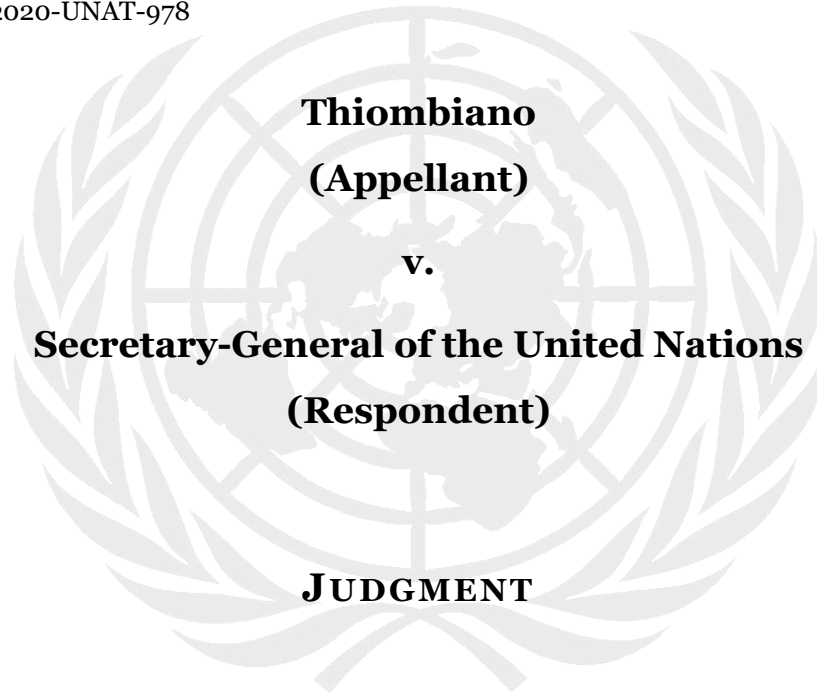




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-978



**Thiombiano
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Sabine Knierim Judge Jean-François Neven
Case No.:	2019-1276
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Mr. Thiombiano:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Ousseini Thiombiano, a Programme Assistant with the United Nations Population Fund (UNFPA) in Agadez, Niger, filed an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) challenging the decision to extend his fixed-term appointment (FTA) in several extension increments pending the rebuttal process of his performance appraisal and requesting that the UNDT confirm the conversion of his appointment to a continuing appointment. The UNDT dismissed the application on grounds that his challenge relating to the extensions was not receivable as he had failed to timely request a management evaluation. The UNDT also dismissed Mr. Thiombiano's claim for a continuing appointment, finding that Mr. Thiombiano had been informed that his appointments were extended pending the review of his performance appraisal by the UNFPA Rebuttal Panel and therefore he had no basis to presume that his appointment would be converted into a continuing one. Mr. Thiombiano now appeals the UNDT's Judgment No. UNDT/2019/079 to the United Nations Appeals Tribunal (Appeals Tribunal). On appeal, we uphold the UNDT's Judgment and dismiss the appeal.

Facts and Procedure

2. On 7 May 2015, by way of letter, the UNFPA Representative of the Country Office in Niger informed Mr. Thiombiano of the decision not to renew his FTA upon its expiry on 14 August 2015 for performance reasons. Mr. Thiombiano filed a request for management evaluation and requested the Executive Director of UNFPA to suspend the decision pending the outcome of the management evaluation. The UNFPA Executive Director agreed to suspend the decision and extended Mr. Thiombiano's appointment to 10 September 2015. Mr. Thiombiano submitted a rebuttal statement to his 2015 performance appraisal and development (PAD) report.

3. The UNFPA Executive Director replied to Mr. Thiombiano's request for a management evaluation and rescinded the non-renewal decision on grounds that it had not been taken in accordance with the terms of the UNFPA's Separation Policy. Mr. Thiombiano was informed that his FTA would be extended until 29 February 2016.

4. On 6 April 2016, Mr. Thiombiano was informed that his appointment had been extended retroactively from 1 March 2016 to 31 March 2016 and from 1 April 2016 to 30 April 2016. On 29 April 2016, Mr. Thiombiano requested a management evaluation of the decisions to retroactively extend him. The UNFPA Executive Director's response to his request concluded that these extensions were lawful.

5. On 12 April 2016, Mr. Thiombiano was informed that his appointment would be extended until 15 May 2016 and should the review by the UNFPA Rebuttal Panel not be completed before that date, his appointment would be further extended on a monthly basis until the rebuttal review was completed. Mr. Thiombiano filed a request for management evaluation of this decision.

6. On 11 May 2016, Mr. Thiombiano was informed that his appointment was extended until 15 June 2016.

7. On 12 July 2016, the UNFPA Executive Director, in response to Mr. Thiombiano's request for management evaluation of the 12 April 2016 decision, concluded that the decision to extend him was correctly based on the evaluation of his performance as reported in his PAD report but before his rebuttal. He was informed that his appointment would be renewed to allow the UNFPA Rebuttal Panel's review. The issue of the renewal of his appointment would be based on the outcome of the review.

8. The UNFPA Rebuttal Panel completed its review on 23 August 2016 and changed Mr. Thiombiano's rating in his 2015 PAD report from "developing" to "fully proficient". He was also informed that the decision not to renew his appointment was rescinded and that he would be extended until 31 March 2017.

9. On 14 September 2016, Mr. Thiombiano filed an application before the UNDT.

10. On 10 May 2019, the UNDT in Nairobi issued Judgment No. UNDT/2019/079 and dismissed the application. The UNDT found that the application as related to the decision to extend his appointment from 11 September 2015 to 29 February 2016 was not receivable as he had not filed a request for management evaluation as required under Staff Rule 11.2(a) and Article 8(1)(c) of the UNDT's Statute. His claim that his appointment should be converted into a continuing one was rejected. The UNDT found there was no basis for Mr. Thiombiano to expect a continuing appointment as such were not granted as a matter of

law but were subject to the fulfillment of eligibility criteria and an approval process. He had been clearly informed that his extensions were finite and for the duration of the work of the UNFPA Rebuttal Panel and therefore had not entailed an *ex lege* conversion to a continuing appointment. The extensions of his appointment were lawful. Regarding Mr. Thiombiano's mention of retaliation and the retroactivity of his fixed-term appointments, the UNDT found that any such irregularities in issuing those appointments could cause vexation but did not amount to a serious violation of rights. The UNDT rejected Mr. Thiombiano's claim for moral damages.

11. On 24 June 2019, Mr. Thiombiano filed an appeal against the UNDT's Judgment and on 23 August 2019, the Secretary-General filed his answer.

12. On 26 September 2019, Mr. Thiombiano filed a motion requesting leave to file additional pleadings seeking to set forth his reply to the Secretary-Generals answer. On 14 October 2019, the Secretary-General filed his comments to the motion arguing that Mr. Thiombiano had not established exceptional circumstances to warrant an additional pleading and in the additional pleading he merely reiterated the arguments he had previously set forth in his appeal brief.

13. On 23 October 2019, Mr. Thiombiano e-mailed the Appeals Tribunal's Registry requesting *inter alia* that he introduce two documents: a copy of the impugned Judgment and a letter of appointment for one year beginning on 15 August 2014. The Registry forwarded his e-mail to the Secretary-General's counsel for comment. The Secretary-General replied on 18 November 2019, noting that the two documents had already been annexed to Mr. Thiombiano's application before the UNDT, but stating that he had otherwise no comments on Mr. Thiombiano's e-mail. Mr. Thiombiano's motion is addressed herein.

Submissions

Mr. Thiombiano's Appeal

14. Mr. Thiombiano requests the Appeals Tribunal to vacate the UNDT's Judgment and order the conversion of his FTA to a "permanent" (continuing) appointment in accordance with Staff Rules 4.5 and 13.4.¹ He seeks compensation in the amount of XOF 48,348,000²

¹ Mr. Thiombiano refers to a "permanent" appointment but the type of appointment at issue in this matter is a "continuing" appointment.

and requests this Tribunal to order “the immediate implementation of the recommendation of the Ethics Advisor which ha[d] been endorsed by the [UNFPA] Executive Director”.

15. Mr. Thiombiano argues that the UNDT Judge had previously served as a Judge for the United Nations in Kosovo, and thus has a professional relationship with the Organization which constitutes a conflict of interest per Article 28 of the UNDT’s Rules of Procedure. Mr. Thiombiano also argues that the UNDT ignored the applicable law when it refused to convert his FTA into a continuing appointment. His appointment was extended retroactively and with a significant delay. The absence of a written contract to extend his appointment means that his employment relationship with the Organization should be reclassified as a permanent contract. The Operations Manager and Directory Focal Point of the UNFPA Country Office did not act diligently to extend his FTA timely and thus is culpable in such mismanagement. The UNDT wrongfully refused to convert his appointment to a permanent appointment without any legal grounds and thus its decision in this regard was arbitrary and should be vacated. The UNDT recognized the Organization’s failings with regard to timely extending his appointment but did not address this failing, leading to a miscarriage of justice.

16. Mr. Thiombiano also argues that the UNDT’s Judgment is flawed as it denied his request for moral damages. He initially requested the UNDT to allow him to submit evidence of the harm he had suffered. The UNDT had not responded to his request yet held in its Judgment that he failed to offer evidence of moral damages. By refusing his request, the UNDT failed to consider facts and evidence supporting his claim. The UNDT did not issue a Judgment for approximately three years and such a delay contributed to his harm. For such harm, he requests the Appeals Tribunal award him three months’ net base salary (NBS) in compensation for the harm caused by the stalling, frustration, and vexation resulting from this procedural delay.

17. Mr. Thiombiano further argues that the UNDT was not correct when it stated in its Judgment that he did not allege a nexus between the complaint of retaliation and the retroactivity of his FTA, as the investigation report and recommendations made by the Ethics Advisor constitute official documents attesting to the harm he had suffered.

² Mr. Thiombiano requests XOF 48,348,000 (West African Francs) which amounts to approximately USD 83,000.

18. Mr. Thiombiano requests the Appeals Tribunal to award him compensation as follows: (i) three months' NBS for the UNDT's procedural delay of three years; (ii) 24 NBS (12 months each) for the two decisions not to renew his appointment; (iii) 12 months' NBS (6 months each) for the two abusive and irregular performance evaluations; (iv) 12 months' NBS for "the irregular situation involving the [FTA] for more than three years"; and (v) the implementation of the recommendations made by the Ethics Advisor which is to place him in the same situation he would have been in had the retaliatory behaviour not occurred.

The Secretary-General's Answer

19. The Secretary-General requests this Tribunal to dismiss the appeal and affirm the UNDT's Judgment. Mr. Thiombiano did not appeal the UNDT's finding that his challenge regarding the first extension of his appointment was not receivable and therefore this Tribunal should affirm the UNDT's Judgment. The UNDT correctly concluded that the second and third extensions were lawful as the retroactivity of these extensions had not rendered them unlawful. Also, the delay in informing Mr. Thiombiano of the extensions did not bear on their legality. The UNDT also correctly held that these extensions did not automatically render his appointment continuing as such appointments were only made following a verification process. Furthermore, Mr. Thiombiano had been clearly informed that his appointment would be extended monthly until the rebuttal process had concluded. Staff Rule 4.5(c) and Section 15 of the UNFPA's Policy on fixed-term and continuing appointments do not carry any expectation, legal or otherwise, of renewal. There was also no lawful expectation for his appointment to be automatically converted. Staff Rule 13.4 regulated conversions into continuing appointments and there is a thorough review process involved. The jurisprudence provides that for a staff member to have a legitimate expectation of a renewal this expectation must be based on a firm commitment to renewal revealed by the circumstances. There was no commitment communicated by the Administration in this regard. To the contrary, Mr. Thiombiano had been informed that his incremental renewals were effected only pending the rebuttal process.

20. Mr. Thiombiano has failed to identify any conflict of interest on the part of the UNDT Judge. Mr. Thiombiano claims that the UNDT Judge served as an international Judge in the United Nations Interim Administration Mission in Kosovo (UNMIK) and that by virtue of her role as a UNDT Judge, she is a staff member of the Organization with a professional relationship to the Organization in violation of Article 27 of the UNDT Rules of Procedure.

This logic would render all Judges of the UNDT in conflict. The UNDT Judges serve at the appointment of the General Assembly and are independent officials, not staff members. Thus, Mr. Thiombiano has failed to establish a conflict of interest in the present case.

21. Mr. Thiombiano has failed to identify any appealable errors, including the UNDT's rejection of his claim for moral damages. Mr. Thiombiano argues that he asked the UNDT to allow him to submit evidence of harm in support of his request for moral damages. It was not necessary to request leave to produce evidence as the UNDT's Rules of Procedure require applicants to produce supporting evidence.

22. Regarding his claim that he should be compensated for procedural delay, the Appeals Tribunal is not competent to award compensation for alleged delays in the UNDT proceedings as this would amount to holding the Secretary-General accountable for proceedings by the UNDT Judges, who are independent.

Considerations

Motion for additional pleadings/e-mail to introduce two documents

23. Mr. Thiombiano filed a motion for leave to file additional pleadings in order to reply to the Respondent's answer. However, a review of Mr. Thiombiano's submissions in support of the motion leads us to conclude that what Mr. Thiombiano seeks via this motion is to supplement his appeal with the arguments in order to rebut the ones in the answer or to re-argue and re-try the merits of his application to the Dispute Tribunal. Apart from the fact that there is no provision in our Statute to justify the filing of additional pleadings, our jurisprudence has established that this could only occur in exceptional circumstances.³ In view of the foregoing, the motion is denied as no exceptional circumstances are present.

Merits

24. The three main issues for consideration and determination in this appeal relate to i) whether the Judge who issued the impugned Judgment was conflicted or biased and ii) whether the Dispute Tribunal committed an error in law or in fact resulting in a manifestly

³ *Khisa v. Secretary-General of the United Nations*, Order No. 329 (2018); *He v. Secretary-General of the United Nations*, Order No. 312 (2018); *Koumoin v. Secretary-General of the United Nations*, Order No. 305 (2017); *Chrichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035; *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044.

unreasonable decision, when it found a) that there was no legal basis for Mr. Thiombiano's claim that his appointment had been converted into a continuing one; and b) that there were no grounds to entertain the question of moral damages.

25. The Judgment, insofar as it relates to the non-receivability of the application regarding the decision to extend Mr. Thiombiano's appointment from 11 September 2015 until 29 February 2016, was not challenged in his appeal.

Conflict of interest

26. Staff Regulation 1.2(m) "Basic rights and obligations of staff" reads:⁴

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.

27. Article 27 of the Dispute Tribunal's Rules of Procedure defines conflict of interest as including any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her, or any personal relationship with the judge, any matter in which the judge has previously served in another capacity, or any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate. The Appeals Tribunal's Rules of Procedure contain the same language on this matter.

28. In the case at hand, Mr. Thiombiano alleges that the fact that the UNDT Judge who drafted the Judgment had previously been a staff member of the Organization is enough to cast doubt on her impartiality, since the Organization is also a party in the case. The Judge should thus have recused herself, according to Article 28 of the UNDT Rules of Procedure.

⁴ Secretary-General's Bulletin ST/SGB/2012/1 effective 1 January 2012.

29. We find error with Mr. Thiombiano's arguments. Firstly, because technically speaking, the Judge who signed the Judgment had previously been a Judge and therefore an "official",⁵ rather than a "staff member", to another court of the United Nations system of justice, hence, not subject to the Dispute Tribunal's jurisdiction. Secondly, because her previous mandate as a Judge had long finished at the time of the issuance of the impugned Judgment, which was, at the earliest, the moment when she took her post as a full-time Judge for the UNDT. Thirdly, and more importantly, none of the circumstances aforementioned in the law relating to conflict of interest are met in the present case. It is clear that Mr. Thiombiano does not agree with the Judgment, but to cast aspersions on a Judge just because the judgment does not satisfy a party's interest is an impropriety.

30. Mr. Thiombiano's unsubstantiated allegations of bias and conflict of interest are therefore rejected.

Conversion of the fixed-term appointment into a continuing one

31. Mr. Thiombiano claims that the UNDT erred when it did not convert his FTA into a continuing one as of 1 March 2016. Since FTAs are precarious and he had not had a formal extension, despite continuing the employment relationship by the end of his last FTA on 29 February 2016, his appointment should have been automatically converted into a continuing one. Mr. Thiombiano also argues that there is no provision allowing for the Organization to retroactively extend his FTA, as it happened, with the consequence that, in his view, these further extensions were invalid.

32. It is indisputable that the Organization should have formally extended Mr. Thiombiano's FTA before the last expiry date on 29 February 2016. The UNDT Judgment acknowledged that it was not a good practice to retroactively extend the FTAs as of 1 March 2016 by the 6 April 2016 decision, even though the rebuttal process by which Mr. Thiombiano had questioned his performance appraisal was still ongoing at that time and there had been a previous decision to extend his FTA for a period equivalent to the duration of this process.⁶

⁵ Article 4(12) of the UNDT Statute.

⁶ Impugned Judgment, paras. 8, 47 and 48.

33. What is really in question here is whether the conclusion reached by the UNDT that this bad practice did not have any bearing upon the legality of the FTAs is in fact correct. In other words, the real issue for consideration here is whether the UNDT's finding that the procedural irregularity of the retroactive extension of FTAs did not amount to illegality is indeed accurate.

34. With regard to due process, we have consistently held the view that only substantial procedural irregularities can render an administrative decision unlawful.⁷ Regarding the options given to the Administration to grant appointments, Staff Regulation 4.5 and Staff Rules 4.12 and 4.13 provide that both temporary FTAs do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. While a temporary appointment shall not be converted to any other type of appointment,⁸ the fixed-term appointment carries some exception to that effect, as indicated in Staff Rules 4.13(c) and 4.14(b).

35. This FTA exception relates to staff members who shall be granted a continuing appointment, provided that they are recruited upon successful completion of a competitive examination according to Staff Rule 4.16, after two years on a fixed-term appointment, subject to satisfactory service. The approach suggested by Mr. Thiombiano would undermine this particular provision. He seeks automatic conversion of his FTA to a continuing appointment, whereas the law requires more, namely, successful completion of a competitive examination and satisfactory service. In the present case, there is no evidence on the record of a competitive examination. Moreover, to the extent that Mr. Thiombiano fully complied with the requirement of satisfactory service, this completion only came to light on 23 August 2016, when the UNFPA Rebuttal Panel changed his overall rating in the 2015 PAD report from "developing" to "fully proficient". In the meantime, the extensions of his FTA had already been retroactively issued by the 6 April 2016 decision.

36. Additionally, the mere satisfaction of a good rating in the development assessment does not guarantee an automatic conversion of an FTA into a continuing appointment, since the latter is an open-ended appointment granted through the established procedures in accordance with the Staff Regulations and Rules, as well as the provisions of Secretary-General's Bulletin ST/SGB/2011/9, on the basis of the continuing needs of the

⁷ *Muindi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-782.

⁸ Staff Rule 4.12(c).

Organization as defined in the provisions of the General Assembly. These provisions contain requirements such as selection through competitive process, assessment by the Secretariat review body, a performance rating of at least “meets expectations” or equivalent in the four most recent performance appraisal reports, a certain number of years of service remaining before reaching the mandatory age of separation from the Organization, not to mention the requirements related to the geographical recruitment area and the absence of any disciplinary measures during the five years prior to considering the person in question for a continuing appointment.

37. Mr. Thiombiano did not provide the Tribunal with any evidence thereabout. His appeal, and apparently his initial application to the UNDT, are simply based on the impossibility of the retroactive extension of his FTAs. Although there could have been grounds for his appeal in some national labour tribunals, as discussed previously, this is not a sufficient basis for granting his claim under the applicable legal framework. This, coupled with the fact that Mr. Thiombiano was made aware since the 8 September 2015 decision that his FTA would be extended pending the appropriate assessment of his performance by the UNFPA Rebuttal Panel,⁹ is sufficient to conclude that the UNDT was correct in its finding that there was no basis for the conversion of the FTA into a continuing appointment in the case at hand.

38. Consequently, it is our view that the procedural irregularities, in particular, the retroactive extension of his FTA, although avoidable and regrettable in the circumstances of this case, were immaterial and inconsequential within the context of Mr. Thiombiano’s appointment.

Compensation for moral damage

39. Mr. Thiombiano’s contention that the UNDT did not grant him an opportunity to provide evidence of the moral damages he alleges he suffered, in spite of the three-year delay in issuing its Judgment is without merit. Notwithstanding the fact that Mr. Thiombiano requested authorization to submit evidence in his initial application, as acknowledged by the

⁹ Impugned Judgment, para. 8.

Secretary-General in his answer to the appeal, it was incumbent upon Mr. Thiombiano to submit such evidence, according to the UNDT's Rules of Procedure.¹⁰

40. There was, thus, no need to request special leave for such submission. If a concerned party does not submit his or her own evidence, it is not for the Tribunal to presume that the party is waiting for an order before submitting any supporting documentation or evidence.

41. Another point raised by Mr. Thiombiano is the UNDT's delay in issuing its own Judgment. However regrettable this delay might be for a party who seeks justice, this does not have the effect of entitling Mr. Thiombiano to any compensation for moral damage from the Secretary-General, which is related to the previous employment relationship. Mr. Thiombiano seems to have been misled in this regard. To the extent that the delay in issuing the Judgment occurred, it did not stem from any act of the Secretary-General or of Mr. Thiombiano's superiors. Thus, the delay in question is beyond the scope of his initial application.

42. The other claims and issues highlighted by Mr. Thiombiano as possible grounds for compensation for moral damages, such as the implementation of the Ethics Advisor's conclusions following the complaint against Mr. Thiombiano's supervisors filed in June 2016, do not fall within the scope of Mr. Thiombiano's application, as so received by the UNDT. In this regard, the UNDT only received the application which challenged the retroactivity of the 6 April 2016 decision to extend his FTA from 1 to 31 March 2016 and from 1 to 30 April 2016.¹¹ Therefore, since the decision to extend his FTA had been taken much earlier than the filing of the complaint against his supervisor, there could be no causal link between the filing and the extension, which would thus justify any possible award of compensation for moral damage. The UNDT was correct in its finding.

43. Moreover, the rescission of the Administration's previous decision following Mr. Thiombiano's internal challenge does not count in his favour for the purposes of compensation for moral damage. On the contrary, this only demonstrates that the Administration was ready to recognize that the challenged decision had not been taken in accordance with the applicable law, and itself rescinded the impugned administrative

¹⁰ Article 8(2) of the UNDT's Rules of Procedure prescribes that the application should include, amongst other things, "any supporting documentation".

¹¹ Impugned Judgment, para. 2.

decision. The rescission was favourable to Mr. Thiombiano's immediate interests, not to mention that this was made within the time limit of only a little more than a month between the request for management evaluation and the rescission.¹² While we understand a degree of frustration stemming from Mr. Thiombiano's appeal, particularly related to the errors previously made by the Administration towards him, it is undeniable that the Administration corrected them as soon as requested to do so. To award compensation for moral damage based on the administrative rescission, or any other internal documents that supported it, could be perceived as a possible deterrent or discouragement to future rescissions by the Administration, and possibly even a threat to the regular functioning of the informal dispute resolution system within the Organization.

44. It is therefore the considered view of this Tribunal that the circumstances in the present case did not qualify the UNDT to invoke its statutory jurisdiction to award compensation for moral injury. There is no merit in any of Mr. Thiombiano's complaints and the UNDT did not err in concluding that there were no grounds to entertain the issue of moral damage.

¹² Mr. Thiombiano submitted his request for management evaluation on 24 July 2015 and the Executive Director of UNFPA rescinded the contested decision by response on 8 September 2015; *see* Impugned Judgment, paras. 5 and 8.

Judgment

45. The appeal is dismissed and Judgment No. UNDT/2019/079 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Halfeld, Presiding
Bournemouth, United Kingdom

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Neven
New York, United States

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar