

2021-UNAT-1118, Boubacar Dieng

UNAT Held or UNDT Pronouncements

UNAT first dismissed the cross-appeal, finding that although the Administration has the discretion to reassign staff members, such reassignment must be reasonable in the particular circumstances and cause no economic harm to the staff member. It must also respect the procedural and substantive rules of law and must not be arbitrary. UNAT agreed with the UNDT that the reassignment was performance-related and yet the staff member was never allowed the opportunity to address his performance issues prior to being reassigned. Regarding the appeal, UNAT disagreed with the staff member that the UNDT had to order rescission. The Tribunal explained that the UNDT has the discretion to either order rescission or specific performance under Article 10 (5)(a) of the UNDT Statute or compensation for harm under Article 10 (5)(b). It may also order both of these remedies or just one of the two. In the instant case, the UNDT decided to order compensation only under Article 10(5)(b) of the UNDT Statute, and it has the discretion to do so. Regarding the staff member's claim that he suffered economic harm, UNAT agreed with the UNDT since he was transferred to another position at the same P-5 level, he suffered no economic prejudice. Regarding the staff member's request that moral damages be increased from one month to six months' net base salary for the stress and anxiety he suffered, UNAT disagreed and found that the UNDT did not commit any error of law in its assessment. Finally, as to reputational harm, UNAT disagreed with the UNDT. UNAT noted that despite the UNDT finding on the staff member's poor performance being communicated to others in the hierarchy, UNDT nevertheless deemed that the damage to his reputation was purely speculative. UNAT explained although there is no evidence of the staff member applying to jobs and being rejected as a result of his tarnished reputation, he nevertheless experienced this harm to his reputation, through increased stress and anxiety, which was documented. As such, UNAT ordered an additional one month's net base salary for moral harm, as a result of the damage to his reputation. Regarding the staff member's request for an apology, the Tribunal explained it was not within its remit to order such, and instead it ordered that the Judgment be placed in the staff

member's official status file. The request that the supervisor be referred for accountability was rejected on account that the breach in question did not exhibit the most serious flaws. The supervisor thought it was within his discretion when he decided to reassign the staff member.

Decision Contested or Judgment/Order Appealed

A staff member, previously serving as a Child Protection Officer at the P-5 level, challenged the decision of the Administration to reassign him to the position of Political Affairs Officer at the P-5 level within the same Mission. His supervisor had received complaints about his work and communication style and instead of addressing his unsatisfactory performance through the proper procedures, the supervisor decided to reassign him to a different unit to work in political affairs. The reassignment happened in April 2018, and the staff member received notice in October 2018 that his fixed term appointment will not be renewed after its expiration on 31 December 2018. The UNDT found the reassignment unlawful. It concluded the administrative decision was performance-related, and yet the proper procedures were not followed to address the staff member's performance issues. The UNDT also said there was a lack of transparency behind what truly motivated the reassignment decision, and it amounted to a veiled disciplinary measure. Notably, the tribunal did not order reinstatement because it found that the staff member was already separated from the organization, and that his separation was the subject of other proceedings. Because the staff member was reassigned at the same P-5 level, the tribunal found that he suffered no economic harm. Regarding the staff member's request compensation because of the harm to his reputation, the tribunal found that such claim was purely speculative. Regarding his request for moral damages for stress and anxiety, the tribunal credited the medical evidence the staff member provided and found a causal link between the administrative action and the harm he suffered. Accordingly, it awarded the staff member one month's net base salary. The staff member appealed the UNDT Judgment arguing *inter alia* that the tribunal erred because it did not rescind the reassignment decision and failed to recognize the reputational harm he suffered. The Secretary-General filed a cross-appeal arguing that the UNDT erred in finding the reassignment unlawful.

Legal Principle(s)

A reassignment must respect the procedural and substantive rules of law and must not be arbitrary. The UNDT has the discretion to order rescission or specific performance under Article 10 (5)(a) of the UNDT Statute or compensation for harm under Article 10 (5)(b). It may also order both of these remedies or just one of the two. A transfer to a position at the same level does not show any economic prejudice on its face. The UNDT is best positioned to determine the level of compensation to be given based on its appreciation of a case. Damage to reputation can be compensated as moral harm, if the staff member can demonstrate that the harm to his reputation has caused him stress and anxiety. The Tribunal has no jurisdiction to order the Administration to issue an apology. The exercise of the power of referral for accountability under Article 9(5) of the UNAT Statute must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.

Outcome

Appeal granted in part; Cross-appeal dismissed on merits

Outcome Extra Text

The staff member's appeal is granted, in part. The Tribunal increased the compensation awarded for moral harm with an additional one month's net base salary, in consideration of the reputational harm suffered by the staff member. The Tribunal also ordered that a copy of the present Judgment be placed in the staff member's official status file. The cross-appeal is dismissed.

Full judgment

[Full judgment](#)

Applicants/Appellants

Boubacar Dieng

Entity

UNAMID

Case Number(s)

2020-1430

Tribunal

UNAT

Registry

New York

Date of Judgement

25 Jun 2021

President Judge

Judge Raikos

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Evidence of harm

In-lieu compensation

Loss of chance

Non-pecuniary (moral) damages

Pecuniary (material) damages

Due process

Right to comment/respond

Performance management

Reassignment or transfer

Discretion
Referral for accountability
Remedies
Compensation (see also, Compensation)
Rescission

Applicable Law

Administrative Instructions

- ST/AI/2010/5
- ST/AI/2017/1
- ST/AI/371

Staff Regulations

- Regulation 1.2(c)

UNAT Statute

- Article 9.1(b)
- Article 9.5

UNDT Statute

- Article 10
- Article 10.5(a)
- Article 10.5(b)
- Article 2.1(e)

Related Judgments and Orders

UNDT/2020/093
2021-UNAT-1166