



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/064

Judgment No.: UNDT/2023/048

Date: 9 June 2023

Original: English

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**Before:** Judge Francesco Buffa

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

GUIMARAES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Julia Kyung Min Lee, OSLA  
Jason Biafore, OSLA

**Counsel for the Respondent:**  
Nicole Wynn, AS/ALD/OHR, UN Secretariat  
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## Introduction

1. The Applicant, a staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”), is challenging the decision to remove her from the position of Chief of Joint Movement Coordination Centre (“JMCC”) and to reassign her as Bonded Warehouse Supervisor within the MONUSCO Logistics Base in Régie des Voies Aériennes (“RVA”); she also seeks compensation for moral injury caused by the reassignment.

## Facts

2. The Applicant joined MONUSCO on 26 August 2018 and served as a Movement Control Officer at the P-3 level in Goma.<sup>1</sup>

3. In September 2019, the Applicant became the Chief of the JMCC Unit of the Movement Control Section in Goma (“MOVCON”).<sup>2</sup>

4. The Applicant claims that from February 2020, the Chief of MOVCON, her Second Reporting Officer (“SRO”), made several sexual advances towards her which she rejected. This made the working environment unbearable for the Applicant.<sup>3</sup>

5. On 27 May 2021, the Office of Internal Oversight Services (“OIOS”) and the<sup>4</sup> Conduct and Discipline Team (“CDT”) received from the Applicant, a complaint of harassment and abuse of authority alleging that the Applicant’s SRO had sexually harassed her.<sup>5</sup> On several occasions, she alleged that her SRO made unwelcome sexual advances to her.

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<sup>1</sup> Application, annex A titled *Personnel Action*.

<sup>2</sup> *Ibid.*, at page 3, para. 3.

<sup>3</sup> *Ibid.*, at para. 4.

<sup>4</sup> Application, page 3, at para. 4.

<sup>5</sup> *Ibid.*, at para. 5. Application, annex B.

6. At the time of the misconduct, the Applicant was Chief/JMCC with MONUSCO in Goma. The Applicant also complained of harassment and abuse of authority against her First Reporting Officer (“FRO”).<sup>6</sup>

7. On 25 June 2021, the Applicant’s 2020/2021 electronic performance appraisal (“ePAS”) was issued and signed by her FRO and SRO.<sup>7</sup>

8. On 22 July 2021, the Applicant wrote to the Management Evaluation Unit (“MEU”) requesting that her 2020/2021 ePAS be “redeemed”<sup>8</sup> and that her FRO and SRO be made “accountable for not observing the ST-SGB-2019-8”.<sup>9</sup>

9. By email dated 13 August 2021, the OIOS confirmed receipt of the Applicant’s complaint and transmitted it to the Head of MONUSCO on 24 August 2021 pursuant to ST/SGB/2019/8(Addressing discrimination, harassment, including sexual harassment, and abuse of authority).<sup>10</sup>

10. On 5 November 2021 the Applicant wrote to the Chief of CDT, expressing concerns about her work environment and requesting information about the status of her complaint.<sup>11</sup>

11. Following a meeting with the Applicant on 5 November 2021, on 10 November 2021, the Applicant’s reporting officers informed her that she would be put on a Performance Improvement Plan (“PIP”).

12. The same day, according to the Applicant, the Chief of Mission Support (“CMS”) informed her during a dinner that her PIP would be “dropped” if she withdrew her complaint against her two reporting officers. The CMS also informed the Applicant that she could work under his supervision.<sup>12</sup>

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<sup>6</sup>*Ibid.*, at annex B.

<sup>7</sup>*Ibid.*, at annex C.

<sup>8</sup>*Ibid.*, at annex B.

<sup>9</sup>*Ibid.*.

<sup>10</sup>*Ibid.*, at page 3, para. 7 and at annex D.

<sup>11</sup>*Ibid.*, annex E.

<sup>12</sup>*Ibid.*, at page 4, para. 11.

13. From 22 November 2021 to 28 January 2022, the Applicant was placed on Certified Sick Leave (“CSL”).<sup>13</sup>

14. By letter dated 24 November 2021, the Applicant wrote to the Special Representative of the Secretary-General (“SRSG”), MONUSCO, “seeking an outcome about OIOS Case Id 0835/21 that was referred to [her] according to ST/SGB/2019/8 as responsible official in MONUSCO on 24 August 2021.”<sup>14</sup>

15. By email dated 30 November 2021, the Applicant’s SRO sent a “Note to File” dated 10 November 2021 to the Chief of CDT regarding the meeting of 5 November 2021, stating that the Applicant had been placed on a PIP.<sup>15</sup>

16. On 2 December 2021, the Applicant wrote to the MEU contesting the decision to place her on a PIP without having her workplan 2021/22 approved.<sup>16</sup>

17. On 15 December 2021, the Applicant wrote to the Investigations Division of the OIOS reporting fraud and abuse of authority committed by her reporting officers. In her complaint, the Applicant also sought protection against retaliation to the United Nations Ethics Office (“Ethics Office”).<sup>17</sup>

18. By memorandum dated 28 December 2021, the Ethics Office wrote to the Applicant notifying her that she “did not establish a *prima facie* case of retaliation pursuant to ST/SGB/2017/2/Rev.1 [and] encourage[d] [her] to engage the Ombudsman to resolve issues outstanding with [her] supervisors.”<sup>18</sup>

19. On 30 December 2021, the Applicant wrote to the MONUSCO sick leave team seeking extension of her leave until 30 January 2022.<sup>19</sup>

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<sup>13</sup>Reply, page 3, para. 5.

<sup>14</sup>Application, at annex G.

<sup>15</sup>*Ibid.*, at annex H and at page 5, para. 15.

<sup>16</sup>*Ibid.*, at annex I.

<sup>17</sup>*Ibid.*, at annex K.

<sup>18</sup>*Ibid.*, at annex L, titled *Interoffice Memorandum* dated 28 December 2021.

<sup>19</sup>*Ibid.*, at annex M, page 2.

20. By email dated 17 January 2022, the Chief of MOVCON, wrote to the Applicant's FRO and to the Applicant expressing concerns on the business continuity within the Section as staff members were on Rest and Recuperation and Annual Leave ("R&R and AL"). He explained that a staff member had been released on a Temporary Duty Assignment ("TDY") to another mission on the grounds that the Applicant would have resumed duties upon expiration of her sick leave on 17 December 2021. To ensure business continuity and continued operations within the Section, the Chief MOVCON proposed that another staff member replace the Applicant who would serve as the Bonded Warehouse Supervisor upon her return to work.<sup>20</sup>

21. On 18 January 2022, the Human Resources ("HR") notified the Applicant's SRO that the Applicant's CSL had been approved until 28 January 2022.<sup>21</sup>

22. On 19 January 2022, the Applicant wrote to the Ethics Office requesting a review of its determination before the Alternate Chair of the Ethics Panel of the United Nations("EPUN").<sup>22</sup>

23. The Applicant returned from CSL on 31 January 2022.<sup>23</sup>

24. On 1 February 2022, the Applicant requested management evaluation of the contested decision and to be reinstated as Chief of the JMCC Unit with protection from retaliation from her FRO and SRO.<sup>24</sup>

25. By letter dated 4 February 2022, the Chief of MOVCON informed the Applicant of her transfer to the Bonded Warehouse within the "MONUSCO Logistics Base in RVA Land effective 8 February 2022". The Chief of MOVCON added in the same letter that the Applicant's "reporting lines w[ould] remain the same, unless determine[d] otherwise".<sup>25</sup>

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<sup>20</sup> *Ibid.*, at annex N, pages 1 and 2.

<sup>21</sup> *Ibid.*, at annex N, Human Resources' email to the Chief of MOVCON Section.

<sup>22</sup> *Ibid.*, at page 6, para. 29.

<sup>23</sup> Reply, page 3, para. 7.

<sup>24</sup> Application, annex P – *MER filed 1 Feb 2022*.

<sup>25</sup> Reply, annex R/2.

26. On 12 April 2022, the Applicant left her duty station on CSL.<sup>26</sup>
27. By Memorandum dated 17 April 2022, the Alternate Chair, /EPUN wrote to the Applicant and shared its conclusion according to which the determination of the Ethics Office of 28 December 2021 should be reversed as there was a *prima facie* case that the Applicant's report of prohibited conduct "was a contributing factor in causing the alleged retaliation". The EPUN also informed the Applicant that as per the procedures set out in ST/SG/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), it shared its recommendations with the Ethics Office for referral to OIOS.<sup>27</sup>
28. By letter dated 29 April 2022, the Under-Secretary-General for Management Strategy, Policy, and Compliance ("USG-DMSPC") wrote to the Applicant informing her that following for her request for management evaluation dated 1 February 2022, she had "decided to accept the recommendation of the MEU and uphold the contested decision."<sup>28</sup>
29. The same day, on 29 April 2022, the Applicant wrote to the Ethics Office "attaching a PaR form (...) with additional reporting of all the latest events which resulted into [her] removal and downgrading from [her] current position as a retaliation for reporting prohibited conduct." She further requested for a "review hoping that the Organization w[ould] protect [her] from further harm."<sup>29</sup>
30. By email dated 5 May 2022, the Ethics Office notified the Applicant that on 29 April 2022, the Chef de Cabinet transmitted to the USG/DMSPC her request for interim measures. The Ethics Office also shared with the Applicant its recommendations to protect the Applicant against retaliation from her reporting officers and to re-assign her performance evaluation to another Chief of Section in MONUSCO.<sup>30</sup>

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<sup>26</sup> Application, page 7, para. 35.

<sup>27</sup> *Ibid.*, at annex T, memorandum dated 17 April 2022.

<sup>28</sup> *Ibid.*, at annex V, page 7.

<sup>29</sup> *Ibid.*, at annex U, page 5.

<sup>30</sup> *Ibid.*, at annex U, page 3: email from the United Nations Ethics Office to the Applicant.

31. On 9 May 2022, the Applicant was selected for a temporary position as Logistics Officer at the P-4 level at the United Nations Regional Service Centre in Entebbe (“RSCE”); a position for which the Applicant’s SRO refused to release her, stating that the Applicant’s role as the Bonded Warehouse Supervisor was crucial.<sup>31</sup>

32. On 16 May 2022, the Applicant’s FRO and SRO finalized her performance evaluation for the performance cycle 2021/2022.<sup>32</sup>

33. By email dated 18 May 2022, the Ethics Office informed the Applicant that its recommendations were implemented.<sup>33</sup>

34. By email dated 20 May 2022, the Chief of Section, Human Resources Management (“HRM”) wrote to the Applicant to inform her that her performance cycle 2021/2022 evaluation was withdrawn and would be performed by another Chief of Section. HRM further indicated that the Applicant was “temporarily reassigned to Operations Support Managers”.<sup>34</sup>

35. On 19 June 2022, the Applicant wrote to the Ethics Office complaining that her contract with MONUSCO was extended only until 31 July 2022 and requested for the implementation of the Ethics Office’s recommendation according to which: “As a first option, that the Complainant be transferred to a Logistics Officer P3 position in a comparable or family duty station for which she has been rostered.”<sup>35</sup>

36. The Applicant came back from sick leave on 12 July 2022.<sup>36</sup>

37. By email dated 15 July 2022, the Chief of Section, HRM shared with the Applicant the placement options offered for her consideration in the Aviation Section or in the Acquisition Planning Section at the P-3 level with a different FRO and SRO.<sup>37</sup>

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<sup>31</sup>*Ibid.*, at page 8, para 40.

<sup>32</sup> Application, annex X, document titled *United Nations performance Document*.

<sup>33</sup>*Ibid.*, at annex U, page 1.

<sup>34</sup> Reply, annex R/1.

<sup>35</sup> Application, annex Z.

<sup>36</sup>*Ibid.*, at page 9, para. 44.

<sup>37</sup> Reply, annex R/1, HRM email to the Applicant dated 15 July 2022.

38. On 18 July 2022, the Applicant decided to be assigned to the Aviation Section.<sup>38</sup>

39. On 1 August 2022, the Applicant's fixed term appointment was extended until 30 June 2023.<sup>39</sup>

40. On 17 March 2023, the Ethics Office wrote to the Applicant informing her that it agreed with the OIOS finding that the threat of being put on a PIP was the consequence of the Applicant's engagement in a protected activity.<sup>40</sup>

### **Procedural history**

41. On 28 July 2022, the Applicant lodged with the UNDT seat of the Tribunal in Nairobi, the application mentioned in para.1, challenging the administrative decision mentioned in para. 20.

42. On 29 August 2022, the Respondent filed his reply submitting that MONUSCO notified the Applicant that her request to be moved to the Aviation Section was granted and that the application was moot and should be dismissed as not receivable.

43. On 29 September 2022, the Applicant filed a response to the Respondent's reply in compliance with the Tribunal's direction dated 30 August 2022.

44. This case was assigned to the undersigned Judge on 12 January 2023, for his deployment starting on 6 February 2023.

45. By Order No. 037 (NBI/2023) of 14 February 2023, the Tribunal decided to conduct a hearing on the merits of the case.

46. On 27 February 2023, the Tribunal issued Order No. 055 (NBI/2023) on case management with notice for an oral hearing in the UNDT Courtroom in Nairobi, from 27 March to 3 April 2023.

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<sup>38</sup> *Ibid.*, at page 2, para. 2.

<sup>39</sup> Application, annex A: Personnel Action.

<sup>40</sup> Trial bundle, page 418, para. 61.



47. On 21 March 2023, the Applicant filed a motion seeking leave to adduce additional evidence under art. 18(1) of the Dispute Tribunal Rules of Procedure.

48. On 23 March 2023, the Respondent filed a motion seeking leave to file additional documents.

49. On 24 March 2023, the Applicant submitted her response to the Respondent's motion for leave to file additional documents.

50. At the hearing, on Monday, 27 March 2023, the parties reiterated the issues above mentioned about documents and raised some issues about the power of the parties to examine the witnesses; the Tribunal issued an oral order at the hearing ruling on the matters.

51. On the same day, on 27 March 2023, after the opening statements by the parties, the Tribunal heard the Applicant; on Tuesday 28 March 2023, Mr. George Opio, the Applicant's FRO, Deputy Chief, and Mr. David John, the Applicant's SRO also Chief of Section MOVCON gave their testimony in the morning; Mr. Ebow Idun, the Chief of Section, Human Resources Management, in the afternoon.

52. No other witness appeared and the parties, renouncing other oral evidence, asked to submit to the witness, Ms. Yewande Odia, Chief of the Conduct and Discipline Team at MONUSCO questions in writing; the Tribunal allowed the written testimony of the witness.

53. On 28 March 2023, the Tribunal issued Order No. 065 (NBI/2023), granting the Respondent's motion on additional documents and directing the Applicant to submit her comments on the documents and file contradicting documents, if any, by 2 April 2023.

54. On 31 March 2023, the Applicant filed her submissions pursuant to Order No. 065 (NBI/2023).

55. On 5 April 2023, the Applicant filed interrogatories for Ms. Odia pursuant to the Tribunal's directions in paragraph 12 of Order No. 065 (NBI/2023).

56. By Order No. 069 (NBI/2023) dated 6 April 2023, the Tribunal allowed the Applicant to submit the questions directly to the witness, setting a deadline for her answers of Wednesday, 19 April 2023.

57. It further directed the parties to file closing submission on or before Wednesday, 26 April 2023.

58. Both parties complied with the directions in Order No. 069 (NBI/2023) on 26 April 2023. The Applicant submitted, with her closing submission, also Ms. Odia's written testimony, a witness identified by the Tribunal for the purpose of the hearing.

### **Parties' submissions**

#### ***The Applicant's case***

59. The Applicant's principal contentions are that the decision to reassign her as Bonded Warehouse Supervisor, to an unsafe area was unlawful and in retaliation against the Applicant's complaints of harassment including sexual harassment and abuse of authority.

60. She claims that the Bonded Warehouse Supervisor position was performed at the FS-6 level by another staff member, Mr. Bakou, focal point from the MOVCON unit who ensured the operationalization of the Bonded Warehouse since 3 November 2021. The Applicant further claims that Mr. Bakou was the most suitable staff member to assume this position. Nevertheless, the Applicant replaced Mr. Bakou, who benefited from an unlawful promotion.

61. The Applicant's SRO gave, as a reason to reassign Mr. Bakou into the Applicant's role, the absence of international staff members at the JMCC Unit between 18 to 30 January 2022. Without giving reasons why the Applicant could not resume her role as Chief of JMCC upon her return to the duty station on 31 January 2022, the Applicant's SRO simply decided to reassign her to the Bonded Warehouse.

62. The Applicant claims that the Terms of Reference ("TOR") for the Bonded Warehouse Supervisor position was created on 27 February 2022 and that her SRO

backdated the TOR document to 4 February 2022. The Applicant states that her SRO created the TOR to match her Personal History Profile (“PHP”) and credentials and to justify that she was the “only suitable person in the MOVCON unit” to perform this task.

63. The Applicant further submits that the TOR of the Bonded Warehouse Supervisor is akin to the Inbound Delivery Coordinator at the FS-6 level advertised as Generic Job Openings (“GJO”) by United Nations Headquarters (“UNHQ”). The Applicant participated in the recruitment process and served as a Competency Based Interview (“CBI”) Panel member for roster purposes. Mr. Bakou was rostered for the Inbound Delivery Coordinator position, terms of which are akin to the TOR of the Bonded Warehouse Supervisor.

64. The Applicant’s reassignment was tainted by improper motive because she filed complaints of harassment and abuse of authority against her FRO and SRO as well as a complaint of sexual harassment against her SRO in June 2021. The Applicant claims that both reporting officers were aware of her complaints against them and retaliated against the Applicant by attempting to place her on a PIP.

65. According to the Applicant, the retaliation is corroborated by the CMS, who informed her that her SRO involved him to persuade the Applicant to “drop her case” against her two reporting officers before the OIOS and the MEU.

66. The Applicant also relies on *Silva*<sup>41</sup> where the United Nations Appeals Tribunal (“UNAT”), reaffirmed its ruling in *Chemingui*<sup>42</sup>, that, while the administration has discretion in staff management, including in reassignment or transfer, such discretion is not absolute. The UNAT reiterated that “the principle of good faith and fair dealings still applies,” and that “a reassignment decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. It can then

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<sup>41</sup>2022-UNAT-1223, para. 34.

<sup>42</sup>2019-UNAT-930, para. 39.

be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law.”

67. Following the stripping of her functions as Chief of JMCC without justification and her replacement by Mr. Bakou on a permanent basis, the Applicant was humiliated. Her performance was unlawfully criticised. The Applicant fears for her career development, which has been compromised by the unlawful stripping of her functions.

68. The Applicant requests that the decision to remove her from the position of Chief of JMCC, to reassign her as Bonded Warehouse Supervisor be rescinded and that she be awarded compensation for reputational and moral damages caused by the unlawful reassignment.

69. In compliance with the recommendation of the Ethics Office, the Applicant seeks to be permanently removed from the reporting lines of her two reporting officers and requests to refer them for accountability pursuant to art. 10.8 of the Tribunal’s Statute.

*The Respondent’s case*

70. The Respondent contends that the Secretary-General has discretion to reassign staff under staff regulation 1.2(c). He claims that Heads of departments and offices have the authority to reassign staff members including to other units. Only the Organization can determine if a measure of such a nature is in its best interests.

71. However, this discretion is subject to examination. Pursuant to the *Sanwidi* test “the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally, and procedurally correct, and proportionate”.<sup>43</sup>

72. The length of the Applicant’s absence was unknown. Given the absence of international staff members within the Section, the Chief of MOVCON decided that another staff member would be assigned as Chief of JMCC, and that the Applicant would be appointed to perform Bonded Warehouse Supervisor functions upon return

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<sup>43</sup> 2010-UNAT-084, para. 42.

from sick leave. The Applicant was reassigned in line with the MOVCON Officer position she already held at the P-3 level. The contested decision was legal, rational, and procedurally correct.

73. The Respondent contends that the reassignment was in Goma, the same duty station where the Applicant was already appointed and that staff members work in the Bonded Warehouse where no security report indicates the area as unsafe.

74. On 3 February 2022, the Applicant and the Chief of MOVCON already discussed the reassignment for which he was not required to obtain her agreement prior to transferring her.

75. The Respondent claims that the Applicant did not perform her new functions based on her understanding that she had to wait for a MEU determination. As held by the Appeals Tribunal in *Silva*<sup>44</sup>, “it is not necessary that during the consultation, the administration discusses reasons for the intended administrative decision, or has to be ‘open’ and reconsider issuing the administrative decision”. Based on the needs of the Organization and the Applicant’s capacity to meet them, the contested decision was procedurally correct.

76. Based on her PHP, the Applicant possessed the competencies and skills for the Bonded Warehouse Supervisor functions. Her profile matches the TOR for the position. In determining whom to assign, the Chief of MOVCON considered three staff members’ PHPs at FS-4, FS-6 and P-3 levels that complete the Transportation Management training course. The Applicant’s qualifications and experience are prerequisites for optimizing the movement of freight and personnel contracted by the United Nations.

77. The Respondent found that the Applicant’s PHP, indicating private sector managerial experience, was the most suitable.

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<sup>44</sup> *Op. cit.*, at para. 77.

78. The Respondent contends that the Applicant has received the relief that she requests, and that the application is moot.

79. The Applicant never took up functions at the Bonded Warehouse (contested decision) and any damages would be relevant to her complaint for retaliation, which is under/pending investigation.

80. The decision to reassign the Applicant has been rescinded and superseded by the Applicant's reassignment to the Aviation Section under different reporting lines.

81. In fact, the Applicant stopped being in a professional relationship with her two reporting officers from 22 November 2021 to 31 January 2022 when she came back from CSL, and from 12 April to 12 July 2022, the period for which she was also placed on CSL. Thereafter, she did not work anymore within the same Section as her reporting officers. The Applicant accepted her reassignment to the Aviation Section on 18 July 2022. Her contract with the MONUSCO was extended until 30 June 2023.

82. The Applicant did not produce evidence of moral harm or harm to her career development. Compensation cannot be granted without illegality being established. Accordingly, there is no basis for the requested referral for accountability.

### **Considerations**

83. The Tribunal preliminarily notes that on 18 July 2022, MONUSCO and the Applicant agreed on her reassignment to the Aviation Section, where the Applicant started her service soon after.

84. In this situation, the challenged decision on the Applicant's reassignment to the Bonded Warehouse was superseded, and the Applicant has no more interest in that decision being vacated.

85. The Applicant, however, insists on claiming for damages related to that decision, which was in her view unlawful.

86. Being still matter of the dispute, although reduced in its content as above, the Tribunal has jurisdiction to assess the case.

87. Article 10.5(b) of the Dispute Tribunal's Statute stipulates that, as part of its judgment, the Dispute Tribunal may order:

(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.

88. Under art. 10.5(b) of the Dispute Tribunal's Statute, as amended by General Assembly resolution 69/203, compensation for harm should be supported by evidence; the Applicant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act.

89. The evidence should consist of three elements: an illegality, the harm, and a nexus between them. The Tribunal will assess these three elements in turn.

90. For damages to be awarded it is essential that a determination be made as to the lawfulness or otherwise of the decision to reassign the Applicant from the position of Chief of JMCC to that of Bonded Warehouse Supervisor within the MONUSCO Logistics Base in RVA.

91. The Tribunal is aware that the Secretary-General has wide discretion to reassign staff members and resources in the best interests of the Organization. However, this discretion is not unfettered, and can be declared unlawful.

92. In *Silva*<sup>45</sup>, UNAT pointed out that it was crucial to assess whether the reassignment was lawful or not, and that in this respect, and in line with settled jurisprudence, reassignment decisions need be properly motivated, or not be tainted by improper motives, or not taken in violation of mandatory procedures. Reassignment can be impugned if found capricious, or arbitrary, or motivated by prejudice, or by

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<sup>45</sup>*Ibid.*, at para. 76

extraneous factors, or flawed by procedural irregularities, or by error of law. It further recalled the standard method for assessing as per *Chemingui*<sup>46</sup> and *Rees*<sup>47</sup> included - but were not exclusive to – whether a reassignment was at the staff member’s grade, whether the responsibilities corresponded to his/her level, and whether the functions were commensurate with competence and skills.

93. At the hearing on her claim and on the facts related to it, the Applicant said that her supervisors sent their email of 25 November 2021 to scrutinize the Applicant’s performance only after they found out that she had filed a complaint against them, and she added that a meeting on performance never happened. She also claimed that, although committed to work, she was not fairly treated and there were detrimental conditions of working and that the accusations of retaliation remained without consequences for more than a year. She added that the Chief of Mission Support, Mr. Rogers Tonda, offered her a better assessment of the performance in return for withdrawing the accusations against her supervisors and that there is evidence of the meeting with him (the invoice of the dinner when it occurred). The allegation by the Applicant on the fact that Mr. Tonda approached the Applicant to have dinner with him, that he informed her that he had been made aware of her complaints against Mr. John and Mr. Opio and that her placement on a PIP would be dropped if she dropped her complaints against them, is corroborated by the audio recording of her conversation with Mr. Tonda (admissible evidence following *Asghar* 2020-UNAT-982, para. 43; see trial bundle, p. 398, Annex KK and Annex LL).

94. The Applicant further stressed that the reporting line also remained the same after her reassignment, and that she didn’t receive the TORs for the new functions for a long time.

95. The Tribunal is aware that in this case, the challenged decision is related only to the reassignment of the Applicant, and therefore that the initiation of a PIP, the delay

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<sup>46</sup> 2019-UNAT-930, paras. 38-40.

<sup>47</sup> 2012-UNAT-266, para. 58.



in assessing the harassment accusations, the refusal of temporary release of the Applicant to a different position, are not the subject of the present dispute.

96. However, the facts alleged by the Applicant constitute the framework in which the reassignment decision was taken, and therefore they are relevant as such.

97. The hearing confirmed that the SRO and the FRO played undoubtedly a role in the decision to reassign the Applicant to the Bonded Warehouse, in a different neighbourhood of Goma: indeed, Mr. Opio –while he confirmed that he was aware of the accusations of discrimination against him (motivated –he so said- for not having allocated a car to the Applicant and for having side-lined her in operational activities) and claimed he never participated in the PIP of the Applicant in that year (although contradicted by the document at page 224 of the trial bundle, annex X)- said in his testimony that he was not part of the decision-making to reassign the Applicant, which was made by Mr. John (see email recalled in para. 20).

98. In his testimony at the hearing, Mr. John confirmed he was aware of the sexual harassment accusation against him since his meeting with the CDT. He added that he was for a zero-tolerance policy against sexual harassment but objected that in the case he thought it was only a performance issue. Answering to a specific question by the Presiding Judge at the hearing, Mr. John denied having been in conflict of interest because the accusations against him were not proven and he was not informed of any outcome of the accusations of retaliation or misconduct. He confirmed that the Applicant's ePAS for 2020/2021 was corrected after the Ombudsman's intervention; he also confirmed he did not release the Applicant for a temporary job because she had a critical assignment, and she did not have a right for that release because that was not a recruitment. On a different side, he took responsibility for the decision of reassignment, saying that it was motivated by continuity and operational needs and that he chose the Applicant for objective reasons related to her experience and because she would have remained in his Section.

99. In his testimony, Mr. Idun confirmed that the Applicant was informed of her reassignment when on sick leave. He added that she refused to move and that he

advised her that there was no basis for refusal because the functions were of the same grade. He further confirmed the role played by the SRO in the decision of reassignment. Finally, he stated that his Office, HRM, ordinarily takes action after a claim of sexual harassment only after investigations have taken place.

100. The Tribunal notes with concern that the Administration, notwithstanding such a serious accusation (in particular, that one of sexual harassment by Mr. John) and the zero-tolerance policy it follows in the matter, did nothing to protect the Applicant after her complaint, leaving her instead subjected to the same reporting line, which had at the top the Applicant's SRO, that is the alleged sexual harasser of the Applicant.

101. Indeed, both the FRO and SRO, although accused by the Applicant, remained in their positions, and continue to manage the Applicant's working relationship, assessing her ePAS, deciding to put her on a PIP, and finally deciding her reassignment.

102. The Applicant convincingly affirmed that the finding of retaliation by the Ethics Office alone of 17 March 2023 is sufficient to establish that the reassignment decision was tainted by improper motives based on the attitudes and actions of Mr. John and Mr. Opio taken against the Applicant in bad faith. Indeed, although the finding refers to administrative acts that are not challenged in these proceedings, they constitute the framework of the relationship between the Applicant and her supervisors and raise the suspicion that also the reassignment was a special form of retaliation.

103. The Tribunal cannot but take into account the Ethics Office finding, although recalling the observations under para. 95.

104. It is also interesting to note that in the Memorandum on 17 April 2022, the Alternate Chair/EPUN, in reversing the determination of the Ethics Office of 28 December 2021, invited the Administration to move the Applicant to different reporting lines.

105. The Tribunal is, however, of the view that the challenged decision was unlawful for a different reason, that we can say it is upstream of the improper motives behind the decision we can presume by a mere inference.

106. Indeed, the Tribunal stresses the abnormality of a situation where an officer accused of serious misconduct (like indubitably sexual harassment is) can continue exerting powers towards the complainant. While it can be admitted that the accused officer remains in office till the investigation confirm the accusation, from the moment he is aware of the accusations he is in a situation of conflict of interest which imposed on him the obligation of abstention, refraining from any administrative act which involves or can impact, even indirectly, the complainant.

107. We can go also further, saying that the Administration, who receives the complaint of sexual harassment, must immediately not only investigate the facts (or close the case, communicating the closure to the complainant), but in any case, pending the case, intervene to prevent the accused from exerting his managerial powers towards the complainant; this obligation is larger than that one of the accused person and starts from an earlier moment, operating even during the period the accused person is not aware of the complaint.

108. The Administration seems to have followed this principle when, on 20 May 2022, the Chief of Section, HRM, wrote to the Applicant to inform her that her performance cycle 2021/2022 evaluation was withdrawn and would be performed by another Chief of Section.

109. It is clear in the rules that the existence of a conflict of interest undermines the powers of a manager to take decisions.

110. Staff regulation 4.2 provides that:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity...

111. Specifically, on conflict of interest, staff regulation 1.2(m) states that:

A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international

civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

112. The Report of the Secretary-General on Personal conflict of interest dated 27 June 2011 (A/66/98) stated:

Risks of conflict of interest can generally be found at two levels: (a) as organizational conflict of interest; and (b) as personal conflict of interest. An organizational conflict of interest arises where, because of other activities or relationships, an organization is unable to render impartial services, the organization's objectivity in performing mandated work is or might be impaired, or the organization has an unfair competitive advantage. A personal conflict of interest may generally be understood as a situation where a person's private interests interfere or may be perceived to interfere with his/her performance of official duties. The present report focuses on personal conflict of interest, in accordance with the emphasis on this subject matter in the request by the General Assembly in its resolution 65/247.

In general, the need to address and manage conflict of interest results from a risk assessment of staff members' potential exposure to competing interests through their work and status as United Nations officials. Certain functional areas, such as procurement, may provide greater potential for exposure to conflict of interest. However, other types of conflict-of-interest result from the risks inherent in all functions of an international civil servant, independent of any particular authority or position held by the staff member.<sup>48</sup>

113. On the same wavelength, the Standards of Conduct for the International Civil Service (2001) considers that "Conflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management".

114. Finally, it is worth recalling that the definition of conflict of interest in the Staff Regulations and Rules stems, in essence, from the written declaration (also referred to as the "Oath of Office") mandated for all staff members under staff regulation 1.1(b)

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<sup>48</sup>At paras. 4-5.

(see ST/SGB/2011/1), obliging them “to discharge these functions and regulate my conduct with the interests of the United Nations only in view”.

115. In the case at hand, the Administration –which had the obligation to ensure that any known conflict of interest could have no room in the management of the work relationship- should have put a remedy to the situation and intervened since the moment the complaint for sexual harassment was filed by the complainant, that is, since May 2021.

116. Apart from recourse to a precautionary measure, failure by the Administration to intervene made any act of exercise of managerial powers by the SRO towards the Applicant invalid, as affected by a conflict of interest by its author.

117. Although this conclusion applies to all the decisions taken by the Applicant’s SRO after the relevant date, the impropriety relevant in the present dispute is only that one related to the challenged decision, that is the decision to reassign the Applicant, which is unlawful because it was taken in a situation of conflict of interest. The reassignment happened when not only the Administration, but also the Applicant’s SRO, was fully aware of the complaint by the Applicant filed against him for sexual harassment.

118. The Tribunal observes on this point that it is irrelevant for the present case any consideration of the outcome of the complaint on sexual harassment, being the simple fact of the complaint relevant to create a situation of conflict of interest; this conflict is immediately operating and cannot be excluded even by a future outcome favourable to the manager.

119. The Tribunal preliminarily notes that the damage at stake in the case is the only one derived from the challenged decision, and therefore directly connected with the reassignment of the Applicant; the damage arising from other previous administrative decisions, although affected by the same impropriety of conflict of interest of their author, are not part of these proceedings.

120. As the Respondent highlighted, the 17 March 2023 Ethics Office determination -wherein the Ethics Office found that whilst the cancellation of the Applicant's 2020/2021 performance evaluation was not a retaliatory act, the proposal to place the Applicant on a PIP was retaliatory- is not relevant for the damages from the contested decision. This is also true for Annex II of the Applicant's submission, dated 22 February 2023, pursuant to Order No. 037(NBI/2023), in which there were findings of retaliation by the Alternate Chair of the Ethics Panel, as retaliation did not relate to the contested decision.

121. For the same reasons, the Applicant's request to refer the SRO and the FRO for accountability must be rejected, as it is connected to the accusations of retaliation more than to the administrative decision challenged in these proceedings.

122. Having so narrowed the damage relevant in this proceedings, the Tribunal recalls that the Applicant explained the humiliation that she felt after being removed from Chief of JMCC to being sidelined and reassigned to the Bonded Warehouse; she was no longer supervising her large team of international staff members and military contingents as she used to do as Chief of JMCC; her managerial functions were decimated significantly to supervising two United Nations Volunteers, who were not international staff members; she explained how she no longer felt like herself and how she was scared to go to the Bonded Warehouse, where there were constant attacks on United Nations personnel.

123. The Tribunal notes that the Applicant was reassigned to less important functions (the Respondent did not contrast the clear and specific allegation of the Applicant on this point), although of the same position level of her previous functions; it further notes that reassignment was not linked to poor performance by the Applicant (see the testimony by Mr. John on the reasons of his choice of the Applicant).

124. However, the Applicant did not work in the new functions for long, as she went soon on sick leave; the Applicant served few weeks in the Bonded Warehouse, and there is no evidence to support any damage to her reputation during that time.

125. The Tribunal is of the view that while the damage to the Applicant's professionalism did not have a chance to emerge, the reassignment could have impacted the well-being of the Applicant, causing her suffering, and therefore being relevant as damage to health.

126. As to this damage, the Respondent stresses on the basis of the Applicant's medical records that the initial diagnosis of "Burnout" was on 15 September 2021, over three months before the contested decision, and that the same diagnosis was maintained on 20 November 2021, 20 December 2021 and that none of these records identify the contested decision as the cause of the Applicant's alleged burnout. The Respondent further recalled that also personal reasons, such as familial problems (acknowledged by the Applicant in the cross-examination), impacted the situation.

127. The Applicant observed that her medical doctor deemed her fit to return to work from sick leave on 30 January 2022 and she returned, and that the reassignment to the Bonded Warehouse exacerbated her medical condition (see the medical report dated 20 April 2022 by the Applicant's treating physician, who refers to a "work-related stress reporting a hostile work environment that is affecting her mental health and well-being. The patient tried to return to work on 31 January 2022 but after her attempt the symptoms of fear, vulnerability, constant fatigue, chronic headaches and insomnia still persisted and worsened. She continues to show a sense of self-doubt with a pessimistic approach to her work and life.").

128. In the described situation, the Tribunal is of the view that, even if the Applicant's health conditions have origin both in her personal situation and in a work-related stress, the impugned decision in this case aggravated the Applicant's mental health, impacting her well-being in a continuous and deeper way. Therefore, moral damages must be awarded also for this kind of damage as well.

129. In *Maslei*,<sup>49</sup> the Appeals Tribunal found that an award of six months 'net base salary was adequate where similar medical harm was caused as a result of the Administration's impugned decision.

130. The Tribunal, considering that the reassignment is, on the one hand, a final step of a pattern of actions taken in a situation of conflict of interest and, on the other side, is in itself invalid as coming from a conflicted manager accused of serious misconduct, is also satisfied that in the situation the contested decision objectively affected not only the Applicant's professional reputation and health, but also the Applicant's dignity.

131. As UNAT stressed in *Kallon*<sup>50</sup>, the harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by art. 10(5)(b) of the UNDT Statute:

The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.

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<sup>49</sup> 2016-UNAT-637, para. 36.

<sup>50</sup> 2017-UNAT-742, paras. 66-68.



It could be argued that the amendment to Article 10(5)(b) was aimed at precluding awards of moral damages of the first kind identified in *Asariotis*. But that would be too far-reaching an interpretation. The purpose of the amendment was merely to introduce an express requirement that compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred. As such, it is a prudent and legitimate reminder to judges that harm should not be too readily assumed on an insubstantial factual basis, whatever the nature of the harm and the damages in issue, be they patrimonial or non-patrimonial.

The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence;[ ] or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute...

132. To quantify the damages to the Applicant for the moral harm suffered, in *Asariotis*<sup>51</sup>, UNAT held that:

The identification [of the moral injury sustained by the employee] 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 [...] [f]rom 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.

133. In applying this principle, the Tribunal finds necessary to refer to similar cases handled by UNAT. In *Rees*<sup>52</sup>, where the applicant challenged a decision of reassignment with procedural irregularities and without previous consultation with the staff member concerned, the UNAT awarded six months' base salary.

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<sup>51</sup> 2013-UNAT-309, para. 36.

<sup>52</sup>2012-UNAT-266, para. 83.

134. The Tribunal observes on this point, recalling what is already stated above about the irrelevance for the case of the outcome of the complaint on sexual harassment, that the offense to dignity comes from the simple fact that a person takes a managerial decision toward a person who, allegedly, is a victim of sexual harassment.

135. The Tribunal does not know at all if the accusation of sexual harassment, which have been detailed in no way in this proceeding, are founded or not, and therefore it cannot award those higher damages for the offense to dignity that would have come if the sexual harassment had been proved; in the case, the relevant damage is necessarily minor, related to the violation of the obligation of abstention by a conflicted person (and not by a sexual harasser).

136. The Tribunal notes with satisfaction that the Administration gave a partial remedy to the said illegality and decided to supersede the reassignment to the Bonded Warehouse and approved the Applicant's reassignment to the Aviation Section. This reduced the negative impact of the previous administrative decision and limited the damage produced.

137. Considering that the unlawful situation lasted from February to mid-July (that is more than five months), during which the Applicant continued receiving her salary, and on the other side that the damage was caused to health and dignity of the Applicant both, although in the measure above mentioned, considering also that the Administration finally moved the Applicant to more satisfactory functions, and having in mind the UNAT case-law, the Tribunal finds it fair to award the Applicant compensation for damage of three months 'net base salary in total.

### **Conclusion**

138. The application succeeds.

139. The Respondent shall pay to the Applicant damages equivalent to three months' net base salary at the P-3 level.

140. The compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date the Judgment becomes executable.

*(Signed)*

Judge Francesco Buffa

Dated this 9<sup>th</sup> day of June 2023

Entered in the Register on this 9<sup>th</sup> day of June 2023

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi