudence of the Appeals Tribunal, found that based on the case record there was not sufficient evidence to substantiate any findings that the reassignment decision was tainted by any ulterior improper motivation.

84. In her cross-appeal, Ms. Silva submits that the circumstances around her reassignment show that the Administration did not have any valid reason to reassign her, apart from its own bias towards a staff member who is subject of an investigation. The UNDT should have applied *Chemingui*, para. 47, where a UNDT finding on this issue was corrected by the UNAT.

85. This argument is without merit, and the UNDT's finding is correct. Ms. Silva has misunderstood our Judgment in *Chemingui*, which reads, in the relevant parts (footnotes omitted):

47. Regarding the claim of improper motives in the reassignment, the UNDT dismissed this specific ground of appeal because the claim was both vague and unsupported by any evidence. We partially disagree. In his UNDT application, Mr. Chemingui submitted that the contested decision had been tainted by improper motives and taken in response to his challenge of an administrative decision of [the Economic and Social Commission for Western Asia] in 2014 and that the impugned decision was used to disadvantage him so that his eventual non-renewal would be legitimized. This is not a vague argument. Rather, it is a clear and precise statement. On the other hand, we find no evidence of the alleged improper motives that could justify an award of compensation for harm in the present case.

86. The UNDT's finding that there is not sufficient evidence for bias or improper motive is in complete accord with our Judgment in *Chemingui*.

87. The fact that the UNDT did not accept the Secretary-General's contention (that Ms. Silva's return to AAS would result in a conflict of interest) does not in itself prove that the Administration acted with bias or improper motive. In addition, as the Appeals Tribunal now accepts the Secretary-General's arguments that Ms. Silva's return to AAS would have resulted in a conflict of interest, it becomes evident that, in May 2019, there was indeed a valid reason for such reassignment.

Compensation

88. As the reassignment decision has been found lawful, Ms. Silva is not entitled to receive any compensation.

Secretary-General's motion to admit new evidence and pleading

89. As set out above, the Secretary-General has filed a Motion requesting the Appeals Tribunal to allow new evidence and arguments on appeal.

90. Article 2(5) of the UNAT Statute provides:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. [...]

91. In the present case, we consider that these conditions are not fulfilled. As set out above, there is sufficient evidence upon which to grant the appeal of the Secretary-General without considering further additional evidence in support of his appeal. Therefore, the Secretary-General's Motion to allow new arguments and evidence is dismissed.

Judgment

92. The Secretary-General's appeal is hereby granted and Ms. Silva's cross-appeal is dismissed. The Impugned Judgment is reversed and Ms. Silva's application is dismissed in its entirety.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Sandhu,
Vancouver, Canada

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 9th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar