UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1227

Ade Mamonyane Beatrice Lekoetje
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case No.:	2021-1533
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Ms. Lekoetje: George G. Irving

Counsel for the Secretary-General: Noam Wiener/André Luiz Pereira de Oliveira

JUDGE GRAEME COLGAN, PRESIDING.

1. The Secretary-General of the United Nations appeals against the Judgment of the United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) which concluded that he had not made out sufficiently a case justifying the separation from service (with compensation *in lieu* of notice) of Ade Lekoetje for alleged misuse of funds, abuse of authority and acting while conflicted. The UNDT ordered recission of the contested decision to separate Ms. Lekoetje from service and awarded her a sum equivalent to three and a half years' salary *in lieu* of reinstatement, plus compensation for moral harm of two years' net base salary. For the reasons set out below, we allow the Secretary-General's appeal and modify the UNDT's Judgment.

Facts and Procedure

2. We will refer by letters of the alphabet to a number of people involved in the following narrative. That is because, although there may be some criticism of their acts or omissions in relation to the events that saw Ms. Lekoetje dismissed, those people did not give evidence or otherwise have an opportunity to contest what was said of them.

3. Ms. Lekoetje was, at relevant times, the United Nations Development Programme's (UNDP's) Resident Coordinator and Resident Representative for the Gambia Country Office (RR) at a very senior (D-1) level. Since 2004 the Gambian Government had made available to the UNDP a residential property and, in 2013, Ms. Lekoetje leased this from the UNDP. It was alleged that she improperly set the rental and other conditions of this lease, had work performed on the residence at the UNDP's cost, and both misappropriated UNDP funds and had staff carry out personal errands for her in connection with the property. It was said that, by doing so, Ms. Lekoetje engaged in an impermissible conflict of interest and used undue influence attaching to her office to determine a low rental for the property. Ms. Lekoetje denied these allegations and said that, in part, they arose because of an innocent misunderstanding about utility charges for which she reimbursed the UNDP and then assumed personal responsibility for them from the time this was identified.

4. The present case arose on 22 November 2016, when UNDP's Office of Audit and Investigations (OAI) received a report of misuse of UNDP's resources from a staff member to whom we will refer as "F. E.", then Deputy Resident Representative (DRR), the Country Office

of UNDP in The Gambia (UNDP/Gambia). In his e-mail, the DRR alleged financial irregularities surrounding the management of the RR's residence. Specifically, he stated that the monthly rent for the RR's residence had gone from USD 1,000 in 2013 down to USD 700 in 2014 without any justification on file or approval from the UNDP at Headquarters in New York (UNDP/NY). Moreover, the DRR reported that, while the lease agreement required the tenant, the RR in this case, to pay for all the utilities during the lease of the RR's residence, the UNDP/Gambia had been paying for them without any authorisation. Consequently, as the complaint expressed it: "what is paid in rent is recovered by charging utilities and 'bills it consumes during the use and enjoyment of the residence'".

5. The RR's residence at issue is the property with the street address on Atlantic Road, Fajara, Kanifing Municipality, The Gambia, around 12 kilometers from the capital city of Banjul. The property sits on a parcel of land of approximately 8,619 square metres overlooking the Atlantic Ocean. There are several structures on the property: i) a two-storey residential house including five bedrooms and four bathrooms having a floor area of approximately 827 square metres; ii) a one-storey guest house of approximately 81 square metres consisting of a living room, a bedroom suite, a visitor's bathroom and a kitchenette; iii) a meeting room or "bantaba", either hexagonal or octagonal in shape, of approximately 80 square metres, consisting of a meeting room with a service counter and two bathrooms; iv) an out-kitchen and bathroom building of 35 square metres with a kitchen and two toilet and shower units ; v) a generator house with a floor area of 18 square metres; and vi) a gate security post, which is a single room of 6 square metres.

6. On 19 July 2004, the Government of The Gambia gave this compound to the UNDP/Gambia for the latter's use free of charge, "which will serve as the Official Residence of the United Nations Resident Coordinator to The Gambia". From then on, this compound became the incumbent RR's residence and all RRs resided there as tenants during their tours of duty normally lasting five years, with the UNDP/Gambia as landlord. The UNDP does not have an official policy on the management of this type of property. Also notable is that after the compound was handed over by the Gambian Government, the UNDP/Gambia turned the bantaba into a site accommodating its business continuity plan (BCP), for storing materials and goods for emergency purposes and for holding scenario simulation exercises. Part of the property was thereby used by the UNDP/Gambia for its business or operational purposes.

7. The UNDP/Gambia is headed by a RR, who is at the D-1 level, and he or she is assisted by a DRR at the P-5 level. The RR leads the UN Country Team in The Gambia comprising UNDP, the United Nations Population Fund, the United Nations Children Fund, The World Food Programme, the Food and Agriculture Organization, the World Health Organization and the Office of the United Nations High Commissioner for Refugees. The RR's residence is about five minutes' drive from the UN House in Cape Point, Banjul, where the UNDT/Gambia offices are located. It was decided that the RR's residence would be managed solely by the UNDP/Gambia on a no-gain no-loss principle, meaning that the rent paid by the RR residing there would be kept in an extrabudgetary account to be used for the maintenance of, and repairs to, the property. In return for maintaining the property the UNDP/Gambia would have free use of it for its operations in The Gambia. The RR residing there would pay a rental to the UNDP/Gambia to cover these maintenance and repair costs and the RR would also pay utility charges for services provided to the property.

8. In 2008, a person to whom we will refer as "C. D." was appointed as the RR for the UNDP/Gambia. C. D. became a tenant at the RR's residence. She paid USD 1,000 rent monthly to the UNDP/Gambia. Due to the paucity of records, it is not clear whether the UNDP/Gambia as landlord had concluded a lease agreement with C. D. as tenant, let alone the terms of such a lease agreement. Nor is it clear if, or how much, C. D. paid for any utility charges. There is information only from Ms. I. M., who became the DRR under C. D. in May 2012, that C. D. did not pay personally for the gardening service for the compound or the garbage disposal. Consequently, it is not clear on what basis the monthly rent of USD 1,000 was arrived at, or whether USD 1,000 was or was not sufficient to cover the costs of the maintenance of, and repairs to, the RR's residence or was an excessive amount for these purposes. C. D. departed The Gambia in December 2012 and did not return to Banjul. From December 2012 onwards, I. M. acted as the Officer-in-Charge (OiC) for the UNDP/Gambia and remained so until Ms. Lekoetje's arrival in Banjul on 6 September 2013. Ms. I. M. resumed her DRR functions in September 2013 through to August 2015.

9. In view of the uncertainty about what constituted a reasonable rent for the RR's residence, on 24 June 2013, the Operations Specialist, UNDP/Gambia, contacted the Administrative Services Division (ASD), UNDP/NY for guidance and advice. She informed the ASD that "the [Gambian] Government gave us a Residence consisting of a 5-bedroom house with a 2-bedroom annex, Gazebo and a generator room for the RR/RC". She continued that

"[t]he rental cost for similar houses in The Gambia for international personnel is between USD 2,000 and USD 2,500. Based on this information, we will be grateful for your advice to facilitate our negotiation with her [meaning Ms. Lekoetje] so that we can sign a Lease Agreement upon her arrival." In his response dated 24 June 2013, the Operations Analyst, ASD, wrote that "I assume this is in regard to a RR's residence that is donated by the Govt. The rent needs to be sufficient to cover all operating costs (cleaning, gardening, utilities, maintenance, security, etc.) as well as to build up a reserve to carry out any unforeseen rehabilitation costs down the road. If you need help with determining the rental rate, we can provide you with guidance on undertaking a market rent survey." The Operations Specialist confirmed that she was indeed referring to the residence "donated" by the Gambian Government. I. M., the OiC for UNDP/Gambia, was always copied into those e-mail exchanges.

10. On 26 June 2013, following the advice from UNDP/NY, the Operations Specialist, UNDP/Gambia, contacted Sphinx Associates, a local real estate company, requesting a quotation for conducting a "valuation" of the RR's residence. She attached the terms of reference for the valuation project and a sample valuation report.

11. On 8 July 2013, Sphinx Associates issued its valuation report, in which it provided its professional opinion on, among other things, the current open market rental value of the RR's residence. Based on rental comparisons, Sphinx Associates estimated that the annual rental value of the RR's residence ranged from 675,000 to 900,000 in Dalasi or USD 18,517 to 24,689 (USD 1,543 to 2,057 per month). On 23 July 2013, the Operations Specialist contacted Sphinx Associates with some follow-up questions about its rental estimates, but according to her, she did not receive any response. It is unclear whether the valuation was for the lease of residential property owned by a landlord seeking a commercial return on investment or took account of the special nature of the UNDP/Gambia's role as caretaker landlord. It is also unclear whether the valuation related to the whole property or only to the RR's residence thereon.

12. Ms. Lekoetje arrived in Banjul on 6 September 2013. The Operations Specialist provided several draft lease agreements to Ms. Lekoetje for her to select one for finalisation and conclusion. Among them was a draft lease agreement specifying that the monthly rent would be USD 2,000, which apparently reflected the median monthly rental value suggested by Sphinx Associates, and clarifying, in Annex B, that the UNDP/Gambia would be responsible for the common services including cleaning of external and common areas, garbage collection,

and maintenance of grounds. On 10 September 2013, Ms. Lekoetje selected the three-page lease agreement for the residence dated 30 November 2006 between the then DRR and the previous RR, as the model for her new lease agreement, crossed out the (earlier) quarterly rental fee of USD 2,600, and inserted the monthly rental fee of USD 1,000. On the top left corner of the first page of the 2006 lease agreement Ms. Lekoetje wrote a note to I. M.: "Pls. let's use the same lease as [the previous RR's]. It is less complicated."

13. On 11 September 2013, a lease agreement was signed by I. M. on behalf of the UNDP/Gambia as lessor/landlord, and Ms. Lekoetje as tenant, for the lease of "the house located at the Atlantic Boulevard, Fajara for a period from **15th day of September 2013** until **Reassignment**". The 2013 lease agreement read, in preambular paragraph 2, that "[t]he LEASE shall define the terms and conditions for such tenancy. Upon its expiration, UNDP and Ade Mamonyane Lekoetje shall review the entire arrangement and obligations prior to the expiration date and may renew the LEASE based on mutual agreement." It continued, with terms pertinent to this case highlighted in italics:

> The Tenant shall pay in advance a monthly rental fee of **US$1000.00** (One thousand Dollars) to UNDP as Landlord of the House on or before the *5th* day of each month to which the rent pertains for the period of the tenancy or until termination of the LEASE, whichever comes first. …
>
> *The Tenant shall have the exclusive use and enjoyment of the House. The Tenant shall be responsible for settling all utility bills i. e. water and electricity, telephone, and other services with the appropriate authorities which may be charged on the demised premises during the term of this Lease Agreement.* The Tenant shall take good care of the House and the fixtures and appurtenances therein, reasonable wear and tear excepted. *The Tenant shall be responsible for all replacement of all expendables, i. e. bulbs.*
>
> UNDP shall be responsible for the structural maintenance and repairs done to the house and its annexes as well the standby generator.
>
> …
>
> *The Tenant shall be responsible for the payment of all utilities, electricity, water, sewage and bills that it [sic] consumes during the use and enjoyment of the residence.*
>
> …
>
> The Tenant agrees to lease the House. Initial repairs, *remodeling and/or renovation to improve the functionality and security of the premises shall be undertaken by UNDP. If the Tenant wishes to undertake additional remodeling and/or renovation,*

> *the tenant shall request UNDP's agreement in writing to these alterations. The Tenant further agrees to bear the costs related to such renovation at the Tenant's option …*
>
> *… The Tenant shall promptly report to UNDP any defect or need for repairs.*
>
> *…*
>
> *Any difference between the Tenant and UNDP shall be resolved by means of mutual discussions. Any differences not so resolved may be referred to the UNDP-Headquarters for its advice.*

14. It is not clear whether the valuation report by Sphinx Associates was presented to Ms. Lekoetje for reference. She denied having seen the valuation report. According to the Operations Specialist, during the negotiation she discussed the monthly rent of USD 2,000 with Ms. Lekoetje, but Ms. Lekoetje rejected that proposal. According to I. M., there were "conditions and variances", Sphinx Associates was not a credible surveyor, and the company "did not conclude the process properly" because Sphinx Associates had failed to respond to the follow-up questions from the Operations Specialist.

15. Again, according to I. M.'s evidence, while the 2013 lease agreement specified the lease period from 15 September 2013 until Ms. Lekoetje's reassignment, I. M. and Ms. Lekoetje reached an informal understanding that they would revisit the 2013 lease agreement after a year, during which the parties would monitor the income and expenditures for the RR's residence, and determine whether USD 1, 000 as monthly rent was too high or too low for its maintenance. There is no formal or other written record of this understanding between the landlord and the tenant.

16. Accordingly, in an e-mail dated 15 September 2014, I. M. instructed E. C., the Procurement Associate, to "prepare renewal of [the lease] contract for [RR's] Residence" with "[t]he new rent as of September 2014" reduced to "USD 700 per month". She informed the Procurement Associate that "[s]o far we have USD 4,000 reserve as contingency". Subsequently, I. M. and Ms. Lekoetje signed a new lease agreement backdated to a starting date of 1 September 2014, and with USD 700 as the new monthly rent. Everything else in the 2014 lease agreement remained the same as in the 2013 lease agreement. Assuming that USD 12,000 was collected in rent from Ms. Lekoetje in the first year of her lease and USD 8,000 (USD 667 per month) was expended on repairs and maintenance, and therefore with a buffer of USD 4,000 built up during that first year, the new agreed monthly rental of

USD 700 per month appears to equate to that monthly expenditure figure from the previous year, *albeit* rounded up.

17. No new lease agreement was concluded thereafter. Starting from September 2014, Ms. Lekoetje paid USD 700 as rent to the UNDP/Gambia. The payment record kept by the UNDP/Gambia shows that she was always late in making rental payments, sometimes long after the 5th day of the month as required by the lease agreement. However, she was not sanctioned for this, and the lease agreement made no provision for what was to happen in the event of late payment.

18. After she assumed her functions as the RR for the UNDP/Gambia, based on her previous experience as the Director of the UNDP Country Office in Nigeria, Ms. Lekoetje decided that the UNDP/Gambia should pay for the home internet service for herself as well as for the DRR and the Senior Economist. This appears to be contrary to the terms of lease as it was arguably a utility service.

19. As tenant, Ms. Lekoetje paid for electricity consumed at her residence. Initially, she also paid water bills. But in March 2015, she received multiple water bills because of errors made by the utility company due to multiple water metres being installed on the compound. Ms. Lekoetje gave those bills to the Procurement Associate and told him to fix the problem. The UNDP/Gambia thereafter started to pay for all the water bills addressed to the UNDP Resident Representative including those for the RR's residence. She did not follow up on the matter with the Procurement Associate until two years later and then resumed paying for water in March 2017 when her obligations were brought to her attention.

20. Ms. Lekoetje initially paid for the garbage collection, but after she learnt that her predecessor's gardening service paid by the UNDP/Gambia had included garbage collection, she directed the UNDP/Gambia to do the same for her, and the UNDP/Gambia complied. It is less clear whether this service was addressed by the terms of the lease, although it is arguable that this too was a utility service.

21. In July 2015, Ms. Lekoetje wrote to I. M. that "some repairs [were] required in the kitchen and landscaping both inside and outside the compound", which e-mail message I. M. forwarded to the Operations Specialist with an instruction: "please get specifications from the RR and get quotes for those works". It is not clear how I. M. came to know that, by saying

"repairs … in [her] kitchen", Ms. Lekoetje had meant replacement of the kitchen countertops. A contractor "Quality Kitchen" was engaged. Ms. Lekoetje then selected the granite stone countertop of her choice and had the existing countertop replaced at the cost of 160,000 Dalasi, or USD 4,104.80, all paid for by the UNDP/Gambia.[1]

22. Noticing an increase in the expenditure, possibly in the wake of the kitchen countertop replacement, starting February 2016 Ms. Lekoetje decided to pay USD 800, instead of USD 700 under the 2014 lease agreement, as monthly rent to the UNDP/Gambia, without amendment to the lease agreement.

23. After F. E. reported possible misconduct on the part of Ms. Lekoetje on 22 November 2016, the OAI launched an investigation. Ms. Lekoetje was notified that she was the subject of an investigation and informed of the allegations against her. After preliminary inquiries, the OAI Investigators travelled to The Gambia, where they interviewed her. They also interviewed several current and former staff members of the UNDP/Gambia and some staff members at the UNDP/NY and obtained evidence of contemporaneous documents and materials. On 22 August 2017, the OAI provided Ms. Lekoetje with a draft investigation report, and all exhibits relevant to the investigation including the transcript of her interviews with the OAI Investigators. On 4 and 5 September 2017, Ms. Lekoetje provided the OAI with her responses. In its investigation report dated 14 September 2017, the OAI found that the allegations of misconduct against Ms. Lekoetje were substantiated, and that, as a result of Ms. Lekoetje's misconduct, calculated that UNDP had sustained a financial loss of USD 29,187.91.

24. The OAI's specific findings may be summarised as follows. The OAI considered that the 2013 and 2014 lease agreements had deviated from the UNDP Lease Agreement template, in that certain specific clauses/conditions such as 15 per cent penalty for late payment of rent that the UNDP/NY insisted be maintained were not included. This was said to be due to Ms. Lekoetje's opposition to the draft version modeled on the UNDP Lease Agreement template. It found that I. M. was not entirely credible in her explanations about the basis for the USD 1,000 monthly rent in the 2013 lease agreement and the reduction of the monthly rent to USD 700 only a year afterwards without proper justification. It also found that the fact that

[1] The purchase order raised by the UNDP/Gambia for countertop replacement was dated 28 September 2015. On that date, the exchange rate between US Dollar and Gambian Dalasi was 1: 38.9788.

Ms. Lekoetje began to pay USD 800 in September 2015[2] only showed that the rent had initially been set too low to have an adequate reserve. In this regard, the OAI determined that Ms. Lekoetje dictated many of the terms of the lease agreements including setting the rent to be paid below market level and having it further reduced after one year.

25. The OAI found that some of the statements of income and expenditures provided by the witnesses and Ms. Lekoetje showed discrepancies regarding the actual surplus and/or deficit. However, the OAI was unable to reconcile the accounting record as the Finance Unit of the UNDP/Gambia lacked proper financial administration and oversight about the management of the RR's residence. Nevertheless, it found that Ms. Lekoetje had failed to adhere to the provisions of the lease agreements when she had the new kitchen countertops and sinks installed at the RR's residence without having sought the UNDP/Gambia's prior approval, and therefore when she, instead of the UNDP/Gambia, should have assumed the costs related to such renovation which had been at her option. The OAI also found that the UNDP/Gambia should not have paid for the minor and day-to-day repairs at the RR's residence through payment vouchers or petty cash, as there were no justifications on files as to why those payments were paid by the UNDP/Gambia or any report of defect or need for repairs by Ms. Lekoetje as required by the lease agreements. The OAI further found that Ms. Lekoetje should have assumed all expenditures related to water, garbage collection, gardening service and internet services for the RR's residence from September 2013 onwards.

26. In connection with the income and expenditures, the OAI raised the matter of the "bantaba" serving as the BCP site for the UNDP/Gambia and agreed that some expenses might have been paid for the special events such as simulation exercises. However, the OAI Investigators did not find any such explanations in the payment vouchers that they had reviewed, which could have justified those payments.

27. The OAI noted that Ms. Lekoetje had willingly paid USD 3,974.06 to the UNDP/Gambia in reimbursement of the water, garbage, and internet services for the RR's residence that the Agency had initially paid. However, the OAI determined that an amount of USD 20,987.91 should be recovered from Ms. Lekoetje for the goods, services and utilities paid

[2] This seems to be an error. The evidence shows that Ms. Lekoetje began to pay USD 800 monthly in February 2016.

by the UNDP/Gambia, which were unjustified or in breach of the 2013 and 2014 lease agreements.

28. By letter dated 3 July 2018, the Assistant Administrator and Director, Bureau for Management Services, UNDP, charged Ms. Lekoetje with having engaged in misappropriation of funds and misuse of resources by using UNDP/Gambia staff and funds to pay for her personal expenses, engaging in an abuse of authority and having a conflict of interest by unilaterally determining the rent that she would pay the UNDP/Gambia for her personal residence, allowing petty cash to be used for personal expenses, instructing UNDP/Gambia personnel to pay her personal bills, and failing to uphold the highest standards of efficiency, competence and integrity. On 23 July 2018, Ms. Lekoetje submitted her response to the charge letter. She filed an additional response on 25 August 2018.

29. By letter dated 12 December 2018, the UNDP Administrator informed Ms. Lekoetje that he had reviewed all the evidence on record and determined that the evidence supported the charges of misconduct against her. Consequently, he decided to impose on Ms. Lekoetje the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity for misappropriation of UNDP resources, misuse of authority, conflict of interest and a failure to uphold the standards required of her as a staff member. He also informed Ms. Lekoetje that, since she had repaid USD 8,200 in August 2018, the balance of the loss in the amount of USD 20,987.91 would be taken from her separation entitlements.

The UNDT's Judgment

30. Ms. Lekoetje appealed the separation decision to the Dispute Tribunal. The Dispute Tribunal held a hearing on 9, 10 and 11 September 2020, during which it heard from I. M., E. C., and Ms. Lekoetje as witnesses.

31. In Judgment No. UNDT/2021/002 dated 13 January 2021, the Dispute Tribunal found for Ms. Lekoetje, concluding that the facts on which the disciplinary measure had been based had not been established, and that the separation decision was unlawful because the Administration had "abused its authority in exercise of its discretion to institute disciplinary proceedings in a matter where it could have, and it indeed did, institute managerial action by

clarifying the lease terms with [Ms. Lekoetje] and mutually agreeing with her to reimburse the organization whatever had erroneously been paid on her behalf".[3]

32. In the view of the UNDT, the lease agreements between Ms. Lekoetje and the UNDP/Gambia were "a private arrangement and not part and parcel of [Ms. Lekoetje's] terms of appointment".[4] The UNDT considered that the rent adjustments in 2014 had been "based on an objective criterion after a careful assessment of previous expenses and balances in the account using an income and expenditure spread sheet", and that it was "abuse of authority and unlawful" to apply the market value to the determination of the rent price, because market value was an irrelevant factor under the circumstances of the case.[5]

33. The Dispute Tribunal found Ms. Lekoetje's explanations and assertions to be "justifiable, reasonable and plausible",[6] and her actions after the payment anomalies had been brought to her attention to be "professional[…], [and made] with due diligence and integrity to resolve them. She was cooperative and showed remorse for her minor oversight in relation to the water and garbage bills…"[7]

34. The UNDT reviewed the specific allegations in respect of repairs, remodeling and renovation, the use of UNDP funds to pay for miscellaneous items such as light bulbs and garbage collection, water bills and the use of staff resources, but found them unpersuasive for lack of evidence or proof, let alone clear and convincing evidence. The Dispute Tribunal concluded that the fact that the Administration had decided to initiate disciplinary proceedings was "beyond comprehension", as "[t]hese are not matters of serious misconduct. At the most, they are performance issues".[8] "[T]hese kinds of issues are raised in routine country management financial audits done all the time".[9]

35. As remedies, the Dispute Tribunal ordered rescission of the separation decision or payment of an in-lieu compensation amounting to three years six and a half months of Ms. Lekoetje's D-1 salary calculated from the date of her termination (12 December 2018) to the date of her expected retirement (30 June 2022). Moreover, the UNDT awarded

[3] Impugned Judgment, para. 81.
[4] *Ibid*., para. 59.
[5] *Ibid*., paras. 62 & 63.
[6] *Ibid*., para. 65.
[7] *Ibid*., para. 79.
[8] *Ibid*., paras. 74 & 76.
[9] *Ibid*., para. 76.

Ms. Lekoetje two years' net base salary as damages for moral harm. Additionally, the Dispute Tribunal ordered that Ms. Lekoetje be reimbursed USD 20,987.91 with interest at the US Prime Rate applicable from the date of deduction to the date of payment, which deduction had caused her financial loss.

36. We feel constrained to say that it is puzzling how, in a judgment running to 24 pages, the UNDT dealt with the relevant facts in less than 2 of those pages.[10] This was a fact-intensive case. That is illustrated, for example, by the fact that on appeal the Secretary-General has submitted for our consideration more than 1,100 pages of documentary exhibits which were before the Dispute Tribunal. The UNDT heard from several witnesses. It has been difficult, on the appeal, to discern the Dispute Tribunal's factual findings and the reasons for these. However, to do justice to an important case for both parties, we have had to attempt to reconstruct the relevant facts and have set these out at some length to determine whether the UNDT erred in its judgment.

Submissions

The Secretary-General's Appeal

37. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and find that Ms. Lekoetje committed misconduct. Alternatively, he requests that if UNAT does not vacate the UNDT Judgment in its entirety, the Appeals Tribunal reduce the in-lieu damages that the UNDT awarded to a reasonable amount, vacate its unsubstantiated moral damages and vacate its order for reimbursement of UNDP's misappropriated funds.

38. The Secretary-General raises the issue of the UNDT's treatment, as a witness, of the Procurement Associate whom the Administration called at the UNDT hearing. It was unreasonable for the UNDT to require him, on the witness stand in September 2020, to "itemize" from memory the inappropriate expenses that he had processed in 2014 and 2015, and for the UNDT to conclude that the Procurement Associate had failed the test, despite "much probing" from the UNDT Judge, because he could only identify one instance in which he had contested an unlawful use of petty cash under his management.

[10] Pages 2-3 address both "Facts and procedural history", summaries of the parties' submissions occupy approximately eight pages, considerations about nine pages, the UNDT's conclusions less than one page, and the remedies granted a little over one page.

39. The Secretary-General submits that the UNDT erred by finding that Ms. Lekoetje did not abuse her authority or have a conflict of interest when she negotiated a reduction of her rent with her subordinates in the UNDT/Gambia. The rent negotiations were one-sided, because setting the monthly rate was directly related to her pecuniary interests and also because she held authority over those with whom she negotiated. Ms. Lekoetje abused her authority and placed herself and her subordinates in a conflict of interests by requesting that her subordinates lower her rent, thus putting them in conflict between their loyalties to the Organisation and to her, and moreover, by not disclosing and referring the matter to the UNDP Regional Bureau for Africa (RBA) as required by the Staff Regulations and Rules.

40. The Secretary-General also submits that the UNDT manifestly erred by holding that Ms. Lekoetje had not benefitted from the reduced rent because "the rent payable was more than sufficient to maintain the property".[11] Paying the lowest rent possible was in her personal interests. Whether the UNDP/Gambia could sustain the decrease in rent and whether the lower rent was based on objective criteria is irrelevant to the question as to whether Ms. Lekoetje benefitted personally from the lower rent. The UNDT failed to recognize the conflict between Ms. Lekoetje's personal pecuniary interest to pay the lowest rent possible and the UNDP's interest to charge an amount of rent that does not appear to be favouring its officials.

41. The Secretary-General further submits that the UNDT erred by holding that determining the monthly rental rate based on the market value of the RR's residence was an abuse of authority. In the view of the UNDT, what happened between Ms. Lekoetje and her subordinates over the rent reduction was merely a dispute about the fairness of the monthly rental rates and it should have been resolved under the dispute resolution clause in the lease agreements rather than through a disciplinary process, or under a managerial audit, or through a clearer policy.

42. The Secretary-General maintains that the UNDT erred in fact and law when it found that Ms. Lekoetje's misconduct had not been established by clear and convincing evidence, and that there was no misconduct. Both the 2013 and 2014 lease agreements clearly required Ms. Lekoetje as tenant to be responsible for paying all utility bills and for buying all expendable items for the RR's residence. They also made it clear that any repairs or renovation to the RR's

[11] Impugned Judgment, para. 61.

residence could be procured only with UNDP's approval. Ms. Lekoetje has acknowledged that payment of utilities for the RR's residence was her responsibility, and that her subordinates were not responsible for her financial obligations. Yet she instructed her staff to process payments on her behalf, even after being reminded of her responsibility to pay utility bills out of her own pocket. Ample evidence before the UNDT demonstrated that the staff of the UNDP/Gambia had followed Ms. Lekoetje's instructions and used the UNDP funds such as extra budget and petty cash for multiple payments of the costs of utilities for the RR's residence, such as garbage removal, water consumption and expendable items for the RR's residence, and that Ms. Lekoetje had procured repairs and renovations using the UNDP funds without UNDP's approval.

43. In this connection, the Secretary-General points out the factual errors that the UNDT made: The UNDT's finding that Ms. Lekoetje had inherited an arrangement by which the UNDP/Gambia had paid for garbage removal is contrary to the evidence. Contrary to the UNDT's finding, the invoices for water supply were not issued in the name of the UNDP Country Office; they were issued to "UNDP RESIDENT REP" and delivered to the RR's residence. As a result of Ms. Lekoetje's direct instructions, her subordinates used UNDP funds to make 14 payments for water bills between April 2014 and February 2017. Ms. Lekoetje resumed her payment of water bills in March 2017 and paid some of them back only upon becoming aware of the OAI investigation. The UNDT had no evidence to support its finding that paying water bills required "queuing at a water utility company (most probably during working time)".[12] Contrary to the UNDT's findings, the Procurement Associate did not ask the UNDT to strike the charge that Ms. Lekoetje had misused UNDP funds for expendables; he rather stated that one voucher was for cleaning supplies for the BCP site, and it was thus not a misuse of UNDP funds by Ms. Lekoetje.

44. The Secretary-General also maintains that the UNDT erred by holding that UNDP had abused the disciplinary process by launching it in bad faith, without evidence or basis.

45. Finally, the Secretary-General states that the UNDT erred and abused its authority by awarding excessive compensation to Ms. Lekoetje in the amount of three years and six and a half months' salary, without any basis or justification. Even if all of Ms. Lekoetje's claims were to be accepted, this case does not represent the egregious and malicious abuse that could justify

[12] *Ibid.*, para. 73.

such high damages. The Secretary-General also states that the Dispute Tribunal exceeded its authority by additionally awarding Ms. Lekoetje two years' net base salary as moral damages based on the evidence of a letter from her physician dated 15 February 2019. He notes that in the letter the physician identified the onset of Ms. Lekoetje's medical issues in 2013, 2017 and an unspecified month in 2018, which could not have been caused by the separation decision made in December 2018 or the OAI investigation the lawfulness of the latter of which was not questioned by Ms. Lekoetje. The Secretary-General further states that it was an error for the UNDT to order reimbursement of USD 20,978.91 to Ms. Lekoetje. He notes that the sum of USD 20,978.91 has been collected from Ms. Lekoetje's final entitlements representing the difference between the total unauthorized expenses and the reimbursed sum.

Ms. Lekoetje's Answer

46. Ms. Lekoetje requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment. She also requests that the Appeals Tribunal award her USD 10,000 for the Secretary-General's abuse of process by using the appeals process to reargue his case, introducing new arguments, unnecessarily exceeding the pleadings page limit, knowingly misrepresenting the facts, and misleading the Appeals Tribunal.

47. Ms. Lekoetje submits that there are no mistakes of law or fact in the UNDT's conclusions with respect to the rental terms. The Administration's undocumented claim that she altered the terms of the lease regarding late payments and renovation is untrue. There was no late payment provision in the 2013 or 2014 lease agreements, but the lease provided for settlement of any disputes either through negotiation or mediation by UNDP/NY. The Administration has not established why a tenant in this situation has different rights from those of any other residential tenant, including the right to negotiate a lease. The claim that there was a conflict of interest or abuse of authority in negotiating a lease is misplaced. The Administration ignored the evidence of I. M. and E. C., both of whom said that there was no pressure applied to them. I. M. testified, unchallenged, that the rent was based on an analysis of the income and expenditure statements. Ms. Lekoetje notes that there was a surplus of funds for future renovations when she left the UNDP/Gambia and the improvements she had made were for the benefit of future occupants.

48. Ms. Lekoetje also submits that it is not the Dispute Tribunal, but rather the Secretary-General, who has misunderstood the concept of conflict of interest. She was not the decision maker but a party to a contract. There was no evidence that she ever instructed or directed her subordinates to pay any bills. In this connection, Ms. Lekoetje points out that the Administration was never able to articulate what the rent ought to have been. The argument that Ms. Lekoetje benefitted from the arrangements that were agreed upon is not relevant to the question of whether she committed an act of misconduct. The argument that she had exerted undue influence and the staff of the UNDP/Gambia were presumably incapable of resisting such pressure is pure conjecture.

49. Ms. Lekoetje further submits that the issue of determining the rent based on market value is false, because market value was only relevant for commercial rentals of property by UNDP. The RR's residence is a government-owned property used for the accommodation of the RR, and not for profit and especially not for the UNDP's profit. There was no UNDP policy for the government-owned properties. The UNDP policy was to pay for reasonable maintenance and repairs of the property together with an adequate reserve for extraordinary expenses. Ms. Lekoetje and the UNDP/Gambia honoured it. Even the officials at UNDP/NY did not want to get involved but advised that it was left up to the Country Office to set a rent in accordance with the no-loss no-gain formula. The UNDT was merely applying the stated policy to the case.

50. Ms. Lekoetje states that the Secretary-General's arguments on payment of expenses are all derived from a misstatement of the facts that were fully examined and correctly established in the UNDT Judgment. A pile of receipts and a chart do not amount to clear and convincing evidence of wrongdoing. The Secretary-General appears to expect that the Appeal Tribunal will conduct a *de novo* examination of all the documentation or else will simply accept his false claims as fact. No proper audit of the records was undertaken. Instead, the Administration unilaterally presented her with a bill at the end of her service. Her own review revealed that while she had agreed to pay for some disputed charges as a gesture of good faith, she was overcharged by more than USD 20,000.

51. Ms. Lekoetje stresses that the UNDT's opinion that the matters cited by the Administration were inappropriate for a disciplinary process is significant. That is because it considered the fact that a process to resolve differences over the lease was available for the parties to the lease; that no audit had raised issues of misuse of funds; that the investigation had never reviewed her suggestion about the malicious motivation behind the claims filed by F. E.; and that the entire process was characterised by bad faith. The UNDT conducted a proper judicial review of the facts and the penalty as well as the unique circumstances that had not been adequately considered, such as her long record of exemplary service.

52. Ms. Lekoetje submits that the UNDT did not substitute its judgment for that of the Administration but felt compelled to overturn an injustice when it made an order for remedies. The Secretary-General has cited no error by the UNDT in this regard; he simply labels the remedies as excessive. The UNDT clearly set out the reasons for making these awards in the Judgment. The losses or harms that she has incurred are the result of the Administration's actions entailing its responsibility for the consequences of those actions. Contrary to the Secretary-General's assertion, the in-lieu compensation awarded by the Dispute Tribunal is not an award of damages. The Secretary-General has advanced no rationale for reducing that alternative compensation, which he could easily avoid paying by reinstating her.

53. On moral damages, Ms. Lekoetje submits that the UNDT was within its Statute in awarding her two year's net base salary for the harm occasioned by the egregious nature of the mistreatment. Her harm was supported by medical evidence. In this regard, Ms. Lekoetje has provided a report from her treating physician dated 15 February 2019, in which the doctor detailed the worsening of her condition from 2017 and the aggravation of her blood pressure problem in 2018 and closed by stating that "it is reasonable to conclude that her medical problems emerging since 2017 were directly related to severe occupational stress".[13]

Considerations

54. The Secretary-General's appeal is divisible broadly into three parts. First, he challenges the UNDT's conclusions about how the leases were entered into and what he says was Ms. Lekoetje's improper role and conduct in settling these and in their performance in practice. Second, he challenges the UNDT's conclusions about how Ms. Lekoetje's obligations under the leases were performed by her, alleging that not only did she breach their terms but that this

[13] The report was addressed to Ms. Lekoetje's Counsel in response to the Counsel's request.

amounted to improper conduct by her. Third and finally, the Secretary-General challenges the remedies granted to Ms. Lekoetje by the UNDT saying that, even if her separation from service was unlawful, the remedies she received were significantly excessive.

55. It is appropriate to start with the allegations made against Ms. Lekoetje before considering whether they were sufficiently proven and then, if so, they amounted to misconduct. Then, again if so, we will consider the sanctions imposed for those misconducts. We remind ourselves that this is not a re-trial of the proceedings that were before the UNDT. Rather, we are to determine whether the UNDT acted erroneously on a question of fact resulting in a manifestly unreasonable decision, and/or erroneously in law. The other grounds under Article 2(1) of the UNAT Statute (excess of jurisdiction, failure to exercise jurisdiction, and procedural error) are not raised on the appeal.

56. At paragraph 56 and following the UNDT particularised the charges against Ms. Lekoetje which the UNDP Administrator upheld, as follows:

> a. Misappropriating funds and misusing resources by using UNDP staff and funds to pay for her personal expenses:
>
> i. By instructing staff to make payments of expenses related to her personal residence using UNDP funds;
>
> ii. Misusing staff resources by utilizing staff time to process, account for and pay her personal bills well beyond that which may have been justified.
>
> b. Engaging in abuse of authority and a conflict of interest by unilaterally determining the rent she would pay UNDP for her personal residence, allowing petty cash to be use[d] for personal expenses and instructing UNDP personnel to pay her personal bills:
>
> i. By unilaterally reducing the rent payment for the RC/RR residence from USD 1,000 to USD 700.
>
> ii. Misusing petty cash.
>
> iii. Improper use of staff resources for her benefit and to serve her needs.
>
> c. Failing to uphold the highest standards of efficiency, competence and integrity.

57. The UNDT began its judgment by setting out, correctly, its task in such cases generally. That was first to determine whether the Administration had established facts on which the disciplinary measure had been based and whether these had been proven to a clear and convincing evidentiary standard; whether those proven facts constituted misconduct; whether

the staff member's due process rights were respected; and whether the sanction imposed was proportionate to the proven misconduct. As elements of those due process rights, the UNDT said that it had to be satisfied that the decision to dismiss was not vitiated by bias, bad faith or taken for improper purpose (which it said would amount to abuse by the Secretary-General of his authority).

58. The UNDT continued, correctly we conclude, that the property at the centre of the case was made available by the Government of The Gambia to the United Nations or the UNDP at no (or at most very modest) rental terms in return for the UNDP providing its development agency services in that country. The UNDP was expected to maintain and repair the property so that it could revert to the Gambian Government substantially in the condition in which it was handed over to the UNDP. It was thus not a situation of a property leased on the open market, whether by the government to the UNDP, or by the UNDP to its RR for the time being. The Secretary-General's imperative was to ensure that the RR met those outgoings (utility services, repairs and maintenance) so that these would not be a charge on either the UNDP or the Government of The Gambia. It is logical, therefore, that the rental to be paid by Ms. Lekoetje to the UNDP would have to be set at a level that would meet repairs and maintenance outgoings, while periodic utility and similar charges levied against the property would be paid directly as they arose. Given the *ad hoc* nature of repairs and maintenance, these expenditures would come out of an accumulating fund and the regular rental payments would need to be set at a level that established, and then maintained, this fund so that it would be sufficient at any time to meet such regular and irregular expenditures. These would occur from time to time and might, in some cases, require significant expenditures. It was also logical that the financial arrangements would have to either provide that Ms. Lekoetje as tenant would meet the regular outgoings on the residence (utility charges and the like) from her own pocket, or that the rental would have to be set accordingly if these were to be met by the UNDP. Unsurprisingly, the former course was taken and evidenced clearly in the rental agreements.

59. There was one complicating element to this otherwise simple arrangement. Parts of the premises were used or were at least available for use for UNDP purposes rather than for the RR's private and personal use. Logically, the proportion of the total rental representing this UNDP benefit would need to be met by it rather than by the RR personally. That does not appear to have been allowed for, at least in the lease agreement. Logically, therefore, a

proportion of the outgoings, repairs, maintenance and other charges levied against the property should have been met by UNDP itself.

60. Despite the Secretary-General's case that Ms. Lekoetje abused her power and position to compel staff reporting to her to do as she demanded and to breach relevant UNDP practices and rules in the settlement of the terms of the lease, there was no clear and convincing evidence that Ms. Lekoetje obtained the leasehold terms she did by improperly prevailing on her staff to agree to do things they knew they should not have done. There was no credible evidence of such egregious abuse by Ms. Lekoetje of her authority. Such non-compliance with the applicable rules and practices applicable to such situations was not the responsibility solely of Ms. Lekoetje, but no account of the absence of clear procedures and the fault of others seems to have been taken into account by the Administration in its decision-making.

61. The UNDT appears, nevertheless, to have erred by determining too narrowly whether there was clear and convincing evidence of these necessary elements of the Secretary-General's case. It appears, at least from its reasons in its relatively sparse judgment, that while it examined and took account of the evidence of the small number of witnesses before it in person, the Dispute Tribunal did not examine, as it should have, the UNDP's comprehensive investigation report and subsequent correspondence with Ms. Lekoetje about the report's findings. That is not to say that these contemporaneous documentary records, and in particular the recommendations and their reasons, should have been accepted without question by the UNDT. But they were relevant in deciding whether there was clear and convincing evidence of Ms. Lekoetje's misconduct and in particular for evaluating the strength and veracity of the oral evidence presented by the parties. Because of the UNDT's failure to acknowledge and evaluate these documentary records in its Judgment, it has become necessary for us to do so.

62. The starting point for decision of a number of the issues is the relevant UNDP rules and regulations addressing issues raised by this case. The Staff Rules and Regulations contain a number of these as follows:

Staff Regulations and Rules of the United Nations (2018)

Regulation 1.2
Basic rights and obligations of staff

…

General rights and obligations

…

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour;

…

Conflict of interest

…

(m) A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization;

…

Use of property and assets

…

(q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets;

(r) Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

…

Rule 1.2
Basic rights and obligations of staff

General

…

(c) Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action

and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

(d) Disciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules and administrative issuances.

…

Conflict of interest

…

(q) A staff member whose personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant shall disclose any such actual or possible interest to the head of office and, except as otherwise authorized by the Secretary-General, formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to a conflict of interest situation.

…

Rule 1.7
Financial responsibility

…

Staff members shall exercise reasonable care in any matter affecting the financial interests of the Organization, its physical and human resources, property and assets.

63. There follow more particularised regulations affecting these matters:

UNDP Financial Regulations and Rules

Rule 102.02

All personnel of UNDP are responsible to the Administrator for the regularity of actions taken by them in the course of their official duties. Any personnel who take any action contrary to these Financial Rules or to the instructions which may be issued in connection therewith may be held personally responsible and financially liable for the consequences of such action.

…

Rule 125.09

Petty cash advances may be made available to officials designated by the Treasurer or his or her designate from petty cash accounts … These cash accounts shall be

maintained on an imprest basis. The amount and purposes of each account shall be defined by the Treasurer. The amount held shall be the minimum compatible with working requirements.

Programme and Operations Policies and Procedures (POPP) on the Management of Petty Cash

… A Petty Cash Fund is an amount of cash securely kept in the cashier's office and used to make cash payments for minor miscellaneous items like stamps, for which it is not practical or possible to make payments by check or electronic funds transfer. Payments from the Petty Cash Fund may be made for amounts up to the local currency equivalent of US$ 100 per payment. Normally petty cash funds are established for the equivalent of US$ 100. In exceptional cases the Treasurer may authorize establishing a petty cash fund for amounts up to equivalent US$ 5,000 …

…

The POPP on the Petty Cash Fund for Management Project

1. PCF is the cash balance kept in the safe in a CO's main office or a HQ unit to meet small expenses for management projects where the use of cheque or electronic funds transfer (EFT) is inefficient. …

…

Qualifying expenses for Petty Cash Fund

…

6. Expenses qualified to be paid from PCF are as follows:

a. Small purchases for office's management operations (not programmes), and

b. Each such purchase not to exceed US$ 100 equivalent. …

Internal Controls for PCF

…

14. Pre-sequentially numbered PCF Vouchers must be used (either in paper form or in spreadsheet form with password control) to request the PCF disbursements; the proper approval obtained, and full Chart of Accounts (COA) indicated.

15. Invoice/receipt for small purchases should be attached to each PCF Voucher. …

64. The next important documents are the 2013 and 2014 lease documents. They were materially identical (except as to the rental amount) so we will refer to the 2013 (the first) edition. It is short, comprising 7 paragraphs. It was executed on UNDP's behalf (as lessor) by Ms. Lekoetje's deputy, that is by a more junior member of her staff and one who reported

immediately to her. It contained several internally contradictory terms: for example, there were two termination notice periods set out, one of one month and the other of three months, both apparently applicable in the same circumstances. The monthly rental of the property (defined only as a street address and not with any description of the facilities thereon) was USD 1,000. This applied for the first year of the lease, and, in the subsequent 2014 edition of the lease document, was thereafter US 700 monthly payable in advance and fixed for the term of the lease. Differences between the parties to the lease were to be settled by "mutual discussions" failing which such differences were to be referred to UNDP Headquarters "for its advice". No certain mechanism was provided for in the event of stalemate about these differences. This may not matter in this case because, in any event, the parties' differences about their rights and obligations were not referred to the mechanism just described. The lease document did not make provision for several of the circumstances that arose during the term of the lease and for which Ms. Lekoetje's service was severed, for example, the re-setting of the rental payable after the first year of occupancy.

65. Next, it is necessary to say something about the relationships between Ms. Lekoetje and the UNDP. We refer to these in the plural because there were two and their interrelationship is complex. As Ms. Lekoetje asserts in submissions, the residence lease was a commercial relationship of landlord and tenant. The parties' rights and obligations were spelled out in the lease document or should have been.

66. The manner in which the terms of the lease were negotiated and settled does not reflect well upon the UNDP which, as both employer and landlord, had regulatory guidelines to be followed and with which it must have been experienced not only with previous RRs in The Gambia but with resident country representatives elsewhere. It appears that there was no, or at least insufficient, more senior oversight of this lease transaction, whether before it was entered into or even when difficulties first arose about its operation. The Deputy RR with whom Ms. Lekoetje negotiated may have been remiss in not insisting on prior approval of the terms of the lease. It is possible that, with a full explanation for the proposed arrangements in the particular circumstances of the UNDP/Gambia, a rental of less than USD 2,500 or even less than USD 2,000 might have been approved by the UNDP, not to mention that better expression of other terms and conditions of the lease could have been arrived at. One example of this missed opportunity (which we have already noted) was the split nature of the property, part of which was for the RR's private residence, but other parts of which served the business

needs of the UNDP/Gambia and the outgoings on, and repairs and maintenance of, which should have been the Organisation's responsibility.

67. However, neither does the negotiation about, and the execution of, the first lease document reflect well on Ms. Lekoetje. Its terms affected her personally as tenant, but as the head of the Gambia country office, which was the landlord, she also had a potentially irreconcilable requirement to ensure that all outgoings on the property including for repairs, maintenance and utility provision costs were sufficiently and properly recovered. In these circumstances, Ms. Lekoetje should have insisted that the proposed form of lease was vetted and approved by a responsible UNDP officer higher in the hierarchy than she and at least at its regional headquarters if not at its head office in New York. It was this perception of a conflict of interest between Ms. Lekoetje's roles as the tenant and as the head of the local office of the landlord, which required this measure to be taken, if not by the Deputy RR, then by Ms. Lekoetje as the RR herself, but which was not. While there may have been an absence of regulatory provision to guide staff in these particular circumstances, it is not sufficient that no precise process may have existed to address this issue. More general and important expectations of senior staff members nevertheless did so.

68. As a preliminary observation, and as the UNDT noted, the Secretary-General faced dealing with Ms. Lekoetje in two different capacities. Although she was a staff member and thereby subject to the rules and policies affecting that relationship, Ms. Lekoetje was also a tenant under a commercial lease arrangement which also imposed rights and duties on the parties to it, the UNDP/Gambia as landlord and her as tenant. The concerns that the Secretary-General held about Ms. Lekoetje's conduct could not reasonably have been staff relations matters exclusively. They were, to a greater or lesser extent, also issues arising under the rental contract which provided an express mechanism for addressing such differences. It was necessary for the UNDP to consider and address both relationships when complaint was made to it against Ms. Lekoetje.

69. Despite its analysis of the various complaints made against Ms. Lekoetje, the UNDT did not address the OAI's investigation report, the acceptance of which led to her severance from service. Rather, the UNDT appears to have focused on the written and oral evidence of witnesses who gave evidence before it and decided the proceeding on what it assessed was a weak case presented by the Secretary-General. The investigation report was, nevertheless, an important evidential element which should have been, but was not, examined and analysed by

the Dispute Tribunal. That is not to say that it should have been accepted uncritically by the UNDT. But where, for example, its contents addressed what the Dispute Tribunal assessed was inadequate oral evidence of financial irregularities alleged against Ms. Lekoetje, the UNDT was wrong to have dismissed those allegations without considering the report's evidence of them.

70. In the absence of an expressed examination of it by the UNDT, we have had necessarily to consider that report (and Ms. Lekoetje's considered written responses to it), which was part of the record put before the Dispute Tribunal.

71. In its summary of the investigation and findings following a detailed report, the OAI concluded that Ms. Lekoetje had been instrumental in settling the terms of the 2013 lease agreement which differed significantly from that which the Organisation had directed be followed. It concluded that the reduction in the rental from 2014 (a reduction of 30% from its 2013 level that was itself significantly less than the indicated market rent) was attributable to Ms. Lekoetje and was made "without justification". It also reported that she made most payments of rental after the due dates and that the lease contained no penalty provisions as it should have for such defaults. The OAI was unable to reconcile the competing theories advanced by different witnesses about the level of the surplus available for major repairs and maintenance, because the UNDP/Gambia's Finance Unit "lacked proper financial administration and oversight" of the management of the property. Ms. Lekoetje's increased payments of USD 800 per month were undocumented and without contemporaneous explanation and even if, as was explained to the investigators, this had been with the intention of establishing and preserving a sufficient maintenance fund, the rental was set too low to achieve this objective in any event.

72. The OAI investigation concluded that some expenditures (including the new countertops and sinks) should have been met by Ms. Lekoetje personally according to the terms of the lease but were paid for by the UNDP/Gambia and without her having requested and obtained the Organisation's approval in writing. Some expendables and other unjustified minor and regular repairs were also paid for by UNDP contrary to the terms of the 2014 lease and for which petty cash ought not to have been expended by UNDP. It was likewise in relation to garden and grounds' maintenance costs, and she benefitted personally from this arrangement also.

73. The investigation report concluded that Ms. Lekoetje benefitted personally from the UNDP/Gambia's payment of invoices for water and garbage collection from September 2013 when the first lease commenced, and which charges should have been met by Ms. Lekoetje personally.

74. It concluded likewise concerning internet services arranged by Ms. Lekoetje but which should have been paid by her personally.

75. OAI concluded that no payments could have been justifiably made by the UNDP/Gambia on grounds of the Organisation's use of part of the property as asserted by Ms. Lekoetje.

76. The investigation report concluded that Ms. Lekoetje owed UNDP the sum of USD 29,187.91 in total to reimburse it for payments made by it instead of by her personally over the duration of the leases.

77. It is instructive also to consider Ms. Lekoetje's response to the investigation's findings. In a letter dated 23 July 2018 to the Director LO/BMS responding to the Bureau's comprehensive letter of 3 July 2018 to her setting out the allegations and its conclusions of misconduct and inviting her response, for the most part Ms. Lekoetje did not dispute the investigation's findings and conclusions. Rather, she sought to explain what she had done, why she had done it and to mitigate the seriousness of her misconduct.

78. For example, as to what she conceded was her unilateral reduction in rental payments (from USD 1,000 per month to USD 700 per month), Ms. Lekoetje said that she accepted personal responsibility for any shortfall for future necessary repairs. She also said in this regard that while the property was her residence, parts of it were used for UNDP purposes although she personally paid rental for services provided to these non-personal areas. She denied ever having intended to mismanage UNDP funds. Ms. Lekoetje asserted that she considered that she was at liberty to vary the rent payable, so long as it covered the costs of repairs to the property. She conceded, nevertheless, that in doing so she did not consider the UNDP's possible future financial obligations to maintain the property for future occupants.

79. Ms. Lekoetje maintained what she had previously told the investigation team but highlighted some features of this. She claimed that the lease was what she called "a gentlemen's agreement" whereby the rental charged was intended to cover the costs of structural maintenance and repairs to the whole property including those parts used by the

UNDP. Ms. Lekoetje admitted, after she had "carefully read[…] the lease" document, that she should have paid personally for utilities, electricity, water, sewage, and other bills "for the enjoyment of the residence". She maintained, however, that she should not have been expected to pay for the cleaning and repairs of those parts of the property used for UNDP purposes.

80. In relation to the provision of new kitchen countertops, Ms. Lekoetje said that these were fixtures for the ongoing enjoyment by future RRs and so ought to have been paid for by UNDP, as indeed they were.

81. While admitting she was aware of the high standard of conduct expected of her, Ms. Lekoetje stated that she never set out to defraud the Organisation and that her actions in relation to the lease payments were "at best … negligence or gross negligence". She did, however, then immediately distance herself from "gross negligence" by saying that her conduct had not met the high standard required for this degree of negligence, claiming that hers was more in the nature of inadvertent error, oversight or simple negligence, an inability to foresee the negative consequences of her chosen course of action.

82. She said that, even if grossly negligent, she had nevertheless acted in good faith, and without dishonesty or willfulness. In a legal analysis of possible descriptions of her conduct, she distinguished recklessness from gross negligence or willfulness. Although she did not say so, we assume that she denied being reckless in her acts and defaults. These legal definitions of misconduct were identified and emphasised by her with a view to persuading the Organisation about the seriousness of the sanction she seemed to accept was due against her.

83. Ms. Lekoetje reflected that, considering the evidence accumulated by the investigation, she should have "acted more carefully" when signing the lease. She repeatedly used the phrase "a gentlemen's agreement" to describe her understanding of the lease and reiterated that her actions were not committed with malicious intent.

84. Generally, in mitigation, Ms. Lekoetje emphasised what she said was her long and impeccable record of service with the United Nations, conducted at all times with the highest degree of integrity, both professional and personal. She said that her record was illustrated by her performance evaluations and her progression by promotions to a senior level within UNDP. She said that there had never been any previous suggestion of similar conduct during

her time with the United Nations. She pointed to her impending retirement from the UNDP in 2022 and her difficulties in finding alternative work if dismissed.

85. She said that when her failings were made known to her, she cooperated with the OAI's investigation and "immediately refunded UNDP for all payments of utilities, that is, water and garbage collection". She emphasised that she immediately reverted to paying the original monthly rental of USD 1,000.

86. While Ms. Lekoetje accepted that she should "receive a punishment", she pleaded that this not be of such a nature as would affect those for whom she cared. She wrote, citing decided analogous cases, that "overpayments [,] even if made fraudulently, which is not the case here, do not merit dismissal". She said that, simply, she should have read the lease document more diligently and she "should have known better". Ms. Lekoetje offered to "repay the full amount due within 28 days". Although she did not specify the amount she offered to repay, we assume it was the sum assessed as still owing (after a partial reimbursement) by the OAI's report.

87. On 25 August 2018 Ms. Lekoetje wrote again to the Bureau making further points in her defence. In this letter, she concentrated on asserting that the Organisation did not have clear and convincing evidence of misconduct in several respects and, in particular, of willful intent. She challenged the investigation's finding that she had directed her staff to misuse UNDP funds for her personal benefit. She asserted that not only was there no clear and convincing evidence that she had done so, but indeed there was evidence that she had not done so.

88. This letter acknowledged that there had been "a potential conflict" between her role as the UNDP leader in The Gambia and as a tenant of the residence but said that while she was accused of undue interference in the tenancy arrangements, she was at the same time accused of not exercising proper oversight of the financial procedures of the office. She said that she had tried to balance her role as caretaker of the property for the UNDP and, on behalf of the UNDP, for the Government of The Gambia, by "rely[ing] on those officials who were designated to administer the arrangement". She reiterated that she had not profited from the arrangements and there was no suggestion of loss to the Organisation from decisions that were subsequently questioned. She admitted underpaying the rental and accepted financial responsibility for this but pointed out that a monthly rental greater than set out in the second

lease would have resulted in her subsidising the UNDP beyond its obligations to maintain the property.

89. Ms. Lekoetje pointed out that an audit of the Gambia Office of the UNDP in 2013 did not identify any concerns about the rental of the property but did reiterate a longstanding need for qualified financial staff within the office. She also pointed out the absence of procedures for the management of such rental properties as the one in issue, and of the absence of documentation about how such issues had been dealt with during the times of her predecessors. She identified that the management of the property had been delegated to the Country Office of the UNDP and so, in effect, to the RR as head of that office. She emphasised that decisions about the management of the property were made under her predecessor and continued upon her assumption of the office in 2013.

90. Ms. Lekoetje reiterated that the rent reduction in 2014 was because a sufficient reserve fund had accumulated to pay for anticipated repairs and other contingencies under an arrangement that was based on a 'break-even' rather than a commercial for-profit model. She emphasised the evidence of the DRR at the time, that the rental was set not by Ms. Lekoetje unilaterally but after receipt of "an analysis from Finance".

91. She pointed out that after a unilateral decision was taken by the Organisation to repaint the residence during a period of her absence on leave, Ms. Lekoetje increased her payments by USD 100 per month to ensure that the fund was not depleted unduly by the painting costs.

92. Ms. Lekoetje denied any knowledge of, or involvement in, the obtaining of the Sphinx valuation prior to her arrival but emphasised the evidence of the then DRR that the Sphinx report was not fit for purpose in relation to a property that was to be rented for the cost of maintenance and repairs only. She emphasised that her predecessor had paid USD 1,000 per month yet the Sphinx proposal was for this to double. She pointed to evidence of comparable UN agency leases of such properties.

93. Ms. Lekoetje explained that dual water bills in the name of the UNDP had been received and she asserted that only one of these could have been attributable to her residence of the house. These became excessive and although she said she asked the UNDP/Gambia's Procurement Associate to sort this out, nothing was done, and the water bills were paid by the UNDP/Gambia. She conceded that she should have been more diligent in resolving this issue.

94. Ms. Lekoetje contested the Organisation's interpretation of the lease agreement in relation to whether she or the Organisation bore financial responsibility for all repairs after those effected upon her moving in.

95. In relation to her supervision of petty cash payments, she emphasised that this was the responsibility of the Procurement Office and the Operations Manager in the Country Office and that all payments made in respect of the residence were within their discretionary limits. She accepted, again in relation to this element, that she could nevertheless have been more vigilant and to have enquired what was happening.

96. In relation to the allegation that she failed to consult the UNDP Headquarters to ensure that her Country Office was following proper procedures, she complained about an absence of specific particulars of her alleged breaches. She said that responsibility was sheeted home to her for actions that should have been taken by others with delegated authority, relevant financial officers and senior officials. Nevertheless, Ms. Lekoetje conceded that she may have had insufficient managerial oversight of these staff members but that this did not amount to culpable misconduct and would have been out of character for her after a long and successful career.

97. Also important to decision of this appeal is the document recording the Organisation's reasons for dismissing Ms. Lekoetje issued after all of the foregoing communications had been exchanged and considered. This was a letter to her dated 12 December 2018 over the hand of the UNDP Administrator. It concluded that the evidence supported the charges set out in the 3 July 2018 letter to Ms. Lekoetje and that the sanction was to be separation from service with compensation in lieu of notice without termination indemnity following Staff Rule 10.2(a)(viii).

98. As to the charge of misappropriating funds and the misuse of resources (UNDP funds) to pay for her personal expenses, the UNDP Administrator said that Ms. Lekoetje had "largely acknowledge[d]" that she had instructed staff to make payments of expenses related to her personal residence using UNDP funds. Ms. Lekoetje's innocent misunderstanding and lack of contractual clarity defences to this charge were rejected: her actions were said to have been taken "intentionally and knowingly". The lease terms were said to have been explicit and unmistakable in requiring her to pay for utilities and repairs. The UNDP Administrator concluded that, contrary to Ms. Lekoetje's assertion that she was careless in not reading the document closely enough, she had done so carefully and had suggested amendments to its

form. The repairs for which Ms. Lekoetje denied responsibility were ones that were hers alone to pay for, including the provision of replacement lightbulbs. There was likewise no absence of clarity around the responsibility for the costs of renovations and remodeling which she elected to do but charged to the UNDP. As the highest ranked official of the UNDP in the Gambia, Ms. Lekoetje was told it was her responsibility to ensure that her financial obligations were fulfilled and, more importantly, to demonstrate that probity to others.

99. While conceding that there may have been some confusion about how some bills were to be paid (water for example), the UNDP Administrator concluded that this did not alleviate Ms. Lekoetje's responsibility for misusing staff resources including using staff time to process, account for and pay her personal bills unjustifiably.

100. On the charge of abuse of authority and having a conflict of interest by unilaterally determining the rental to be paid, allowing petty cash to be used for the payment of personal expenses and instructing UNDP/Gambia personnel to pay her personal bills, the UNDP Administrator concluded as follows. Although the DRR had some responsibility for the residence, this did not obviate Ms. Lekoetje's own responsibility. The UNDP Administrator concluded that the initiative for the rent reduction after the first year of the lease came from Ms. Lekoetje and despite the lease being for the duration of her assignment in The Gambia. She stood to gain personally from the rent reduction. In these circumstances, she was obliged to recuse herself from decisions about the rental to avoid either a conflict of interest or the perception of one. She did not do so and played a central role in the decision to reduce the rent, emphasised by her subsequent unliteral decision to increase rental payments to USD 800 per month but which amendment remained undocumented and unsupported by reasoning. Finally in this regard, the UNDP Administrator decided that it was significant that after only one year of operation, there was no evidence of necessity to reduce the rental from USD 1,000 to USD 700. In these circumstances, this was seen as benefitting only Ms. Lekoetje: it was unnecessary or to the UNDP's benefit to maintain a lower balance of funds for future use. Ms. Lekoetje should have left the rental as it had been previously rather than engaging actively in reducing it. As to Ms. Lekoetje's claim that she was unsure whom to contact at headquarters about this, the UNDP Administrator concluded that it was her responsibility to ascertain that before taking decisions affecting the Organisation's finances.

101. On the part of this charge relating to the misuse of UNDP's petty cash, the UNDP Administrator noted that Ms. Lekoetje did not deny that her personal bills had been so paid and her explanation that staff responsible for the administration of the relevant finance rules should have followed them and prevented such payments being made. The UNDP Administrator concluded that, as the head of the office, Ms. Lekoetje had overall responsibility for the proper use of the UNDP's resources in The Gambia. She was not able to rely on the omissions of subordinates "who may have felt that the conduct of which [she was] clearly aware was authorized by [her]". The evidence was said to have persuaded the UNDP Administrator that Ms. Lekoetje was indeed reviewing the expense reports relating to petty cash so that she was aware of what was happening but did nothing to correct this until it was identified by others. Her attempt to deflect her own responsibility in this matter was "disturbing".

102. On that part of the charge relating to improper use of staff resources, while acknowledging that it may have been appropriate that some staff did so because some invoices were made out to the UNDP, the UNDP Administrator concluded that Ms. Lekoetje's practice was more widespread than that. She made no effort to reduce the involvement of staff to a strictly necessary level, rather continuing to allow their deployment on matters that benefitted her personally and not to serve the needs of the UNDP's operations.

103. Moving to the next charge of failing to uphold the highest standards of efficiency, competence and integrity, the UNDP Administrator concluded as follows. Her use of UNDP funds to pay personal expenses, her use of the UNDP/Gambia staff to serve her personal needs and her unilateral decision to reduce her rent were all actions which she either admitted or had been found established by the investigation. Ms. Lekoetje had failed to consult with the Regional Bureau or other UNDP offices to ensure that her practices followed proper procedures for procurement and payment, and she had failed to recuse herself from transactions from which she stood to gain financially and personally. She failed to document management decisions she had taken in relation to the residence and from which she benefitted personally. When the propriety of several transactions was raised by other staff with her, Ms. Lekoetje failed to ensure that her conduct was appropriate. The UNDP Administrator concluded that, as RR, Ms. Lekoetje had failed to uphold her responsibilities for the regularity of the Office's business practices and to set an example to her staff, especially in relation to her dealings with personal expenses.

104. For the foregoing reasons, the UNDP Administrator concluded that the disciplinary sanction of separation from service with compensation in lieu of notice was the appropriate sanction to impose on Ms. Lekoetje. The UNDP Administrator noted that mitigating factors identified by Ms. Lekoetje (her long and otherwise good record of service with UNDP, her proximity to retirement and her repayment of some of the financial losses) had been taken into account. However, the UNDP Administrator concluded that these factors did not mitigate sufficiently the seriousness of the charges, and especially those concerning her integrity and breaches of obligations as an international civil servant. Indeed, these were said to have been aggravated by her position of leadership and the level of trust and responsibility accorded her and which allowed her to misconduct herself as she did without detection.

105. We turn from the Organisation's conclusions which, in the absence of the UNDT's doing so, we have summarised and assessed, to those factors which favoured Ms. Lekoetje's position when it came to deciding whether she had committed serious misconduct warranting her severance from service.

106. As the evidence of the payment of outgoings on the property over the first 12-month lease illustrates, the estimated commercial rental of USD 2,000 per month, set by reference to the report of the valuation firm Sphinx Associates, was excessive for an arrangement of this sort whereby the staff member was to rent the property from the Agency on a cost-neutral basis. It also tends to establish that the Sphinx rental valuation may well have been of the open market for a commercially rented property of that nature reflecting the need to service borrowings made for the purpose of the purchase, paying taxes and other incidence of commercial rentals of residential property. Nor is it clear just what the Sphinx-recommended rental was for, i. e., the residence alone or with the other facilities on the site. The fact that outgoings on the property in the first year amounted to about USD 8,000 and that a USD 4,000 contingency fund was also created in that same period indicates that even a rental of USD 1,000 per month, half of the Sphinx estimate, was arguably generous to the Agency and, contrary to the Secretary-General's submission, may have seen the Agency benefitting unjustly at the expense of its staff member had the arrangement continued.

107. There were two flaws in the Administration's methodology in determining that Ms. Lekoetje obtained unduly beneficial advantages to which she was not entitled financially in the settling of the lease terms and in particular in fixing the rental amounts. First, the Sphinx valuation revealing a significantly higher recommended rental than was agreed to appears to

have taken into account two irrelevant factors. The first was the non-commercial nature of the arrangement, the no-loss/no-gain principle. The second is that parts of the property that may have been included in the Sphinx valuation were not only of limited or no benefit to Ms. Lekoetje personally but benefitted the UNDP/Gambia in that they provided both *ad hoc* accommodation for other UNDP officials requiring temporary overnight accommodation and offered a space where the UNDP/Gambia could and did conduct seminars, training sessions and the like on the same site as the residence was located.

108. It is necessary to examine critically and to guard against an approach to deciding the allegations against Ms. Lekoetje which identified first an apparent and significant personal advantage accruing to her and then to seek to discover how this may have taken place by reference to breaches by her of relevant rules. The Secretary-General's case may be seen as inviting such an approach to our decision-making.

109. His first ground of appeal complains about the manner in which the UNDT treated the evidence of his witness (a Procurement Associate) whom it concluded was unable to provide evidence of inappropriate expenses processed by him several years previously and was only able to identify one instance of allegedly unlawful use of petty cash attributable to Ms. Lekoetje while these matters were under his management. The Secretary-General did, however, have the burden of establishing his case by clear and convincing evidence having elected to address his concerns as ones of serious staff misconduct rather than as a dispute under the lease agreement. The witness was the person responsible at the time for these financial matters and there were records available to confirm his evidence or to refresh his memories that may naturally have faded. It seems to us that the Secretary-General's complaint is really that he failed to brief sufficiently his own witness knowing of the high evidential standard required to be established. Had the only evidence of these matters been that of the Procurement Associate as the UNDT appears to have assumed, it would have been entitled to conclude that these allegations failed for want of proof to the clear and compelling evidential standard. However, we have already noted that, although bound to do so, the UNDT apparently failed to take into account also the evidence of the OAI's investigation which dealt with these questions comprehensively and in a way that was not, at least then, disputed seriously by Ms. Lekoetje. In these circumstances, this ground of the appeal must succeed.

110. The second ground of appeal advanced by the Secretary-General is that the UNDT erred in fact and/or law when it determined that Ms. Lekoetje neither abused her authority and/or failed to declare a conflict of interest when she negotiated a reduction of her rental with her UNDP/Gambia subordinates. In particular, he says that Ms. Lekoetje should have disclosed, but failed to disclose, the proposed reduction to the UNDP's RBA, as required by the relevant Staff Regulations and Rules. It is unclear whether this criticism relates to the initial rent setting, or to the subsequent reduction, or to both situations, so we will treat it as the latter.

111. Staff Regulations and Rules affecting abuse of authority include Staff Regulation 1.2(g) which prohibits staff members using their offices or their knowledge gained from their official functions for their private gain. Staff Regulation 1.2(m) defines conflicts of interest essentially as arising when staff members' personal interests interfere with the performance of their official duties and responsibilities or with the integrity, independence and impartiality required of them as international civil servants. Actual or possible conflicts of interest must be disclosed by staff members to the relevant head office, must be mitigated by the Organisation, and resolved "in favour of the interests of the Organization". Similarly, Staff Rule 1.2(q) also addresses conflicts of interest, in a way that is substantially similar to the Regulation summarised above but also requires the staff members conflicted or potentially conflicted to excuse themselves from any involvement in the conflict. Finally in this regard, Staff Rule 1.7 requires staff members to exercise financial responsibility in any matter affecting the Organisation's financial interests.

112. Following literally the foregoing regulations and rules, to have required Ms. Lekoetje to declare a conflict of interest when she considered that the proposed rental of USD 2,000 per month was excessive and unjustifiable would in turn have required the Organisation not only to "mitigate its loss" (although it is difficult to see how it could have incurred any loss from pre-contract negotiations) but also, more importantly, such a declaration would have required the parties to the putative lease to have resolved such a conflict in the Organisation's favour. We interpret that to mean, literally, that the Organisation would have been obliged to insist on a monthly rental of USD 2,000. Combined with requiring the Organisation to exercise unilateral power in a contractual negotiation exercise, the following requirement for Ms. Lekoetje to recuse herself from any negotiations would have meant that she would have had no choice but to accept the Organisation's nominated rental to live in the accommodation

set aside for her use as RR. That would have been the consequence, potentially, irrespective of the inaccuracy or unreasonableness of the Organisation's stance in the lease negotiations.

113. We doubt that such a situation is what the General Assembly/Secretary-General could have intended to be the effects of the Staff Regulations and Rules. It follows that these regulations and rules could not have been applicable, at least as literally, to a commercial negotiation between the Organisation as landlord and a staff member as tenant, over the lease of temporary accommodation at a foreign posting. While we do not suggest that Ms. Lekoetje could simply have set the rental unilaterally, a negotiation the outcome of which required the agreement of a more senior official elsewhere than in the Gambia did not constitute a conflict of interest for Ms. Lekoetje.

114. However, we do conclude that Ms. Lekoetje (and her deputy who represented the Organisation in these) were obliged to disclose the parties' negotiations position to her superiors to establish transparently what was proposed and to obtain the Organisation's approval to these arrangements. This did not occur as it should have, and Ms. Lekoetje was derelict in this regard. Her omission constituted an abuse of her authority.

115. The third ground of appeal by the Secretary-General relates to the UNDT's finding that Ms. Lekoetje did not benefit from the rental reduction because, as it found, the new rental was more than sufficient to maintain the property. The Secretary-General's case is that the adequacy of the rental to meet the Organisation's outgoings on the property and whether such could be sustained objectively were irrelevant to the question as to whether Ms. Lekoetje benefitted personally by negotiating and paying a lower rental amount.

116. We consider, however, that this is an unduly narrow and artificial consideration. That is because any tenant can be said to benefit financially by negotiating a lower rental than might otherwise have been payable if the landlord's preferred rental had been accepted. That financial benefit accrues because the tenant expends less of her income or capital than would otherwise have been the case, in other words makes a saving which can be expended otherwise by the tenant. What is important in a case such as this is whether that negotiated and agreed saving to the tenant was achieved by improper means or is not justifiable reasonably by the application of objective criteria. In this case, the decrease in the monthly rental from USD 1,000 to USD 700 was, *prima facie*, objectively justifiable by reference to the previous year's figures. In a no-loss/no-gain arrangement, approximately USD 4,000 had remained

undisbursed from the sum of USD 12,000 and constituted a reserve or buffer fund available for any extraordinary repairs and maintenance costs that might arise. It was open to the UNDT to conclude that Ms. Lekoetje's unilateral increase of that monthly rental from USD 700 to USD 800 indicated an objective reassessment of the adequacy of the figure rather than a self-interested desire to reduce the rental and to profit personally thereby. We are not satisfied that the UNDT's reasoning, sparse as it was, was in error in this aspect of the case it decided.

117. That is not to say, however, that Ms. Lekoetje's means of achieving that reduction was acceptable and lawful. The Secretary-General is correct that Ms. Lekoetje ought to have proposed that change as a variation to the lease and to have documented that alteration to the rental transparently.

118. The Secretary-General's fourth ground of appeal challenges the UNDT's conclusion that the determination of the monthly rental was not an abuse of Ms. Lekoetje's authority and should have been an issue that was resolved through the lease's dispute resolution mechanism rather than, as it was, by a disciplinary process. We have already addressed the issue of abuse of authority and so will deal with the challenge to the UNDT's decision that the Organisation's dispute with Ms. Lekoetje should have been dealt with as a commercial disagreement soluble through the lease agreement's mechanism.

119. Because of the intertwined natures of the two relationships between the parties (landlord/tenant and employer/employee) and the nature of the allegations against Ms. Lekoetje, which included improprieties in her latter capacity, it was not appropriate that these issues were addressed solely as either a tenancy or as an employment disciplinary issue. All relevant considerations had to be applied to the complex task of categorising and investigating those allegations. While it may have been appropriate to have begun the consideration of those that related to the negotiation and settlement of the lease agreements, as employment issues, contractual lease considerations needed also to be applied to such an investigation. While the rights and duties of the tenant and the landlord fell to be considered initially under those lease contracts, where there was relevant associated employment misconduct alleged, that needed to be considered in that context. To the extent that the UNDT favoured a contractual rights approach exclusively, we uphold the Secretary-General's submission although we do not go so far as concluding that the case was solely about alleged misconduct as a senior staff member governed by the terms of that relationship. We note, indeed in the next paragraph of this Judgment, that the Secretary-General has relied on the

breaches of Ms. Lekoetje's contractual obligations under the 2014 lease agreement in relation to the manner in which she dealt with the payments of outgoings on the property, illustrating the inter-connectedness of the two sets of rights and obligations.

120. The Secretary-General's next ground of appeal is that the UNDT erred in fact and in law in concluding not only that there was no clear and convincing evidence that Ms. Lekoetje had committed misconduct, but that indeed there had been no such misconduct. He says that both lease agreements made it clear that Ms. Lekoetje was obliged to pay all utility bills and expendables used in conjunction with the RR's residence, and that any repairs or renovations required the UNDP's approval. The Secretary-General says that there was clear and convincing evidence that Ms. Lekoetje had directed subordinate staff to process payments of utility bills on her behalf, including after having been reminded of her own responsibility for these. Further, there was clear and convincing evidence that the subordinate staff had used petty cash funds of the UNDP to make these payments on Ms. Lekoetje's instructions, including for garbage disposal, water consumption and small expendables used in the household. Finally, he highlights the procurement of renovations to the kitchen of the residence without the UNDP's approval but using its funds.

121. As compared to the situation with the negotiation and settlement of the leases' terms just dealt with, the Secretary-General is on a stronger ground in this regard. There can really have been no question about Ms. Lekoetje's obligations to meet personally payments for utility and like services provided to the property. The lease agreements' provisions addressing this were clear. More difficult were the subsequent questions whether her allowing them to be paid by the Organisation and especially having her subordinate staff do so on her behalf also constituted misconduct. While we consider the UNDT erred in finding that there was no misconduct by Ms. Lekoetje in these respects, there was a distinction between the two associated actions. While having her administrative staff attend to minor personal issues on her behalf may have been less than serious misconduct at worst, when this included having them paying from the Organisation's resources payments that she should clearly have made herself, the UNDT erred in deciding that this was not misconduct.

122. The Secretary-General's sixth ground of appeal addresses alleged factual errors made by the UNDT. These include that Ms. Lekoetje "inherited" an arrangement by which the UNDP paid for the residence's garbage collection; that the water consumption invoices were addressed to the UNDP Country Office; that the payment of these water bills required the

payer to queue, probably during working hours, outside the water company's offices to make payment; that the UNDP/Gambia's Procurement Associate asked to press the charge that Ms. Lekoetje had misused UNDP funds for the payment of expendables, whereas he had in fact only recommended that one voucher for cleaning supplies for the part of the facility used by UNDP be met by the Organisation and its payment was not a misuse of funds by Ms. Lekoetje.

123. We have already concluded that Ms. Lekoetje's conduct in relation to these utilities and like charges which were her personal responsibility was misconduct. It is therefore unnecessary to try to determine this ground of appeal without reasoned findings supporting the UNDT's conclusions on these issues.

124. The Secretary-General's penultimate ground of appeal is that the UNDT erred in concluding that UNDP had, without evidence or other sound basis, abused the disciplinary process and acted in bad faith. Again, for reasons set out in our decisions of other grounds of appeal, we agree that while the Secretary-General's recourse solely to staff conduct considerations was wrong, it would not have been an abuse of process to have undertaken a combined contractual and disciplinary approach to investigating the allegations against Ms. Lekoetje. It follows that we conclude that the UNDT erred in determining that the UNDP had abused the disciplinary process. Its recourse to it alone was wrong but that does not make its application the significantly more serious abuse of process.

125. Eighth, and finally, the Secretary-General says that, even assuming that she had been wrongfully severed from her role, the UNDT awarded excessive compensation to Ms. Lekoetje (equivalent to three and a half years' salary) as an alternative to the remedy of recission of his administrative decision. He says that there is not the egregious or malicious abuse by the Organisation that might warrant such a substantial award. In addition, he argues that two years' net base salary as compensation for moral damages was unwarranted, based as it must have been on a letter from her physician attributing her suffering to events that occurred before her separation from service or the OAI investigation which preceded it and the lawfulness of which was not challenged by Ms. Lekoetje. Finally, the Secretary-General says that the UNDT erred in directing repayment to Ms. Lekoetje of the sum of USD 20,978.91 which had been deducted from her final entitlements as the difference between her unauthorised expenditures and the amounts of her reimbursements.

126. We are not satisfied by the Secretary-General that Ms. Lekoetje can be shown clearly and convincingly to have abused her authority in all aspects of the negotiation and settlement of her lease agreements and in the setting of their terms and conditions including especially the amount of the monthly rental. However, it is a different story in relation to her breaches of those lease terms. That necessarily requires an examination of whether such breaches were performance issues (as was Ms. Lekoetje's case) or misconduct warranting sanction by the Secretary-General, and if so, whether the sanctions imposed were proportionate to the circumstances of the breaches.

127. We consider that the UNDT erred in dismissing all the allegations against Ms. Lekoetje as being unsubstantiated, or, at worst, inconsequential. Her breaches of the lease agreements in relation to utilities and consumables' payments can only have been clearly and convincingly established, as was her arranging for the replacement of the kitchen countertop without the consent of UNDP. These were breaches of the lease agreement, but where they also involved these payments being made by UNDP rather than personally by Ms. Lekoetje, they were also breaches of relevant staff Regulations and Rules.

128. We will have necessarily to consider the correctness of the UNDT's conclusions about the Secretary-General's liabiliity for moral damages when we ourselves come to consider remedies at the conclusion of this Judgment.

129. We have considered and decided all the Secretary-General's grounds of appeal. There are, however, several points raised by Ms. Lekoetje which we need to address also before finalising this already necessarily lengthy and detailed Judgment.

130. Just as we have concluded that the Secretary-General was obliged to address the issues with Ms. Lekoetje as both a tenant and a staff member, we likewise dismiss Ms. Lekoetje's submission that she had no other rights or responsibilities beyond those of any other residential tenant in a commercial arrangement with her landlord. It was encumbent on her, for example, to ensure that the relevant staff rules were followed where the lease arrangements were negotiated with her subordinates to avoid a perceived conflict of interest. By ensuring that the arrangements met with the approval of an independent office holder outside the Country Office of UNDP/Gambia which she headed, and as the rules required, she could have managed and avoided any potential conflict of interest as came to be alleged against her.

131. That Ms. Lekoetje, when confronted with the fact that the UNDP/Gambia had been paying her utility bills, agreed to reimburse these payments and to assume them herself from then on indicates that she accepted her personal liability for them as the rental agreements clearly provided. It is not simply, as Ms. Lekoetje submits, that "a pile of receipts and a chart do not amount to clear and convincing evidence of wrongdoing". All the evidence of relevant events must be considered and, in this regard for example, she cannot contend justifiably that the UNDT was correct to conclude that there had not been clear and convincing evidence of the Administration's payment of these bills that were her personal responsibility. We have to say that we regard with some skepticism her assertion that her offer to pay for liabilities that were hers all long was simply a "gesture of good faith". That offer appears to be more an acceptance of her obligation as tenant and a belated making-good of it.

132. We come now to the final ground of appeal relating to the remedies awarded by the UNDT to Ms. Lekoetje. While the allegations of serious misconduct on the part of Ms. Lekoetje concerning the negotiations for, and settlements of, the leases were, for the most part, not decided erroneously by the UNDT, several of those grounds in relation to her performance of her obligations as both tenant and senior staff member for what led to her severance from service were decided wrongly by the UNDT. Given that the compensatory awards were made by the UNDT on the basis of a complete exoneration of Ms. Lekoetje's conduct, these remedies awarded to her cannot survive unmodified. Had the Organisation decided that she had misconducted herself in the ways we conclude that the UNDT should have found, what would proportionate remedies have been for her severance from service in these circumstances?

133. We do not accept Ms. Lekoetje's fallback argument that these could only have been "performance" issues which, together, could not have justified any disciplinary action at all. They were, nevertheless, of lesser seriousness than the allegations against her including all those relied on by the Secretary-General concerning the negotiations and settlement of the leases. In all the relevant circumstances, her wrongful conduct could not reasonably have justified her severance from service as took place, but, equally, could not have gone unreprimanded and without consequence.

134. The UNDT applied four considerations to its finding which must be revisited. First, it ordered recission of Ms. Lekoetje's severance. That remedy is unaffected by our Judgment that Ms. Lekoetje's misconducts could not reasonably have justified her severance from service, even on notice.

135. Second, the UNDT fixed compensation in lieu of reinstatement at the rate of her salary for the period of three years and six and a half months which was until, the UNDT estimated, she would retire (on 30 June 2022). That level of compensation must, by any account, be at the uppermost end of such awards and reserved for cases in which a staff member who has suffered grievously was also blameless. Ms. Lekoetje was not in that position and her responsibility for what befell her must be marked remedially. In substitution for the *in-lieu* award made by the UNDT, we substitute this with an award of one year's net base salary.

136. The third element of remedies addressed by the UNDT was the sum awarded for moral damages. This is also subject to the Secretary-General's appeal when he says that Ms. Lekoetje failed to establish her loss in this regard by the evidence she tendered to the UNDT. His case is that Ms. Lekoetje failed completely to establish any loss which would be compensable by an award of moral damages. He says that although there was independent corroborative evidence of Ms. Lekoetje's medical practitioner, the dates attributed to her ill health do not coincide with the investigation into the allegations (the process of which investigation she does not challenge in any event) or certainly not coincide with her severance from service which was the potentially compensable consequence of what we might conclude to have been her wrongful dismissal.

137. We have re-considered carefully that medical report on which Ms. Lekoetje relied in support of her claim to moral damages before the UNDT and corelated its opinions and conclusions with the dates of events set out earlier in this Judgment. Ms. Lekoetje was treated by her physician from not long after her arrival in The Gambia. While her general health was stable, the particular treatment she initially underwent had no apparent connection with her work there. That assessment and treatment continued until 2016. It was at the end of 2016 that Ms. Lekoetje became aware of the complaints against her and the investigation of these. That process continued until December 2018 when she was severed from service. In March 2017 she was treated for a new condition which was arguably related to the additional stress of the allegations and their investigation. Her symptoms increased in frequency and severity so that in April 2017 when she was again seen by her physician, she reported workplace stress. Medication was prescribed but she was also advised of the possibility of the further development of her condition and consequent deterioration in her health. In August 2017 the physician noted further signs of excessive stress exhibited by a number of symptoms including, but not limited to, elevated blood pressure, sleeplessness, recurring headaches, involuntary

muscular twitching and nervousness. She required ongoing and frequent treatment for these conditions, including counselling, during the latter part of 2017. In 2018 her condition deteriorated significantly so that she had to be evacuated to a health facility in Europe for urgent and long-term treatment for hypertension. Her physician attributed these conditions to "severe occupational stress".

138. Ms. Lekoetje herself gave scant evidence of these conditions and what she considered, by implication, was their causative or contributory factors. Her evidence was not challenged, at least by contrary evidence as indeed would have been difficult for the Secretary-General without separate expert medical evidence. Our recourse to the evidence that was given before the UNDT reveals that in her witness statement to the UNDT she said only: "My wrongful termination has created a blemish on my otherwise exemplary career and has injured my personal and professional reputation. Throughout the investigative process and following my separation I experienced significant work-related emotional stress, obliging me to seek medical treatment." She added to this at the hearing saying, when invited by her counsel whether she had anything to add before her evidence concluded, that she had "served the Organisation for 24 years with humility and pride, … [but she] left a broken woman with medical conditions, stress, anxiety and hypertension and [she was] on medication".

139. We have significant reservations as to the unequivocality of the medical evidence supporting her claim to moral damages. At best, the relevant actions of the Secretary-General in relation to the matters that were the subject of this case may have contributed to her suffering, but along with other factors that are not attributable to his actions. There is, however, a more fundamental ground on which the appeal against the moral damages' award must be determined. Given Ms. Lekoetje's culpability for the losses she incurred which might otherwise be compensable by an award, she is not entitled to moral damages and the UNDT's award equivalent to two years' net base salary must be set aside entirely.

140. In reliance on her response to the OAI investigation report in which she conceded that she should repay the sums estimated to have been lost to the UNDP by her conduct, we consider that the UNDT wrongly remitted Ms. Lekoetje's responsibility for these. It follows that the sum of USD 20, 987.91 is repayable to the Organization by Ms. Lekoetje. If the Secretary-General elects to pay compensation in lieu of recission of his decision, he is entitled to deduct this sum from money payable to her.

141. Finally, we address Ms. Lekoetje's claim to costs. Not only because there was no cross-appeal brought by Ms. Lekoetje which disqualifies her claim jurisdictionally, but because we consider that the Secretary-General's appeal was properly brought, there is no question that he should have to pay Ms. Lekoetje any further sum in costs for his alleged abuse of the appeal process, let alone the USD 10,000 she seeks.

Judgment

142. The Secretary-General's appeal is allowed and Judgment No. UNDT/2021/002 is modified. The UNDT's Judgment rescinding Ms. Lekoetje's severance from service is upheld, but those parts of its judgment on remedies are modified. In substitution for those monetary remedies allowed by the UNDT we direct that Ms. Lekoetje is to have a sum equivalent to one year's net base salary pursuant to Article 9(1)(a) of the Appeal Tribunal Statute; the UNDT's award of moral damages is set aside; and the sum of USD 20,987.91 is declared to be payable by Ms. Lekoetje to the Organisation.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan, Presiding Auckland, New Zealand	Judge Sandhu Vancouver, Canada	Judge Murphy Cape Town, South Africa

Entered in the Register on this 18th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar