UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NY/2013/018
UNDT/NY/2013/019
Judgment No.: UNDT/2016/027
Date: 1 April 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KALLON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RELIEF

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. This is a judgment on the relief to which the Applicant is entitled following the issuance of Judgment No. UNDT/2015/126 ("judgment on liability") on 31 December 2015.

2. On 28 March 2013, the Applicant, former Chief Procurement Officer ("CPO") at the United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed two separate applications before the Tribunal. The applications concerned decisions by the Assistant Secretary-General, Office of Central Support Services ("ASG/OCSS"), affecting the Applicant's delegated authority to perform significant functions in the management of financial, human and physical resources (referred to at the United Nations as "designation").

3. The first application, registered under Case No. UNDT/NY/2013/018, contested the decision, dated 4 October 2012 and notified to the Applicant on 5 October 2012, to deny him the required designation to take up the post of CPO at the United Nations Interim Security Force for Abyei ("UNISFA") ("the UNISFA designation decision").

4. The second application, registered under Case No. UNDT/NY/2013/019, contested the decision, dated 28 November 2012 and notified to the Applicant on 5 December 2012, to remove his designation as CPO/MINUSTAH ("the MINUSTAH designation decision").

5. The cases were subject to an order for combined proceedings on 18 June 2014.

6. In the judgment on liability, the Tribunal found that the contested decisions were flawed and that the Applicant is entitled to be compensated. The Tribunal then stated:

> 157. In the circumstances of this case, the Tribunal considers that a hearing is necessary to decide the appropriate remedy to be ordered by the Tribunal, including compensation, if any. A hearing will therefore be convened unless the parties inform the Tribunal that they have reached agreement to settle the matter of remedy.

Procedural background

7. By Order No. 2 (NY/2016), dated 12 January 2016, the Tribunal ordered the parties to file a joint submission stating whether the matter of relief had been resolved, whether they sought more time to commence or continue settlement discussions, or whether the Tribunal should continue with proceedings.

8. By joint submission dated 10 February 2016, the parties informed the Tribunal that "efforts to resolve the question of relief have proved unsuccessful and the parties request the Tribunal to continue proceedings. Additionally, the parties request the opportunity to make further submissions, including production of evidence, relevant to the issues of remedies".

9. By Order No. 41 (NY/2016), dated 16 February 2016, the Tribunal ordered the parties to submit a jointly signed statement by 25 February 2016, setting out: a list of the remaining issues for determination regarding remedy; a list of further documents that they request to be produced, including the relevance of the documents; a proposed mutually agreeable date for a hearing on remedies; and a list of witnesses that each party would call and the relevance of the proposed testimony of each of those witnesses to the issue of remedy.

10. By email dated 23 February 2016 to the New York Registry of the Dispute Tribunal, and copied to Counsel for the Applicant, the Respondent requested access to the audio recordings of the hearing on the merits held from 27 to 31 July 2015 in this matter, in order to "assess the evidence already on record to determine whether any additional evidence is required".

11. The Tribunal gave both parties an opportunity to comment on the Respondent's request for access to the audio recordings at an urgently convened case management discussion ("CMD") on 25 February 2016. The Tribunal advised the parties at the CMD that a hearing may not be necessary if the parties believed that the evidence and legal submissions on the matter of remedy were already sufficiently placed before the Tribunal.

12. By Order No. 53 (NY/2016), dated 26 February 2016, the Tribunal granted the parties access to the recordings of the five-day hearing on the merits in this matter, and extended the deadline for filing a jointly signed statement on remedies until 1 March 2016.

13. On 1 March 2016, the parties filed a jointly signed statement setting out their respective submissions on the issue of remedy. The Respondent objected to the Applicant referring to the unsuccessful attempts at informal resolution of the issue of remedy, however, the Tribunal finds that it was not inappropriate and revealed nothing confidential. The Applicant attached 16 annexes to the jointly signed statement. The Respondent submitted that the documentation provided was irrelevant. The parties stated that they "do not wish to call any witnesses at this stage".

14. By Order No. 65 (NY/2016), dated 7 March 2016, the Tribunal stated that, given that the parties did not wish to call any witnesses, the Tribunal did not consider it necessary to schedule a hearing on remedy. The Tribunal stated that it would proceed to a judicial determination of the matter and ordered the parties to file an appropriate motion by 9 March 2016 should they wish to file any further submissions, submit any further documents, or call any witnesses.

15. On 9 March 2016, the Respondent filed a further submission on the issue of remedy contending, *inter alia*, that: the Applicant had failed to prove that the breach of his formal right to due process had any substantive impact on him; that a further

decision was taken in April 2014 to correct the breach of his due process rights, which rendered the matter moot; that the Applicant failed to cross-examine a witness on disputed facts that he sought to present in final argument and therefore could not call into question any reassignment decisions, nor claim any damages, based on events or circumstances that took place at any time after June 2014. The Respondent submitted that the Applicant's submissions on remedy concerning his current circumstances, the conduct of his performance assessments, his alleged demotion in April 2015, and/or the nature of length of any reassignment, are beyond the scope of the Applicant's case presented at the hearing on the merits.

16. On 28 March 2016, the Applicant filed a motion for interim measures pending proceedings in Case No. UNDT/NY/2013/019, requesting that the Tribunal suspend the hiring process for the post of CPO/MINUSTAH, which was in progress. He submitted that: "The Applicant's right may be affected if an order of specific performance is rendered impossible to execute because the position of [CPO/MINUSTAH], which is currently unencumbered, has been fast tracked to deny him the opportunity".

17. On 29 March 2016, the Applicant's motion was transmitted to the Respondent. The Tribunal directed the Respondent to file a response by 1:00 p.m. on 30 March 2016.

18. On 30 March 2016, the Respondent filed a response to the Applicant's motion, requesting that the Tribunal reject the motion. The Respondent noted that the Applicant had not sought suspension of the implementation of any administrative decision contested in the current proceedings. He submitted that the Dispute Tribunal's Statute and Rules of Procedure do not grant the Tribunal a general authority to suspend the implementation of *any* administrative decision during the proceedings. Rather, art. 10.2 of the Statute and art. 14.1 of the Rules of Procedure only authorize the Dispute Tribunal to suspend the implementation of the

administrative decision contested in the proceedings. In these cases, the contested decisions have already been implemented.

Preliminary issue: motion for interim measures pending proceedings

19. In the interests of judicial economy, and in light of the findings herein, the Tribunal considers it appropriate to address the Applicant's motion for interim measures pending proceedings as part of the present judgment on remedy.

20. Article 10.2 of the Dispute Tribunal's Statute provides:

> 2. At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

21. Article 14.1 of the Dispute Tribunal's Rules of Procedure states:

> **Article 14 Suspension of action during the proceedings**
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> 1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

22. The above provisions provide the Tribunal with the authority to grant *interim* measures to provide *temporary* relief pending the Tribunal's consideration and ultimate judicial determination of the merits of a case, and where relevant, the appropriate remedy. In the present cases, the issue of liability has been settled in the first instance by the judgment on liability, issued on 31 December 2015. The issue of remedy is dealt with in this judgment. Specific performance is the remedy the

Applicant seeks to preserve through the motion for interim measures pending proceedings. For reasons set out below, the Tribunal elected not to order the specific performance requested by the Applicant in his submissions on remedy. As this judgment represents the Tribunal's final determination on this matter, it becomes unnecessary to rule on the Applicant's motion. The motion is therefore rejected.

Consideration

Applicable law

23. Article 10.5 of the Dispute Tribunal's Statute provides:

> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
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> (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;
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> (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.

The Tribunal may therefore order rescission or specific performance, and/or compensation.

24. The decision on remedy is quintessentially a matter for the first instance Tribunal, having regard to the circumstances of each particular case and the constraints imposed by its governing Statute (*Rantisi* 2015-UNAT-528, para. 53).

Rescission and specific performance

25. The remedy of rescission of an administrative decision generally entails the undoing of the decision. In some situations, rescission as a remedy may be unavailable, for example, where third party rights are affected, or where a restoration of the *status quo ante* is impossible, impractical or undesirable. Further, in some instances, the Tribunal may find that, although rescission is available, other types of relief, such as specific performance or compensation, may be more appropriate.

26. While the power to rescind relates to "the contested administrative decision", the power relating to specific performance is put in general terms as various types of specific performance may be ordered depending on the circumstances of each case. An order of specific performance may be an appropriate alternative to the rescission of an administrative decision, depending on the circumstances of each case and subject to the reasoned discretion of the Judge (*Kaddoura* 2011-UNAT-151, para. 41). The Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached (*Fröhler* 2011-UNAT-141, para. 32).

27. In the joint submission dated 1 March 2016, the Applicant requested the Tribunal "to direct the Respondent to rescind the flawed administrative decisions by ordering specific performance". Specifically, he requested that the Tribunal order the Respondent to reinstate the Applicant's designation, procurement authority and placement as CPO/MINUSTAH at the P-4 level. The Applicant noted that the position was, at the time of the submission, unencumbered, and that it had recently been advertised. In the alternative, the Applicant requested to be placed in a position within the same occupational group, "such as Contract Management at the P-4 level, which is commensurate with his professional qualifications and experience".

28. The Respondent submits that specific performance is not possible as the Applicant has not received the designation necessary to be reappointed to the position of CPO/MINUSTAH. He further submits that the request for rescission of the contested decisions is moot. He states that the "operative decision" denying the Applicant designation is the 16 April 2014 decision (see paras. 49–52 of the judgment on liability). The contested decisions were revisited and the breach of the Applicant's due process rights remedied. He submits that the 16 April 2014 decision is a final and binding determination on the merits.

29. In support of the above contention, the Respondent relies on *Masylkanova* 2014-UNAT-412, stating that because "the alleged illegality was resolved after the judicial procedure had begun" and "the specific remedy sought was reached", this matter is moot. The Respondent further maintains that the outcome and administrative consequences of the subsequent revisited decision can be challenged in their own right via management evaluation and before the Dispute and Appeals Tribunals (citing para. 18 of the aforesaid judgment).

30. In *Masylkanova*, a fact-finding panel was established after a staff member submitted a complaint of harassment and abuse of authority against her supervisor. However, the Applicant was later informed that the work of the fact-finding panel had been "held in abeyance", before any determination was made by the panel, following challenges to its composition and other procedural questions raised by the subject of the complaint. The staff member sought clarification, and when she received no response, filed an application with the Dispute Tribunal challenging the decision relating to the work of the fact-finding panel. One month after the application was filed, a new fact-finding panel was convened to resume consideration of the staff member's complaint. On appeal, the Appeals Tribunal upheld the judgment of the Dispute Tribunal in which it dismissed the application, finding it moot because the fact-finding panel had been reconvened. The Appeals Tribunal found that "at the administrative stage, the alleged illegality was solved

after the judicial procedure had begun, rendering the latter unnecessary, as the specific remedy sought was reached" (para. 16). The Appeals Tribunal further stated:

> 17. This does not mean that the eventual past existence of the illegality deprives the staff member of her claim concerning harassment, damages and compensation, which is the matter of the other case she filed before the UNDT (Case No. UNDT/NY/2012/063).
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> 18. Indeed, such issues, including the initial decision to hold in abeyance the fact-finding panel and the grievances Ms. Masylkanova asserts in respect of alleged unfair treatment, relate to Case No. UNDT/NY/2012/063, rather than the instant case, which was limited to the decision not to constitute the fact-finding panel and which was, inevitably, rendered moot by the constitution of said panel. Ultimately, once the investigation has been concluded, its outcome and administrative consequences, as well as any related acts or omissions, can be challenged in their own right via management evaluation and before the Dispute and Appeals Tribunals.

31. The Tribunal finds that the Respondent's reliance on *Masylkanova* is misconceived because the facts are clearly distinguishable from the present case. In the present cases, a final factual determination and conclusion was already rendered without due process. The Applicant did not obtain the specific remedy sought, being rescission and specific performance. He does not have another matter pending before the Tribunal relating to the same issues, as did Ms. Masylkanova, where her right to contest the past illegality still remained.

32. In any event, The Tribunal does not consider that it is "bound" by the 16 April 2014 decision to "uphold" the contested decisions, as suggested by the Respondent. In the judgment on liability, the Tribunal set out its views on the effect of the 16 April 2014 decision in some detail, as follows:

> 81. … the Tribunal finds that the matters for consideration in this judgment are the decisions dated 4 October 2012 and 28 November 2012, as outlined in para. 2 of this judgment and in the Applicant's requests for management evaluation dated 3 and 12 December 2012. These are the decisions that have been addressed by the parties in written submissions during these proceedings and at

> the hearing between 27 and 31 July 2015. The Organization's attempts to cure or remedy a breach of due process by initiating, in 2014, more than a year after the contested decisions and long after the Applicant's unanswered requests for management evaluation, a new process for the Applicant to respond to the [Headquarters Committee on Contracts] Note are not properly part of the cases before the Tribunal and will not be considered.
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> 82. In this regard, the Tribunal also notes that although the parties had identified, as one of the agreed legal issues, whether any alleged breach of due process had been remedied by the reconsideration of the designation decision in April 2014, the Respondent conceded that this second decision was not for consideration before the Tribunal. Therefore, it would be improper and without legal basis to hold that any process or alleged remedy or consequences flowing therefrom should be considered or taken into account by the Tribunal.
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> …
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> 83. … Whilst management evaluation may afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review is not necessary, it must be timeous, and at the same time the doctrine of *functus officio* should not be compromised in the reconsideration of a final decision.

33. In the judgment on liability, the Tribunal determined that the contested decisions were both procedurally and substantively flawed. The parties did not address the question of the practicalities and interests that would be affected by ordering rescission and/or specific performance. As discussed in the judgment on liability, designation is a form of delegated authority. In accordance with sec. 2.2 of ST/AI/2004/1 (Delegation of authority under the Financial Regulations and Rules of the United Nations), the official delegating authority is accountable for the manner in which the authority is exercised. In the circumstances of these cases, and based on the evidence placed before it, the Tribunal considers that rescission of the contested decisions, rather than the specific performance requested by the Applicant, is an appropriate remedy. The Tribunal finds that the restoration of the *status quo ante* is impossible because, by an order for specific performance, the Tribunal would indirectly be conferring designation whilst not being accountable for the manner in

which it is exercised. On the other hand, the contested decisions having been rescinded, the Applicant may in the future receive designation.

34. In addition, the Applicant requests that, save for the judgment on liability, the Tribunal order that "all negative materials relating to the contested decisions including but not limited to the non-extension of contract letter dated 10 June 2013 be removed from [his] file".

35. The Respondent submits that following the 16 April 2014 decision, the full record of the withdrawal of the designation should be maintained. He states that the records accurately reflect the right of the Applicant to individual due process and the manner in which the right was acknowledged and observed by the Administration.

36. To effectively reverse the contested decisions, the decisions themselves must be removed from the Applicant's Official Status File. Both the decisions of Mr. WS dated 4 October and 28 November 2012, and the communications relaying these decisions to the Applicant, dated 5 October and 5 December 2012, respectively, are to be removed.

37. In addition, the Applicant has specifically requested the removal from his Official Status File of the interoffice memorandum from Mr. GS dated 10 June 2013, which refers to the MINUSTAH designation decision and the subsequent decision of Mr. GS to reassign him "instead of an immediate separation" following that decision. The purpose of the memorandum was to advise the Applicant that his fixed-term appointment was due to expire. However, the Applicant's appointment was renewed and he has continued in employment with the Organization. While the Applicant did not contest the decision to reassign him or any subsequent decisions relating to his contractual status, the Tribunal considers that the reference in the 10 June 2013 memorandum to the decision to withdraw the Applicant's designation and to reassign him "instead of an immediate separation" is prejudicial given the flawed nature of

the contested decisions. The interoffice memorandum from Mr. GS dated 10 June 2013 is also to be removed from the Applicant's Official Status File.

38. This judgment and the judgment on liability are also to be placed on the Applicant's Official Status File.

Compensation

39. In *Warren* 2010-UNAT-059, the Appeals Tribunal held that "the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations" (para. 10, recently affirmed in *Applicant* 2015-UNAT-590 at para. 61).

40. The Dispute Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury (*Antaki* 2010-UNAT-095, para. 21; *Faraj* 2015-UNAT-587, para. 26). The Appeals Tribunal has consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case" (*Rantisi* 2015-UNAT-528, para. 71, citing *Solanki* 2010-UNAT-044, para. 20). Relevant considerations in setting compensation include, among others, the nature of the staff member's appointment (i.e., temporary, fixed-term, or continuing), its length, and any expectancy of renewal (*Andreyev* 2015-UNAT-501, para. 31). In addition, the Dispute Tribunal may consider whether a case was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit set out in art. 10.5(b) of the Statute (*Mmata* 2010-UNAT-092, para. 33).

41. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy that the Tribunal deems appropriate in all the circumstances, rectify

such irregularity or deficiency as may have been found (*Fröhler* 2011-UNAT-141, para. 32).

Pecuniary damages

A. Did the Applicant suffer any actual loss of earnings and benefits as a direct result of the contested decisions?

42. The starting point for consideration of compensation under this head is to recall the position of the Applicant prior to the contested decisions.

43. The Applicant was appointed as CPO/MINUSTAH on 2 July 2010 on a one-year fixed-term appointment. According to the record, his fixed-term appointment at the time of the contested decisions was due to expire on 30 June 2013.

44. By interoffice memorandum dated 17 July 2012, the Applicant received notification that he had been selected for the position of CPO/UNISFA and that, subject to medical clearance and designation, he was to be reassigned. The memorandum stated (emphasis added): "Your fixed-term appointment will be at your current level and step *for an initial period of 1 year(s)* … your designation to perform the function of [CPO] shall be sought. This reassignment is, therefore, subject to your being designated".

45. The Tribunal recalls that following the MINUSTAH designation decision, on 6 December 2012, the Applicant was reassigned to the Office of the Officer-in-Charge, Administrative Services, MINUSTAH. On 6 March 2013, he was reassigned as Officer-in-Charge, Staff Counselling Welfare Unit, MINUSTAH. The Applicant states that after the expiration of his fixed-term contract on 30 June 2013, he was retained by the Organization on "piecemeal" monthly contracts at the P-4 level from 1 July 2013 through 15 April 2015, the uncertainty of which placed great stress on him. The Respondent submits that following the withdrawal of the Applicant's designation, he could not continue as CPO/MINUSTAH. In order to maintain his

employment with the Organization, the Administration reassigned him to an alternative position at the P-4 level.

46. The record shows that the Applicant in fact remained employed by the Organization at the P-4 level until shortly after he accepted, on 20 March 2015, a position at the P-3 level. Therefore, from the dates of the contested decisions—4 October 2012 and 28 November 2012—until he began the P-3 position in April 2015, a period of almost two and a half years, the Applicant received the same salary and benefits that he would have received had the contested decisions not been made.

47. Staff regulation 4.5 and staff rule 4.13(c) state that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service". Therefore, there was no guarantee that the Applicant would have been renewed beyond the initial one-year appointment offered by UNISFA or, if he had remained at MINUSTAH, that his fixed-term appointment would have been extended beyond 30 June 2013. Both this Tribunal and the Appeals Tribunal have expressed reluctance to speculate too far into the future when considering compensation given the normal contingencies and uncertainties that can and frequently do intervene in the average working life (see, for example, *Fayek* UNDT/2010/113 at para. 30 (not appealed); *Mwamsaku* 2012-UNAT-246 and *Mushema* 2012-UNAT-247 at para. 24 of both judgments).

48. Given that the Applicant received salary and benefits at the P-4 level until 2015, he has not shown that he suffered any actual loss of earnings and benefits as a direct consequence of the contested decisions.

B. Is the Applicant entitled to compensation for the decision to deny him conversion to a continuing appointment?

49. The Applicant claims compensation for the Administration's decision to deny him conversion to a continuing appointment. The record shows that by letter from

the Acting Head, Office of Human Resources Management, dated 1 October 2014, the Applicant was informed that he would not be granted a continuing appointment during the relevant annual review period because he did not receive a performance rating of at least "Meets expectations" or equivalent in his four most recent performance appraisal reports. The Applicant states that the relevant performance rating was that given in his 2012–2013 performance appraisal, which was briefly referred to in the judgment on liability (paras. 39–40).

50. As noted in the judgment on liability, the Applicant's 2012–2013 performance appraisal was completed in September 2013, well after the contested decisions were made. The Applicant has not filed an application with the Dispute Tribunal contesting either the outcome of his 2012–2013 performance appraisal or the 1 October 2014 decision denying him conversion to a continuing appointment. These decisions fall outside the scope of these cases. The Applicant's request for compensation for denial of conversion to continuing appointment is rejected.

C. Is the Applicant entitled to compensation for damage to his career prospects?

51. The Applicant submits that the contested decisions have had a direct effect on his job security, created a gap in his professional record, and resulted in him being "demoted" from CPO/MINUSTAH at P-4, step 14 to Administrative Officer at P-3, step 15.

52. While the Tribunals have awarded compensation for loss of a chance for a staff member to improve their status within the Organization, these cases have generally concerned cases of non-promotion (see, for example, *Solanki* 2010-UNAT-044; *Marsh* 2012-UNAT-205). In the present cases, the Applicant was deprived of a lateral transfer opportunity (the UNISFA designation decision), and the opportunity to complete his fixed-term appointment at MINUSTAH (the MINUSTAH designation decision). While the Tribunal accepts that the contested decisions

affected the Applicant's ability to continue his career in the specialised field of procurement, in the circumstances of these cases, these consequences are more appropriately dealt with under the head of non-pecuniary loss caused by damage to his professional reputation.

53. The Applicant also submits that the contested decisions left him vulnerable to separation from service, and that he had to mitigate his losses by accepting a "demotion". The record shows that on 20 March 2015, the Applicant signed an undated interoffice memorandum from the Chief Human Resources Officer, MINUSTAH, indicating that he accepted an offer to serve as an Administrative Officer at the P-3 level in a Joint Logistics Operations Center in Les Cayes, Haiti. The memorandum stated that the assignment was for an initial period of one year. On the same date, the Applicant also signed an "Acceptance of Assignment" document, confirming that he understood that he was accepting an assignment at one grade lower than his current grade and that no lien would be maintained against the P-4 post he was vacating.

54. By email from the Chief Human Resources Officer, MINUSTAH, dated 15 February 2016, the Applicant was advised that he may be affected by the planned abolishment of posts in line with MINUSTAH's 2016–2017 budget. The Applicant states that he has been notified that his post has been subject to retrenchment and will be abolished effective 30 June 2016. Therefore, his contract is not likely to be extended beyond this date. The Applicant submits that he now faces the risk of being separated from service and that he would not have been exposed to this position but for the contested decisions.

55. The Tribunal recalls that, notwithstanding the flawed contested decisions, there is no guarantee that the Applicant would have had his fixed-term appointments at UNISFA or MINUSTAH renewed beyond 2013 (see para. 47 above). The Tribunal does not consider it appropriate to speculate as to what position the Applicant would have been in, but for the contested decisions, in mid-2015, almost

two and a half years after the contested decisions. Although the Tribunal takes into account the Applicant's submission that he accepted the reassignment without prejudice to his cases before the Tribunal, and in order to mitigate his losses, the developments in his career in 2015 and 2016 are simply too remote from the contested decisions to justify an award of compensation for pecuniary loss.

Non-pecuniary damages

56. The Applicant submits that compensation is warranted for the negative effects of the contested decisions on his professional reputation as well as for the stress he has been subjected to over a prolonged period.

57. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal held:

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
> >
> > (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

> 37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

58. In his uncontested testimony at the hearing on the merits, the Applicant stated that the contested decisions had "totally shattered [his] professional image" and that his career progression had been halted. He stated that in pursuing career opportunities he has been asked "how did you leave procurement?" and that the contested decisions have thereby impacted his career prospects. He stated that he had lost mobility in that he has not been able to move to other missions. The Applicant submits that that his "normal career progression" has been foreclosed.

59. The Applicant produced as evidence a printed record from Inspira (the online United Nations jobsite) showing that he has applied for more than 80 positions within the United Nations—mostly at the P-3 and P-4 level—since the contested decisions, without any apparent success. He states that despite being well-qualified with a Masters of Business Administration, and fulfilling the requirements for selection, he cannot secure a position befitting his qualifications and experience. He further notes that many of the positions he has applied for do not require designation and submits that his difficulty in securing appropriate employment with the Organization "suggest[s] that there has been a reluctance to reassign [him] while this case has been in progress". He submits that he was competitively selected for positions as CPO/MINUSTAH and CPO/UNISFA in the past and rostered for other positions and that his qualifications have not changed.

60. At the hearing on the merits, the Applicant also testified that the contested decisions had taken an "emotional toll" and caused "emotional stress" for both him and his family. He told the Tribunal that the case had been hanging over his head until the hearing on the merits and expressed gratitude for the opportunity to explain his position for the very first time. He stated that he felt like a victim and that he had

been blamed for issues that were institutional, some of which even preceded his arrival at MINUSTAH.

61. The Appeals Tribunal has stated that the Dispute Tribunal is best placed to conclude from the evidence, records, or otherwise, whether or not a claim for moral damages is established (*Andersson* 2013-UNAT-379, para. 20), and to calculate, based on the evidence, the appropriate award of moral damages (see, for example, *Finniss* 2014-UNAT-397, para. 36; *Fiala* 2015-UNAT-516, para. 48).

62. Sworn testimony given at an oral hearing, where there is an opportunity for cross examination, may provide sufficient evidence to support a claim for moral damages, but such evidence must be credible and reliable (*Dia* UNDT/2015/112, para. 87 (not appealed)).

63. The Tribunal considered the Applicant to be a credible and reliable witness. It had the opportunity to listen to and observe the Applicant giving testimony over the course of several hours. The Tribunal is convinced from the submissions of the Applicant and his sworn testimony, and in light of all the circumstances of these cases, including the manner in which the contested decisions were made, and the record of the unsuccessful job applications that he has submitted, that the contested decisions resulted in stigmatisation and serious reputational damage to the Applicant, which affected his future career prospects, particularly within the field of procurement. He has applied for at least 21 positions within the United Nations directly related to procurement, as well as numerous others related to contract and risk management, without success. Although the Applicant has continued in employment with the Organization, he has been unable to gain employment in the specific field of procurement, even at a lower grade. To add to his predicament, the Tribunal is unable to grant him specific performance.

64. The Tribunal further finds that the Applicant suffered real and significant stress and anxiety as a result of the contested decisions, and the way in which they

were made. Although the Applicant was generally cogent and composed during his testimony, it was clear during several passages of his testimony that he was emotional and that the contested decisions have caused him significant stress and anxiety, even as at the time of hearing. The Tribunal finds that both the content of the Applicant's sworn testimony—directly addressing the effect of the decisions on his wellbeing—and the obvious emotion and distress exhibited by the Applicant, constitute evidence that he suffered real and genuine moral injury as a result of the contested decisions.

65. In this regard, the Tribunal notes that even if it were to adopt a different view regarding the further decision of the Administration on 16 April 2014, the Applicant would still be entitled to compensation for moral injury. The further decision did not negate the violation of the Applicant's right to be treated fairly and accorded due process at the time of the contested decisions, nor the consequent effects which flowed from it, including the stress, anxiety and sense of frustration and injustice experienced by the Applicant in the intervening period of over a year.

66. The Tribunal considers that the Applicant is entitled to compensation for non-pecuniary damages for the following:

a. The stigmatisation and reputational damage caused by the contested decisions and the resulting effect on the Applicant's career prospects.

b. The stress, anxiety, and moral injury caused by the contested decisions, including the manner in which they were made, i.e., abruptly and without consultation, due process, or adequate reasoning or explanation.

67. As a matter of principle, it is the Tribunal's view that an award for non-pecuniary damages should be expressed as a lump sum rather than in terms of net base salary. The Tribunal is assessing the degree of injury suffered by the individual and quantifying the award accordingly. This exercise is not related to the status or seniority of the individual within the Organization and an award should therefore not

be related to the individual's earning or status, but to the actual distress and moral damage suffered by the individual. Each case is to be assessed on its own facts, including the manner in which the individual has been treated and the impact of the treatment on that specific individual. Factual circumstances will differ from case to case and the Tribunal will carry out, as far as it is possible to do so, a notional benchmarking of various awards in order to determine the level appropriate in a particular case.

68. The facts in these cases are egregious. In the judgment on liability the Tribunal found that "[t]he contested decisions, in combination, and taking into account the effect on the Applicant's professional reputation, and his reassignment to unrelated functions, effectively ended his procurement career within the United Nations". The contested decisions were flawed and resulted in a high degree of non-pecuniary damage which justifies an award at the top end of the current scale of awards.

69. In determining the appropriate amount of compensation for non-pecuniary damages in these cases, the Tribunal considered the judgments of the United Nations Appeals Tribunal which involved a significant degree of non-pecuniary harm attracting high awards similar in scale: see, e.g., *Rantisi* 2015-UNAT-528 (affirming an award of USD40,000 for moral damages); *Finniss* 2014-UNAT-397 (affirming an award of USD50,000 for moral damages); *Appleton* 2013-UNAT-347 (affirming an award of USD30,000 for emotional distress); *Goodwin* 2013-UNAT-346 (affirming an award of USD30,000 for non-pecuniary harm); *Bowen* 2011-UNAT-183 (reducing an award of non-pecuniary damages to six month' net base salary).

70. In all the circumstances, the Tribunal considers that the sum of USD50,000 is an appropriate award for the non-pecuniary damages suffered by the Applicant in these cases.

Request for costs for manifest abuse of proceedings

71. Article 10.6 of the Dispute Tribunal's Statute states that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

72. The Applicant submits that the conduct of the Respondent's case constitutes an "abuse of authority" justifying payment of costs. The Applicant states that he has sustained personal expenses for travel to and from the hearing on the merits in New York in the amount of USD3,100 and legal fees in pursuing his case in the amount of USD50,915.

73. The Respondent submits that there is no basis for a claim of abuse of proceedings. He submits that, while there was a formal breach of due process in this matter, in substance, the initial decision to deny and withdraw the Applicant's designation was confirmed upon review. Further, at an early stage in this matter, the Respondent conceded that the Applicant was not granted his individual due process rights, consulted with the Applicant and his Counsel, and engaged in a reconsideration of the matter, resulting in the decision dated 16 April 2014.

74. Article 10.6 does not allow the Dispute Tribunal to award costs to the prevailing party, as a matter of course (*Nartey* 2015-UNAT-544, para. 73). In *Bi Bea* 2013-UNAT-370, the Appeals Tribunal stated that in order to award costs against a party, it is necessary for the Dispute Tribunal to be satisfied on the evidence that there was clearly and unmistakably a wrong or improper use of the proceedings of the court (para. 30).

75. The Tribunal has already expressed reservations about the process of reconsidering the contested decisions in April 2014 (see paras. 76–86 of the judgment on liability). However, in all the circumstances, it does not consider that there was a manifest abuse of proceedings in these cases justifying an award of costs.

76. The Tribunal declines to make an order for costs for manifest abuse of proceedings.

Request for referral for accountability

77. Article 10.8 of the Dispute Tribunal's Statute provides: "The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability".

78. The Applicant requests that the Tribunal refer "staff responsible for the flawed administrative decisions as established by [the judgment on liability]" to the Secretary-General for possible action to enforce accountability.

79. The Respondent submits that there is no basis for referral of any official for accountability measures.

80. The Tribunal does not consider that it is appropriate to refer these cases for accountability to the Secretary-General pursuant to art. 10.8 of the Dispute Tribunal's Statute.

81. However, in the judgment on liability, the Tribunal noted at para. 92 that "[t]he legal and regulatory framework relating to delegation of authority, designation, and procurement authority does not set out a specific procedure for holding staff member's accountable for failure to abide by the terms and conditions of delegated authority" (see further discussion at paras. 90–95 of judgment on liability).

82. In *Korotina* UNDT/2012/178, this Tribunal stated that art. 10.8 of the Dispute Tribunal's Statute "concerns only referrals for possible action to enforce accountability and does not empower the Tribunal to refer matters of general managerial practices for correction by the Secretary-General" (para. 67). However,

the Tribunal noted that it had raised a number of issues in its judgment that warranted appropriate attention by the Respondent with respect to the existing practices regarding the review of eligibility of staff members applying to positions within the Organization at that time.

83. In the present cases, the Tribunal notes that, based on its findings, there are a number of issues raised in the judgment on liability that may warrant appropriate attention by the Respondent with respect to the lack of clear procedures and policies for fairly managing staff members who are alleged to have failed to exercise their delegated authority appropriately.

Conclusion

84. In view of the foregoing, the Tribunal ORDERS:

a. The motion for interim measures pending proceedings, filed by the Applicant on 28 March 2016 in Case No. UNDT/NY/2013/019, is rejected;

b. The contested decisions dated 4 October 2012 and 28 November 2012 be rescinded;

c. The documents referred to at paras. 36 and 37 of this judgment are to be removed from the Applicant's Official Status File. This judgment and the judgment on liability are to be placed on the Applicant's Official Status File;

d. The Applicant is to be paid the amount of USD50,000 in non-pecuniary damages. This amount is to be paid within 60 days from the date the judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment;

e. All other claims are rejected.

(*Signed*)

Judge Memooda Ebrahim-Carstens

Dated this 1st day of April 2016

Entered in the Register on this 1st day of April 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York