UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1427

AAS[1]

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Kanwaldeep Sandhu Judge Abdelmohsen Sheha
Case No.:	2023-1787
Date of Decision:	22 March 2024
Date of Publication:	2 May 2024
Registrar:	Juliet E. Johnson

Counsel for AAS:	Self-represented
Counsel for Secretary-General:	Amanda Stoltz

[1] This unique three-letter substitute for the party's name is used to anonymise the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE GRAEME COLGAN, PRESIDING.

1. The Secretary-General appeals to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal), Judgment No. UNDT/2021/120 (impugned Judgment) of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal),[2] which found in favour of the claims of AAS[3] and awarded him remedies. AAS was separated from service with the Office of the United Nations High Commissioner for Refugees (UNHCR) on one day's notice, with compensation in lieu of notice and without termination indemnity (contested decision). The case concerns essentially whether the Secretary-General was required to consider and take into account, but failed to do so, or at least sufficiently, the medical causes of, or contributions to, AAS's misconduct towards other staff members for which he was dismissed. It also addresses questions of compensation for wrongful termination of employment.

2. For the reasons set out below, we grant in part the Secretary-General's appeal.

Facts and Procedure

3. The facts of the relevant conduct for which AAS was separated from service are not the focus of this appeal and, because they are set out in the impugned Judgment, we will only summarise them here before addressing the pertinent background of the case.

4. AAS held a series of consecutive fixed-term appointments with UNHCR, the last of which was scheduled to expire on 30 November 2020. In March 2018, AAS went on certified sick leave and shortly afterwards underwent two major surgical procedures to remove a brain tumour. In July 2018, with his sick leave entitlement about to expire, he was requested to undergo a medical assessment to determine his fitness to return to work or, alternatively, to assess whether he might be entitled to disability benefits if he was unfit to return to work. A series of tests and examinations followed over the subsequent two months, resulting in AAS being certified as fit to resume work. Arrangements were made for AAS's gradual reintegration which began with fully remote teleworking and progressed to increased proportionate in-office work. As of 1 December 2018, AAS was working full time and face-to-face with his colleagues as he had before his illness.

[2] *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/132.
[3] Because the case centres on the former staff member's serious medical condition and the consequences of his treatment, we have decided to continue the anonymisation of his identity imposed by the UNDT.

5. Despite being physically capable of usual work, AAS suffered adverse physical and psychological conditions that he attributed to his previous neurological condition and/or its treatment. It is these psychological conditions with which this appeal is concerned.

6. Within a short period after his return to in-person work, the Administration began to receive complaints and allegations from other staff about AAS's conduct towards them described as workplace harassment, threatening behaviours, intimidation, aggression, lying, discrimination and the creation of a hostile work environment. In April 2019, an investigation by the Inspector General's Office (IGO) of UNHCR was opened into these complaints. Over the ensuing months, some 20 staff, including AAS, were interviewed and evidence was gathered. Some colleagues commented on the changes to AAS's personality since his illness and found his behaviour uncharacteristic.

7. In November 2019, AAS was temporarily assigned to another role within the Organization. In December 2019, the IGO's investigation's draft report was shared with him and his comments were invited. AAS provided his comments, reiterating that he had suffered "ventilations, mood swings, frustrations of a kind, etc.", which he attributed to his prior illness and surgeries.[4]

8. The Investigation Report was finalised on 6 February 2020. AAS had denied some of the occurences alleged against him, while accepting and explaining others innocently. The Investigation Report concluded that there was evidence substantiating the allegations that AAS had engaged in discriminatory and insulting behaviours and had created a hostile working environment. Some of the complaints againt AAS, including those related to threatening or intimidating colleagues, were deemed unsubstantiated or insufficiently established. It concluded that his behaviours had included making discriminatory and insulting comments about other staff members in their absence "as well as imposing his personal frustrations and negative emotional outbursts onto colleagues, and thereby, overall, creating a hostile working environment for others".[5] In reaching this conclusion, the IGO assessed that AAS may have violated the applicable legal rules for staff conduct.

9. Despite being invited to respond to the allegations, AAS failed or declined to do so. On 23 November 2020, he was advised that the complaints of offensive conduct towards other

[4] E-mail dated 30 December 2019 from AAS to the IGO.
[5] Investigation Report, para. 158.

staff were established by clear and convincing evidence. As a result, the disciplinary measure of separation from service with compensation in lieu of (without) notice and without termination indemnity was imposed.

10. On 30 November 2020, the last day of his fixed-term appointment, the decision to separate him from the Organization was announced to AAS and it took effect on the day of expiry of his fixed-term appointment.

11. On 26 February 2021, AAS challenged this decision by filing with the UNDT an application appealing the contested decision.

12. In pre-trial directions and orders, the UNDT required AAS to submit medical evidence about his medical condition. AAS did so, in the course of which he consented to his medical records with the Organization being disclosed. By so doing, he waived his right to his privacy and his privilege in their confidentiality to enable them to be considered by the Secretary-General and the Dispute Tribunal. The UNDT subsequently held an in-person hearing in which the contested evidence of relevant witnesses was presented and those witnesses were questioned.

The UNDT's Judgment

13. The first issue addressed by the Dispute Tribunal was AAS's request for anonymity. This was based on the case file containing, and the evidence referring to, sensitive information about his psychological and mental health. The UNDT considered that this information amounted to "personal data" under Article 11(6) of its Statute which, while assuming publication in the ordinary course of cases, required the protection of these in extraordinary circumstances.[6] We infer that in order to provide that protection in a judgment that required specific references to those medical conditions, the UNDT complied with Article 11(6) by anonymising AAS's name. He was referred to in the impugned Judgment simply as the "Applicant".

14. Addressing what it described as the "scope of [its] judicial review" of the case, the UNDT decided against the Secretary-General's submission for a more restricted role than the Dispute Tribunal had indicated through its pre-trial orders and directions. These included

[6] Impugned Judgment, paras. 35-38.

examining the evidence of AAS's health at relevant times and the fact that this evidence was not before the decision-maker at the time the contested decision was taken. The UNDT considered that it was entitled in law to undertake a consideration of whether there was a proper investigation into the allegations that led to the contested decision and upon which that decision relied. In particular, the UNDT considered that it was competent and entitled in law to determine whether the decision-maker had properly considered relevant matters and had rejected, or not considered, irrelevant ones, as well as whether the contested decision was absurd or perverse. This exercise could include consideration of relevant issues that were not before the decision-maker but ought to have been. It differentiated this review from what it described as a *de novo* or merits-based approach, which it did not follow.[7]

15. The UNDT concluded that, despite AAS's various denials or explanations, there was little if any real dispute about AAS' conduct towards other staff after his return to work following his surgery and recovery therefrom or that this would have met the definition of misconduct under the relevant Staff Rules and Regulations. Instead, it focused on whether AAS's due process rights had been respected during the investigative and disciplinary processes, as well as the proportionality of the sanction imposed, given the nature and gravity of the misconduct.[8]

16. The UNDT concluded that the IGO investigation did not include investigation or inquiry about AAS's medical conditions, despite AAS himself informing the investigators that he considered that these played a part in his impugned conduct, and references by the complainants and other witnesses that his behaviours towards them had been unusual and were potentially associated with difficulties with his mental health. These conditions could have caused, or at least contributed significantly to his conduct, thereby mitigating his responsibility for his actions and the sanction imposed for them.

17. The UNDT rejected the Secretary-General's submissions that the IGO was not under any duty to inquire into AAS's mental or psychological condition at relevant times other than what was indicated in the material collected by it or was otherwise produced to the IGO by AAS himself, which was minimal. Furthermore, the UNDT also disagreed with the Secretary-General's assertion that even if the investigation had taken account of the pertinent evidence that was adduced to the UNDT, this would have made no difference to the outcome

[7] *Ibid.*, paras. 39-42.
[8] *Ibid.*, paras. 44-45.

of the case because there was no direct correlation between the mental condition and the behaviour.[9]

18. Applying the procedural requirements set out in Administrative Instructions ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and UNHCR/AI/2019/15 (Conducting Investigations in UNHCR), the UNDT held that the IGO was required to investigate all relevant evidence, both incuplatory and exculpatory, in such matters. Further, the investigated material was required to be disclosed to the staff member investigated and to the decision-maker. Investigators were required to advise in their reports of limitations to their investigations and to explain any apparently relevant evidence that they were unable to obtain, as well as the reasons for its absence. The investigation report was further required to be "impartial, objective, factually correct and complete".[10] Investigators could not ignore any relevant information that may have had an impact on the outcome of the investigation.

19. The UNDT rejected the Secretary-General's contrary position on these issues. It found that the established behaviours reflected characteristics of AAS's medical conditions and their treatment. These included not only the neurological condition which required two major surgical interventions, but also and associated with these, Post Traumatic Stress Disorder (PTSD) and an adjustment disorder characterised by "mood swings, irritation and problematic control of anger", both of which had been identified as being features of AAS's behaviour. The IGO should have investigated the causes of AAS's behaviours, a number of which closely resembled those able to be expected of patients in his circumstances.[11]

20. The UNDT rejected the Secretary-General's contention that even if the IGO had investigated these connections, the evidence (which was adduced before the Dispute Tribunal) about mood swings and angry outbursts would not have established such a causative connection significant enough to affect the sanction imposed on AAS. The IGO had been on notice of this potential causal relationship between AAS's medical condition and his behaviours towards others, including accounts of several persons interviewed by the IGO who spoke of these mood swings and his mental health issues.[12]

[9] *Ibid.*, paras. 55-56.
[10] *Ibid.*, para. 54.
[11] *Ibid.*, paras. 59-60.
[12] *Ibid.*, paras. 61-62.

21. Having found the IGO obliged to consider these potential medical factors, the UNDT examined whether there was any ground exempting the IGO from doing so. It rejected the Secretary-General's contention that AAS told the IGO that the only impact of his neurological condition and surgeries was "physical". Although AAS had been declared fit to work, the Dispute Tribunal considered that it was necessary for the investigators to undertake a more nuanced examination of that simple statement. It should have encompassed more than a physical ability to resume performance of his work tasks.[13]

22. The UNDT also rejected the Secretary-General's argument that AAS had previously created a hostile working environment and made discriminatory comments about other staff before his medical condition manifested itself. The UNDT concluded that there was no factor exempting the IGO from its obligation to inquire further about AAS's medical (including his mental) condition, having been put on notice of its possible relevance to the case.[14]

23. As to the significance of AAS's certification of fitness to return to work and his own advice to the Organization of this status, the UNDT did not accept the Secretary-General's submission that it was thereby incumbent on AAS to establish his mental state as an exculpatory factor. Instead, it was incumbent on the Organization to investigate proactively. The Dispute Tribunal noted that AAS had drawn to the IGO's attention that he was suffering from PTSD despite having been cleared to return to work at a time when his sick leave entitlements were almost exhausted. While his cognitive functioning was apparently normal, the medical evidence then available noted that it was "difficult for [him] to cope with his condition", that he was suffering from an "adjustment disorder", had a weak ability to control his emotions and behaviour, and got "easily irritated showing significant signs of rage and anger".[15]

24. The IGO's focus was, however, on AAS's memory. Despite AAS telling the investigators that his memory was unaffected, he also informed them that he remained affected physically, including that he had experienced losing his balance and tripping.[16] Irrespective of whether AAS may have been believed, the UNDT held it was wrong not to have considered this evidence further in a consistent and impartial manner. Indeed, the IGO and the High Commissioner

[13] *Ibid.*, paras. 69-73.
[14] *Ibid.*, paras. 80-85.
[15] *Ibid.*, paras. 74-79.
[16] *Ibid.*, para. 72.

assessed him as lacking credibility and therefore disregarded his account of relevant events connected with his conduct towards colleagues. It was erroneous for the IGO to default on its obligation to investigate all relevant information, both inculpatory and exculpatory evidence, including mitigating factors.[17]

25. Addressing the Secretary-General's defence to AAS's claim that he was already engaging in misconduct towards colleagues (i.e., creating a hostile working environment and making discriminatory comments) even before he suffered this medical condition, the UNDT concluded that such prior behaviours did not reach the evidentiary threshold of creating a hostile environment. Further, the UNDT determined that there was insufficient evidential certainty about the dates or timing of the relevant events for the IGO to have properly concluded that such conduct predated AAS's medical condition.[18]

26. The UNDT rescinded the contested decision but made no order for compensation instead of rescission. It remanded the case to UNHCR for re-decision and directed the Secretary-General to pay AAS the sum of USD 5,000 as moral damages for the effects of the unlawful manner of his treatment.

Submissions

The Secretary-General's Appeal

27. The Secretary-General submits that the UNDT exceeded its jurisdiction and erred in law and in fact by finding that the investigation procedure was unlawful. The Secretary-General asserts that the UNDT reached its conclusion based on three erroneous findings.

28. The UNDT's first error was that the IGO was duty bound to investigate AAS's medical condition, which, according to the Secretary-General, was never raised by AAS during the investigation or the disciplinary process. The UNDT erred by allowing AAS to raise this new argument and admitting new evidence in support of it. Furthermore, the Secretary-General disputes the UNDT's conclusion that some of AAS's medical symptoms were similar to the

[17] *Ibid.*, para. 73.
[18] *Ibid.*, paras. 80-85.

conduct for which he was sanctioned, emphasising AAS's psychiatrist's evidence that his condition could not have led him to make racist or homophobic comments.

29. The Secretary-General also argues that the UNDT erred in finding that the investigation record contained indications showing the potential pertinence of AAS's medical condition to the alleged misconduct. On the contrary, the Secretary-General submits that AAS always denied all the incidents and, consequently, neither the IGO nor the Administration had any reasons to consider that his medical condition may have been pertinent to his misconduct.

30. Second, the Secretary-General then argues that the UNDT made an erroneous finding by stating that no factor exempted the IGO from its obligation to investigate AAS's medical condition. According to the Secretary-General, AAS's version of the events was not disregarded, and his denial of the events was fully considered and investigated by the IGO.

31. Additionally, the Secretary-General contends that the UNDT erred by disregarding, but without proper supporting evidence, the fact that AAS had been declared fit to work and by making assumptions about the fact that his medical condition could have caused symptoms (e.g., loss of social inhibition) before his surgeries. The Secretary-General also argues that the UNDT erroneously ignored the fact that AAS's incidents of misconduct, and especially his racist comments, began before he was placed on certified sick leave.

32. The Secretary-General submits that the UNDT made a third erroneous finding by concluding that the IGO failed to properly investigate AAS's medical condition. The Secretary-General reiterates that the IGO was not unaware of any connection between AAS's misconduct and his medical condition, thus asserting that the UNDT's findings in this regard should be disregarded. In any event, even if the Appeals Tribunal were to consider them, the Secretary-General contends that the IGO was entitled to rely solely on the information provided by AAS during the investigation process. Consequently, the UNDT's finding that requiring AAS to timeously raise the defense of mental health failed to respect his right to be presumed innocent is "legally unsustainable". The Secretary-General further argues that the UNAT Judgment in *Ouriques*[19] is directly applicable to the present case and "supports the conclusion that the Administration was entitled to rely on the information provided by [AAS] and that it was under no duty to inquire further into his mental state".

[19] *Ouriques v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-745.

33. Therefore, the Secretary-General submits that the IGO had no obligation to investigate AAS's medical condition, that it properly investigated the allegations of misconduct and determined that they were established.

34. Next, the Secretary-General contends that the UNDT exceeded its jurisdiction and erred in law and in fact by finding that the disciplinary measure imposed was not proportionate. The Secretary-General emphasises the broad discretion of the Administration in disciplinary matters, submitting that the sanction imposed on AAS was not excessive, abusive or absurd and was not the most severe available. The Secretary-General also highlights that the Administration considered as mitigating factors that AAS suffered a brain tumour and underwent two brain surgeries.

35. The Secretary-General submits that even if the Appeals Tribunal were to conclude that the IGO was under an obligation to investigate AAS's medical condition, the UNDT nevertheless erred in finding that the disciplinary measure imposed by the Administration was disproportionate. The Secretary-General argues that the procedural flaws in the investigation process found by the UNDT have no connection with the contested decision. Consequently, these procedural flaws "would have made no difference to the contested decision and would therefore be incapable of rendering [it] unlawful". The Secretary-General observes that the Administration considered the totality of circumstances regarding the allegations of misconduct during the disciplinary process, but that AAS had chosen not to provide the Administration with any information. The Secretary-General also points out that AAS's medical condition was not relevant to the allegations of his racist or homophobic conduct. AAS's psychiatrist is said to have confirmed in evidence before the UNDT that his condition could not have led him to make racist or homophobic comments. This made the imposed sanction a proportionate response to these conclusions of misconduct on their own.[20]

36. Last, the Secretary-General submits that the UNDT erred in law and in fact by awarding moral compensation to AAS when no illegality had been established. However, even if the Appeals Tribunal were to consider that an illegality had been committed, the Secretary-General contends that there was nevertheless no basis for an award of compensation. This is because there was no evidence establishing the harm or the cause-effect link between the alleged

[20] Impugned Judgment, para. 61. See also Hearing transcript, 26 October 2022, Dr. L.H.'s testimony, p. 30: 22-25.

harm and the contested decision. Furthermore, given AAS's serious misconduct, the Secretary-General argues that he is not entitled to any compensation for moral damages.

37. Regarding the evidence of harm, the Secretary-General argues that the UNDT erred in relying on the medical report dated 7 September 2022 without assessing or analysing its authenticity. Relying on Appeals Tribunal jurisprudence, the Secretary-General argues that the UNDT's approach in this regard lacks any legal or factual basis, especially since the medical report was issued almost two years after the contested decision and did not specify the cause of the diagnosed disorders or when they were initially diagnosed.[21]

38. The Secretary-General submits that there is no evidence indicating that the Administration's failure to consider AAS's medical condition directly caused AAS's disorders. The Secretary-General points out finally that, as the UNDT remanded the case to the Administration, the disciplinary measure imposed on AAS could still be determined by UNHCR as proportionate and the sanction initially imposed was consequently only "potentially" disproportionate.

AAS's Answer

39. AAS requests the Appeals Tribunal to dismiss the appeal in its entirety and to uphold the impugned Judgment. He submits that the IGO's failure to investigate his medical history constitutes a breach of its duty to investigate allegations with impartiality, fairness and in accordance with the presumption of innocence.

40. AAS argues that both the Administration and the IGO were aware of his medical condition, citing instances in the Investigation Report, where he and the witnesses interviewed by the IGO highlighted his mental health issues. Relying on medical literature, AAS contends that "the studies demonstrate that after brain surgeries, workplace relations of a patient may worsen as a result of the traumatic experiences". AAS submits that the IGO failed to conduct a thorough investigation, which resulted in the Administration lacking relevant information before making the contested decision.

[21] *Ibid.*, para. 126. See also *Korkut Yavuz v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1266, paras. 32-36; *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, para. 32.

41. AAS also contends that the Administration had a duty of care towards him which required the IGO and the Administration to inquire further into his medical condition, once it was on notice of its possible relevance and before concluding the disciplinary process. He further argues that its failure to discharge that duty of care not only violated his due process rights but also his right to be treated with dignity and respect.

42. AAS submits that the sanction imposed by the Administration was clearly in breach of the principle of proportionality and that the UNDT's rescission of the contested decision correctly underscored "the importance of adhering to this fundamental principle in all administrative decision-making processes".

43. Finally, AAS submits that the Dispute Tribunal did not err in awarding him moral damages. On the contrary, he argues that that UNDT based its decision on a "thorough and fair analysis" of the case.

Considerations

44. From the parties' extensive and detailed submissions, we have distilled three essential points on which the appeal turns:

i) First, did the UNDT exceed its jurisdiction or err in law and in fact by finding that the IGO's investigation procedure was inadequate and thereby unlawful? In particular, did the UNDT err in determining that the IGO was duty bound to properly investigate AAS's medical condition and that no factor exempted it from that obligation?

ii) Second, did the UNDT exceed its jurisdiction or err in law and in fact by finding that the disciplinary measure imposed upon AAS was not proportionate to the nature and gravity of his misconduct?

iii) Third, did the UNDT err in law and in fact by awarding moral damages to AAS?

45. We have also ourselves identified two further issues which we address as they arise in the course of the present Judgment:

i) What reliance can be placed on a party's submission that purports to be a reliable summary of academic research literature when the journal articles in question are unavailable for consideration?

ii) Did the UNDT act in excess of its jurisdiction by remanding the case to the Administration for re-decision?

Do errors of law and/or fact constitute excesses of jurisdiction?

46. Incidentally and generally because the Secretary-General's submissions refer to this on several occasions in relation to different points on appeal, we wish to clarify what amounts to a jurisdictional excess, sometimes called acting *ultra vires* or beyond the statutory powers given to a judicial body. Although described as excesses of jurisdiction, the Secretary-General's grounds of appeal are, in reality, assertions of errors of fact and/or law. Exceeding the UNDT's jurisdiction is not simply the commission of an error, but more fundamentally, determining an issue or purporting to exercise powers that it is not entitled to or is prohibited from deciding. In the present case, there is no question, for example, that the UNDT was operating within its jurisdiction when it considered whether the IGO investigation and the Administration's decisions based thereon, were lawful or unlawful. The interpretation of relevant rules, regulations and procedures for the purpose of subsequently deciding whether they were breached is clearly within that jurisdiction. Similarly, it is not a question of whether there was an excess of jurisdiction to decide, as the Secretary-General alleges, that the sanction imposed on the staff member was proportionate to the nature and gravity of the misconduct found. Rather, that is a well-recognized head of review of the Administration's decision-making affecting staff. While these mischaracterizations of the nature of the grounds of appeal are not fatal to the consideration of the appeal, it is important that we determine the appeal by applying the principles relevant to errors of fact and law.

IGO's and UNHCR's consideration of AAS's medical condition

47. This issue is grounded in UNHCR/AI/2019/15. The following paragraphs or parts thereof are relevant and instructive:[22]

> 23. IGO investigations are conducted according to professional and internationally recognized investigative standards. The purpose of the investigation is to search for the truth of a matter, looking for both inculpatory and exculpatory evidence, so as to produce a report providing a full, fair and clear picture of all the facts involving the alleged misconduct.

[22] Emphasis added.

> 24. The IGO shall conduct investigations in a non-discriminatory and gender and culture sensitive manner. The IGO shall respect the rights of all participants, including the presumption of innocence toward the subject of an investigation, the principle of do no harm in respect to all participants and a victim-centred approach in respect to aggrieved individuals. Investigation participants, including the subject, aggrieved individual(s) and witnesses, shall be treated with respect for their dignity, safety and wellbeing. Age, sex, sexual orientation, gender identity and other individual factors that may lead to increased vulnerability (including disability, socio-economic circumstances, legal status, *health status*) shall be taken into consideration at all times.
> ...
> 29. The subject of an investigation has a right to procedural fairness also known as due process rights. (...)
> ...
> 56. The investigator shall make every reasonable effort to search for relevant and obtainable inculpatory and exculpatory evidence.
> ...
> 61. With the voluntary consent of the concerned party, the investigator may search and seize evidence from private areas (e.g. areas not owned, rented or used by UNHCR), such as a private residence and vehicle, *or may seek access to personal items or records* (e.g. DNA samples, *medical records*, bank and private telephone account statements) *if there are reasonable grounds to believe that the evidence has relevance to an investigation.* In addition to voluntary consent from the concerned party, such investigative steps must have the prior approval of the Head of Investigation Service, either in the approved investigation plan or by written request (e.g. email). Refusal to provide voluntary consent and any explanation given may be reflected in the investigation findings and the investigator may draw reasonable inferences depending on the circumstances and the reason given.
> ...
> 110. Persons performing the investigation function shall:
> a. Pursue all reasonable lines of enquiry, and search for and record relevant information and evidence, both inculpatory and exculpatory, in order to establish the facts;
> ...
> 111. (...) Exculpatory evidence: Any evidence that is favourable to the subject and tends to exonerate the subject from allegations of misconduct. It is the opposite of inculpatory evidence.

48. Given the possible consequence of the loss of a staff member's employment, the IGO had serious obligations to investigate and report on exculpatory evidence, as well as that which was inculpatory of AAS. These obligations are referred to in the relevant IGO directions about investigating both inculpatory and exculpatory evidence in an equal and balanced way.

Exculpatory evidence is not simply evidence that may indicate that the conduct investigated did not occur. Explanations for conduct which did occur are important not only to potentially mitigate the ultimate consequences of it but may also mean that the misconduct was less serious than initially believed.

49. The IGO and UNHCR overlooked important factors in the processes that led to AAS's separation from service. With all misconduct allegations, the Administration has the onus of proving the commission of the alleged acts or omissions. However, with misconduct allegations such as those raised against AAS, the mental state of the actor or alleged wrong doer may also be relevant and significant. This mental element of misconduct is itself comprised of two constituents. The first is the conscious choice or the exercise of free will to do or not to do the act, a necessary condition of responsibility. The second is the intention to attain a desired result of doing so, perhaps called the knowing intention. This second element distinguishes intentional from faulty or non-intentional misconduct.

50. This is not to state that there is an onus on the Administration to negative the first sub-element where there are no or insufficient indicia of it that arise in the disciplinary process. Rather, as in this case, where such indicia emerge during an investigation, the obligation of the Administration to investigate exculpatory evidence arises, to ascertain that the act or omission was the result of the staff member's free will. In AAS's case, it is the first sub-element of conscious choice or the exercise of his free will that is the focus.

51. We wish to emphasise that it will not be in every case that there may be questions about the mental element of misconduct, that is the staff member's capacity to commit misconduct. Often the act or omission of the misconduct will make it clear that it must have been intended by the staff member and that he or she clearly had the necessary mental capacity to do so. And investigators should not speculate about this element of misconduct in the absence of any indication of it that arises during the investigation, for example by the staff member affected or another witness drawing to the investigators' attention evidence of a lack of mental capacity going to culpability for the alleged misconduct. This will depend on the circumstances of each case and the conduct in question.

52. The role of the IGO (or of any other similar investigative organ of the United Nations) is not to act as a neutral umpire in a contest of adversarial foes to determine what happened solely by reference to evidence placed before the investigator by the parties. The IGO's

exercises are, by name and nature, "investigative" and aimed at ascertaining the probable truth of what happened. Investigators are given extensive powers to do so within fair process and natural justice limitations.

53. Nor does the IGO decide the outcome of the complaint(s): rather, the IGO investigates and reports comprehensively on allegations made against a staff member. The IGO must do so open-mindedly, neutrally, and comprehensively. Simply because AAS denied the existence of the misconduct alleged against him, this does not mean that the IGO should thereby have ignored relevant information about his medical condition and the possible side effects of this on his demeanour and conduct. On the contrary, AAS's psychological state at relevant times may have been important information and so should have been investigated as potential exculpatory evidence.

54. But nor is this to say that IGO investigators are experts expected to be aware of such correlations between a staff member's medical condition and behaviour. However, once alerted to such a situation with possible influential and relevant medical factors, an investigator can and should be expected to inquire further into those factors. That can be done by seeking out available medical information from the Administration or the staff member. This may entail seeking the staff member's consent to obtain expert input from the staff member's advisers, and/or even to obtain the IGO's own expert advice about their medical condition.

Reliance on research-based medical literature

55. This is the first of the additional issues raised by this appeal that we identified at paragraph 45 above. In his written submissions (summarised at paragraph 40 above), AAS referred to and purported to rely on several academic medical journal articles, which he submitted or inferred, supported his contention that his neurological tumour and its treatment may have induced or contributed to his impugned behaviours towards other staff. His inference is also that, when combined with reports from his own psychiatrist produced before his return to work and the accounts of his behaviour noted by other witnesses, the existence of respectable medical literature on this subject reinforces the UNDT's conclusion that the investigators and decision-makers in his case ought to have at least considered this.

56. However, when attempts were made by the UNAT to access this literature (AAS having provided no more than the journal names and page references), it appears that it is not publicly available, at least at short notice and without payment of a fee. We therefore could not access this research and, most importantly, verify that it supported his arguments. Nor could AAS provide this material to us following a request for him to do so. Instead, AAS then referred us to a number of other academic research articles available online which, again inferentially, he invited us to consider for the same purpose.

57. We have considered whether this material is new evidence that was not before the UNDT and for the introduction of which leave is required on statutory grounds. We have agreed to examine (although not necessarily to take into consideration) the academic literature most recently submitted. It is not "evidence" in the sense of establishing or disproving facts related to the appeal. Rather, it is existing academic research in published form, which, like any academic journal material, may or may not assist this Tribunal in understanding the issues in the case. Finally, its content is not decisive of an issue in contention, either way. The issue in this case is whether the Secretary-General was obliged to inquire into and, if appropriate, take account of information which may have been exculpatory of AAS.

58. Of the five academic research articles most recently submitted to us, only one reports on a study of the psychological consequences of newly diagnosed brain tumours. The others all address the effects of traumatic brain injury (TBI) or mild traumatic brain injury (mTBI). Given our lack of expertise and the absence of expert assistance, we are not prepared to accept without more that the potential psychological consequences of TBIs (which are brain injuries caused by external traumatic sources), can be equated with cancerous or benign tumours of organic origin. In these circumstances, we go only so far as to conclude that the one other article provides some support for AAS's contention that had the Administration considered the issue, there may have been an explanation for his behaviour.[23]

59. Furthermore, we note that a party should not seek to persuade this Tribunal of the importance of expert evidential conclusions drawn from published literature that is not publicly or at least readily available.

[23] Distress in patients with newly diagnosed brain tumours, Goebel, S. and others, published in Psycho-Oncology 20 (2011), pp. 623-630.

60. We return now to the narrative on this main point of appeal.

Did the UNDT err in law and in fact by finding that the IGO's investigation procedure was inadequate and thereby unlawful?

61. The Secretary-General submits that it was incumbent on AAS himself to present a sufficient case negating his mental capacity before the IGO and subsequently UNHCR was obliged to take this issue into account. We disagree. Once the IGO investigators and later UNHCR had sufficient evidence of the possible existence of exculpatory evidence (as we find they had with AAS's own evidence and that of witnesses about the nature of his behaviour and about possible attributions for it), it was incumbent on those bodies to investigate those leads. That was their clear duty under ST/AI/2017/1 and UNHCR/AI/2019/15.

62. As AAS has posited (and his own medical evidence available at the time supported), the following relevant propositions relating to his condition are contained in the medical literature available and as produced to us by AAS. As we have noted, there may also be more or contrary hypothesies but only investigation of the issue could have identified these. Patients may experience elevated (emotional) distress and mood changes shortly following surgery which can affect adversely their quality of life and functioning outcomes. Sources of distress should be considered and addressed (treated medically) in those individuals.

63. Further studies are required to determine the natures and prevalence of longer-term emotional distresses.

64. AAS asserts that his illness and its treatment caused or contributed to his diagnosis of PTSD that includes intrusive thoughts, avoidance behaviours, and hyperarousal. He also submits that he experienced an adjustment disorder manifesting in difficulties in adjusting to changes in daily life and work roles.

65. The expert medical evidence available at the commencement of the IGO investigation and before the UNDT included the following:

> Having been diagnosed as having a "benignant"[24] brain tumour, in a medical report dated 10 August 2018, Dr. L.H., psychiatrist, reported that AAS's mood was "a bit

[24] This term "benignant" may have been an inadvertent error as we suspect such tumours are categorised as either "benign" or "malignant".

> higher" and that he had insight into his invasive "logorrhoea".[25] His "control mechanisms" were described as "a bit loose" and on occasion he "worried about his future".[26] He was diagnosed as having "Adjustment Disorder F43.10".
>
> In a medical report dated 24 August 2018, Dr. L.H. described AAS's psychological state as "still irritated". He was trying to control his "disgust and anger" and was having "mood swings but not to a critical extent". He felt "a lot of anger and rage" in some situations but had begun to "handle it" and wished to get back to work. The diagnosis was then expanded to "PTSD F43.10 and Adjustment Disorder F43.20".

66. We will not attempt to interpret and make findings beyond describing what his medical adviser assessed before AAS's return to work. These assessments were available to be considered by the IGO investigators had they chosen to do so after obtaining AAS's consent. Given that AAS consented to its release at the UNDT stage, we infer he would also have given this consent earlier. The IGO and the Administration failed to appreciate or investigate these, or other effects of AAS's brain tumour and/or treatment as possibly contributing to or even causing aspects of his interpersonal relations with other staff.

67. This is not to say that the existence of these psychological consequences of AAS's neurological illness and its treatment should necessarily have persuaded the Administration to exonerate AAS of blame for his misconduct, or even that the sanction imposed on him should have been significantly less severe for this reason. But it was erroneous not to consider whether his misconduct was simply a matter of deliberate ill-discipline for which he was fully responsible, in which case the outcome for him may have been completely justified. The Administration and the IGO should have approached the matter, at least in part, as a medical issue of potentially involuntary but predictable impairment. While not diminishing recognition of the effects of AAS's misbehaviour on other staff, such an approach may have led the Administration to have treated AAS, at least in part, as a psychologically disabled employee rather than simply as a bad and blameworthy one. Recognition of these factors behind his conduct, if they were present, might also have assisted those other staff exposed to his misbehaviour to understand, even if not excusing it.

68. Because of the significance of the Investigation Report in the UNHCR's decision-making, there was a substantial onus on the investigators to explore and report on all relevant matters affecting the questions in issue and not merely the facts of alleged conduct to constitute

[25] Extreme loquacity, or talkativeness.
[26] We infer this to mean whether his illness might return and whether he would survive.

specified misconduct. Even in the absence of such an analysis by the IGO in its Investigation Report, it was incumbent on the UNHCR decision-maker to have done so. The decision-maker relied significantly (and appropriately) on the Investigation Report and its supporting documents, which included references to AAS's psychological state.

69. In this case, the IGO and UNHCR failed to properly take account of a relevant consideration, namely the medical context in which the established misconduct occured.

70. We reject the Secretary-General's narrow focus only on the acts constituting the misconduct and his position that the mental culpability for that conduct was not an exculpatory factor that the IGO was obliged to consider and pursue.

71. AAS's medical, and in particular mental (psychiatric and psychological), condition was brought to the IGO's attention by AAS and others in the course of its investigation. Those were elements of relevant evidence potentially affecting his conduct, which was being investigated. They were potentially exculpatory in that, if established, they may have at least mitigated, even if they did not excuse, AAS's responsibility for his misconduct. We do not, however, speculate about that: it is the absence of any consideration of the issue that is, as the UNDT concluded, the important feature of this case.

72. Aside from being the clear intent of the Administrative Instructions governing IGO investigations, there is also Appeals Tribunal jurisprudence on the question.

73. In *Ouriques*,[27] the UNAT majority considered that the mental health status of a staff member who had assaulted a colleague, had been taken into account after it had been brought to the decision-maker's attention. However, on the facts of that case, the UNAT found that the Administration was under no obligation to investigate it further. Nevertheless, Judge Halfeld, in a partial dissent on the extent of the duty in this regard, wrote:[28]

> … As reasonably found by the UNDT pursuant to the Tribunal's standard of review in these cases, an administrative decision tainted by procedural unfairness should be considered unlawful. The facts in this case show that some elements were not investigated, although they should have been. Like the UNDT, I would have held that the investigation was strictly limited to the assault itself, which lasted a few seconds, in disregard of the alleged surrounding circumstances that were relevant to determining

[27] *Ouriques* Judgment, *op. cit.*
[28] *Ibid.*, paras. 3 and 8-10. Emphasis added.

> the 'nature and gravity' of Mr. Ouriques' misconduct. *In this way, although the decision-maker mentioned some of the mitigating factors, he was not aware of the whole context of the situation, as the investigation did not probe all the elements to appropriately assess the specific situation.*
>
> …
>
> … In addition to this clear evidence presented during Mr. Ouriques' administrative leave, the need for a proper investigation into Mr. Ouriques' medical condition was corroborated by: (…) (ii) the fact that Mr. Ouriques was undergoing psychotherapy with anti-depressants and his possible involuntary loss of self-control; (iii) Mr. Ouriques' unusual behaviour the day before the event, indicating that, in that whole context, something might have been wrong with the mental state of the staff member and, (iv) the fact that a medical direction from the Organization was required for Mr. Ouriques to resume work after the administrative leave, demonstrating that there was doubt about his mental state during the investigation.
>
> … That medical investigation never took place. (…)
>
> … It is not clear to me that, at the time of the event, Mr. Ouriques was able to understand the nature and quality of his actions. Obviously, this does not justify the deplorable assault by a staff member of another staff member. However, it means that a proper inquiry should have been carried out regarding Mr. Ouriques' mental health after the presentation of the medical certificate put the Administration on notice of Mr. Ouriques' ongoing psychotherapy treatment—which it received just a day or two after the issuance of the 11 November 2014 preliminary report by the SSS—in order to establish what impact his medical condition had on his misconduct. *This information—particularly if it substantiated a medical condition beyond "stress"—could have been a mitigating factor leading the Administration to choose a less severe disciplinary measure* than termination for a staff member with long, satisfactory service and no prior history of misconduct.

74. We agree with Judge Halfeld's approach to such considerations, which is strengthened, and indeed made decisive, in this case by the express requirements on the IGO as to its investigative methodology in UNHCR/AI/2019/15.

75. The IGO did not sufficiently consider or investigate the effect of AAS's medical condition on his behaviours towards other staff. If there was or may have been a link between the two, the IGO should have reported this.

76. In addition, the Organization has a sequential and separate role, along with an independent responsibility to consider and apply relevant factors in its decision-making. That role is to make decisions about the proven nature of the conduct complained of, determining whether it amounted to misconduct, and if so, deciding on the appropriate sanction. Even if the IGO had failed in its obligations to inquire into relevant factors, the Organization has an obligation to take into account these factors and to apply them to its decision-making, in particular in determining what should have been a proportionate outcome reflecting the degree of AAS's culpability for that behaviour and its consequences.

77. It was the failure of the IGO to do so that led the decision-maker into the same error of failing to take any sufficient account of what was a relevant consideration.

78. Therefore, we agree with the UNDT and we conclude that the Dispute Tribunal did not err in its conclusion on this issue.

Did the UNDT err in law and in fact by finding that the disciplinary measure imposed upon AAS was not proportionate to the nature and gravity of his misconduct?

79. Due to the substantive breach of due process outlined above, it is impossible to ascertain or predict what might have happened if the Secretary-General had acted lawfully. Consequently, it is also impossible to determine whether any sanction imposed may have been proportionate or disproportionate to AAS's conduct and his responsibility for it. What we can assert is that by wrongfully ignoring or refusing to investigate the mental or consciousness elements of AAS's action, the Secretary-General failed to establish that the sanction imposed was proportionate to AAS's conduct, including his capacity for it. We are not persuaded that the UNDT erred in reaching this conclusion and, therefore, this element of the Secretary-General's appeal is dismissed.

Was the UNDT's remand of the case to the Administration as part of the impugned Judgment on merits lawful?

80. This is one of the issues referred to in paragraph 45 above. We draw attention to it not because it affects vitally the outcome of this case, but rather to clarify the powers of the UNDT in disciplinary cases.

81. The Dispute Tribunal, having entered upon the merits of AAS's dismissal and indeed having determined that it was flawed, nevertheless remanded the case to the Administration to decide again what was to happen to AAS.

82. The following are the statutory provisions and restrictions in Article 10(4) of the UNDT Statute:[29]

> … *Prior to a determination of the merits of a case*, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, *the Dispute Tribunal may, with the concurrence of the [Secretary-General], remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months*. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

83. Unfortunately, the UNDT referred neither to the statutory provision nor to the statutory language when, at paragraph 128 b) of the impugned Judgment, it "remanded [the Applicant's] case to the Administration for proper treatment". At paragraph 128 a) it rescinded the "disciplinary measure", very arguably having thereby determined the merits of the case, rendering such a referral invalid if it had been intended to be made pursuant to Article 10(4) of the UNDT Statute.

84. It was clearly beyond the UNDT's jurisdiction to remand the case under Article 10(4) of its Statute because it did so as part of its substantive merits-based Judgment and because it did not have the required concurrence of the Secretary-General to do so.

85. It is a tenable interpretation of the Dispute Tribunal's language that its rescission of the contested decision meant that, in practice, the case was back before UNHCR to redetermine the allegations against AAS and that, pending such redetermination, AAS's employment was deemed to have continued. For reasons we have already enunciated, that would not have been a prudent course of action.

86. We propose to set aside that remedy of remanding the case to the Administration for re-decision as it was made in excess of the UNDT's jurisdiction and was erroneous in law.

[29] Emphasis added.

Secretary-General's other submissions

87. For completeness, we deal with the following points made as part of the Secretary-General's comprehensive challenge to the impugned Judgment.

88. As to whether AAS ever raised his medical condition during the IGO investigation or during the UNHCR's disciplinary process, in our assessment, AAS did so sufficiently. We conclude that the UNDT did not err in this regard.

89. As to the associated point that, in these circumstances, the UNDT wrongfully allowed AAS to raise this as a "new issue" in the case before it, we have concluded that there is no statutory or case law prohibition against doing so. AAS was entitled to raise this issue before the UNDT, which had in any event been brought to its attention by him and others interviewed during the IGO investigation.

90. The Secretary-General's next argument is that AAS's psychiatrist's evidence presented to the UNDT should have led to a conclusion that his condition could not have caused him to make racist or homophobic remarks as he did. The UNDT concluded that even if it had accepted that AAS's medical condition could not have borne any degree of responsibility for his racist and homophobic comments about colleagues, he was sanctioned not only for these but also for what were described as "mood swings" and "outbursts of anger" which afflicted his working environment. The UNDT concluded that AAS's diagnoses of PTSD and adjustment disorders affected his ability to control his emotions and that his behaviours had been compromised thereby.

91. We have examined the transcript of the evidence given at the hearing (in particular, the cross-examination of Dr. L.H., AAS's psychiatrist) and consider that an isolated statement on which the Secretary-General relies cannot be taken out of context. The psychiatrist was asked whether having a "loose control mechanism" might have caused AAS to make racist and homophobic remarks. She confirmed that this would not have been so (the statement relied on by the Secretary-General), but added that AAS was working for a humanitarian organisation which, we infer, made it surprising in her view that such a staff member would have made those remarks unless affected by a serious psychological condition such as PTSD or an adjustment disorder.[30] We note, also, that AAS's psychological affliction was not simply a "loose control

[30] Hearing transcript, 26 October 2022, Dr. L.H.'s testimony, p. 30: 22-25 and p. 31: 1.

mechanism"; indeed, this was more a manifestation of serious conditions, namely PTSD and adjustment disorders. In these circumstances, we find no error of fact or law in the UNDT's relevant conclusion.

92. The Secretary-General's next point is that AAS's primary response to the allegations against him was that the conduct complained-of never happened, so that the focus was on whether it did, and was not whether his medical condition might have been a contributory factor. In this regard, the Secretary-General contends that the IGO and UNHCR fully investigated this issue and made conclusions about it. For the reasons set out previously, including that AAS's case was not entirely one of absolute denial of everything alleged against him, we find that the UNDT did not err in its relevant conclusions.

93. As to the significance of AAS's clearance for fitness to return to work, the Secretary-General argues that the Administration was entitled to rely on this certification. In the particular circumstances, AAS did not provide sufficient notice that his medical condition affected his interactions with others. We likewise conclude that the UNDT did not err when it acknowledged that AAS had been cleared fit to return to work. However, the investigation's failure and that of the UNHCR, in relying on the Investigation Report to consider sufficiently the potentially exculpatory evidence meant that there had not been a balanced consideration of the serious allegations against AAS. We are not satisfied that the UNDT erred in this regard.

94. The Secretary-General argues that the UNDT erroneously ignored evidence that elements of AAS's objectionable conduct towards other staff (especially racist comments) occurred before his neurological condition manifested itself and he went on sick leave for surgery and recovery. It was his case that the medical condition which affected his relations with other staff was brought about by that medical condition and his surgery for it. We do not accept, however, that the UNDT erred in its conclusion that the absence of reliable evidence about when these other misbehaviours were alleged to have occurred, made it unsafe to assume that they preceded AAS's illness. There was no error by the UNDT in this regard.

95. The Secretary-General submits that even if the IGO investigators and UNHCR decision-maker had been aware of AAS's medical condition and its potential consequences, they were entitled to rely solely on the information provided by AAS during the IGO investigation. It follows, therefore, that AAS's invocation of the presumption of innocence cannot assist him as he did not bring this issue to the investigators' attention, or at least not

sufficiently, for it to have bolstered that presumption of innocence, and the Secretary-General was under no duty to inquire further for that presumption to have remained for AAS's benefit. For reasons already set out, however, we do not accept this submission. There was enough material before the IGO investigators, provided not only by AAS but by other interviewees, to have triggered their obligation to consider and record potentially exculpatory evidence, but they did not do so.

96. The Secretary-General contends that the remand of the case to UNHCR for re-decision means that the sanction is still for pending review and thus, at most, only "potentially disproportionate". As we have already determined, the UNDT erred in law by purporting to remand the case to the Administration.

Was the UNDT's failure or refusal to award in lieu compensation lawful?

97. There is clear statutory language and authoritative case law stating that if the UNDT orders recission of an administrative decision in a case involving appointment, promotion or termination of employment, it must (not may) also set what is commonly called in lieu compensation.[31] In *Afm Bradul Alam*,[32] the purported justification for not setting an amount of in lieu compensation was that the staff member had not suffered any loss due to non-selection to an advertised post. That is an analagous situation to the present one, in which the UNDT reasoned that because AAS could have had no expectation of renewal and his employment was terminated one day before expiration of this fixed-term appointment, he suffered no loss for which he might be compensated by the Secretary-General if the Administration elected not to rescind the contested decision.

98. This issue can, however, be decided on another basis, although one which reaches the same result as the UNDT did. Given the particular facts about AAS's conduct towards colleagues, it would not have resolved the difficult ongoing workplace situation to have rescinded the contested decision. Rescission does not seem practicable in the circumstances. On the contrary, it could well have meant his return to that environment and a continuation of his possible misconduct, at least until the Administration had re-decided his culpability for it

[31] Article 10(5)(a) of the UNDT Statute. See also *Afm Badrul Alam v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1214.
[32] *Ibid.*, paras. 22, 25-26 and 31.

and what should be done. So, we conclude that the UNDT was wrong to have directed the remedy of recission in these circumstances.[33]

99. It follows that the UNDT would not have been obliged to make an order for in lieu compensation. In these circumstances, it is unnecessary to determine whether the UNDT erred in relation to compensation in lieu. We need, nevertheless, to address the Secretary-General's challenge to the award of moral damages made by the Dispute Tribunal.

Did the UNDT err in law and in fact by awarding moral damages to AAS?

100. The first port of call to decide this issue on appeal is the relevant statutory provision, Article 10(5) of the UNDT Statute. It provides:

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

101. The second port of call is also case law, which provides helpful navigational guidance. In *AAD*,[34] the UNAT established that, albeit only in "exceptional cases", compensation for moral harm may be awarded even where a staff member has committed misconduct.

102. *AAD* was an extraordinary case of misconduct that was potentially attributable, at least in part, to a lack of mental capacity and thereby of culpability on the part of the staff member.

[33] For previous cases in which this course has been taken, see *Alan George Blythe v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1404, para. 69; *Ross v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-926, para. 49.
[34] *AAD v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1267/Corr. 1, para. 80.

The UNDT concluded, despite the establishment of the misconduct, it warranted compensation for the consequences of a significant due process failure.

103. We agree with the Secretary-General that the onus of proof of harm for which moral damages are sought lies with the claimant, that is the staff member. Furthermore, we agree that the burden of proof is to the balance of probabilities, meaning that it is more probable than not that harm was caused and that the breach was causative of the harm.

104. It is unnecessary for us in this case to explore whether the staff member's evidence alone may be enough to award compensation for harm because there was expert medical corroboration of AAS's evidence.

105. Indeed, the medical report dated 7 September 2022 shows that following AAS's psychological consultation sessions on 15 February 2021 and 3 March 2021, he was diagnosed with Obsessive-Compulsive Personality Disorder (OCPD) and Obsessive-Compulsive Disorder (OCD) and "[h]is condition require[d] systematic psychological treatment".

106. In this regard, the Secretary-General submits that the UNDT relied erroneously on AAS's psychiatrist's report dated 7 September 2022 to support its award of compensation, including as to its doubtful authenticity. The report was purportedly prepared some two years after the contested decision, did not specify the cause of the identified disorders or when they were first diagnosed.

107. We are unclear about the Secretary-General's questioning of the 7 September 2022 report's authenticity or why the UNDT erred by not questioning it. There is nothing inherently suspicious about the date of the report alone (which was prepared some two years after the contested decision). Unremarkably, it was prepared for the purpose of the UNDT's hearing. If the submission asserts that it might have been a fraudulent document, it was open to the Secretary-General to request the UNDT to have called for the author to be questioned about it at a hearing. We have little doubt that the UNDT would have allowed this. As for the criticism of the report's failure to attribute a cause to AAS's condition or a date of first diagnosis, any reliance on this report alone ignores the other medical reports prepared at the time of these events, linking the conditions suffered to the times of diagnosis of the tumour and the surgeries performed for it, thereby establishing probable cause and effect. Furthermore, the UNDT does not appear to have relied on it and, in any event, its relevance is marginal.

108. Furthermore, while it is true that the 7 September 2022 medical report does not mention any cause for the diagnosed disorders, the Tribunal notes that these disorders had never been mentioned in various medical reports issued prior to the contested decision. However, they were observed soon after the imposition of the disciplinary sanction.

109. The UNDT concluded that: "There is no doubt that the contested decision further deteriorated the Applicant's psychological condition. The Tribunal thus finds a causal link between the Applicant's moral harm and the contested decision. Accordingly, the Applicant's diagnosed disorders merit a compensatory award."[35]

110. We disagree with the UNDT's conclusive finding ("no doubt") about a causal link between the contested decision and the harm suffered by AAS. At best, that link could only have been a probable one; that is, it was more probable than not that the contested decision caused his subsequent psychological condition or aggravated his previous condition.[36]

111. We base that conclusion on the following evidence:

> i) AAS's sworn testimony during the hearing that when he received the notice of investigation, this was "damaging" to his "psychological condition".[37]
>
> ii) The 7 September 2022 report which states that Dr. O.B., a clinical psychologist, saw AAS on 15 February 2021 and 3 March 2021 and diagnosed him with OCPD and OCD and that "[h]is condition require[d] systematic psychological treatment".
>
> iii) Dr. L. H.'s psychiatric note dated 1 January 2020, as well as her answer to the question of whether AAS's medical history could have been exacerbated by stress from work situations or investigations. Her answer was that "certain situations, especially reminding them of the trauma might bring up the loose control mechanisms to the surface".[38]

112. Added to the absence of any evidence called by the Secretary-General that contradicts the foregoing, we conclude that it was sufficient for the UNDT to conclude as it did. There was

[35] Impugned Judgment, para. 126.
[36] *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.
[37] Hearing transcript, 26 October 2022, AAS's testimony, p. 65: 22-25 and p. 66: 1-4.
[38] Hearing transcript, 26 October 2022, Dr. L.H.'s testimony, p. 29: 9-15.

a causative link between the contested decision (the illegality) and the harm done to AAS by it that had been proven to a balance of probabilities standard, justifying the award of moral damages.

113. We can discern no error in the UNDT's decision that AAS was entitled to moral damages. The amount of an award is not capable of precise arithmetic calculation; rather, it depends on the fact and degree of the harm caused to the wronged staff member, and significant discretion should be reserved to the Judge who saw and heard the evidence. We are not satisfied that the UNDT's award of USD 5,000 was excessive to the point of being erroneous and we have not been persuaded to interfere with that.

Summary of conclusions

114. The Secretary-General's challenge to the UNDT's conclusions about the obligations on the Administration (including on the investigator(s)) fails. The UNDT did not reach erroneous conclusions thereon.

115. The Secretary-General's challenge to the remedies ordered by the UNDT succeeds in part. The UNDT erred in rescinding the contested decision to separate AAS from service. Absent rescission, there shall be no compensation in lieu thereof. We, therefore, affirm the outcome of the UNDT's decision not to award compensation in lieu. The net effect for AAS is that despite the contested decision not having been rescinded, we conclude (and confirm the UNDT's conclusion) that AAS was unlawfully separated from service but his remedy for that remains the award of moral damages set by the UNDT, with which we have not interfered.

116. The UNDT did not err in making an award of moral damages or in setting the amount of these as it did.

Judgment

117. The Secretary-General's appeal is granted in part. The UNDT's remand of the case to the Administration and rescission of the contested decision in Judgment No. UNDT/2022/132 are reversed and the award of moral damages is affirmed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States of America.

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan Presiding	Judge Sandhu	Judge Sheha

Judgment published and entered into the Register on this 2nd day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar