UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1441

AAR[1]

(Appellant/Respondent)

v.

Secretary-General of the United Nations

(Respondent/Appellant)

JUDGMENT

Before:	Judge Leslie F. Forbang, Presiding Judge Nassib G. Ziadé Judge Graeme Colgan
Case Nos.:	2023-1786 & 2023-1788
Date of Decision:	22 March 2024
Date of Publication:	29 May 2024
Registrar:	Juliet E. Johnson

Counsel for AAR:	George G. Irving
Counsel for Secretary-General:	Patricia C. Aragonés

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

JUDGE LESLIE FORMINE FORBANG, PRESIDING.

1. AAR, a P-3 Security Coordination Officer with the United Nations Department of Safety and Security (UNDSS) in Somalia contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision to issue a written reprimand and to place it in his Official Status File (contested decision). By Judgment No. UNDT/2022/133 (impugned Judgment), the UNDT granted the application, in part. The UNDT affirmed the contested decision, but awarded AAR USD 5,000 for moral harm caused by the delay of almost two and a half years to finalize the disciplinary process.

2. AAR and the Secretary-General both appealed against the Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).

3. For the reasons that follow, we dismiss both appeals and affirm the impugned Judgment.

Facts and Procedure

4. AAR serves as Security Coordination Officer with UNDSS in Somalia at the P-3 level on a fixed-term appointment. At times relevant to the present case, AAR served as acting Chief Security Officer (CSO) with the United Nations Mission in Kosovo (UNMIK), following the departure of the former CSO, Mr. V, in early November 2016 and until the arrival of the new CSO in June 2017. Thereafter, AAR served as Deputy CSO.[2]

5. On 27 October 2016, the former CSO reassigned Ms. A, a local staff member, effective 1 November 2016, within UNMIK.[3]

6. By e-mail on 7 November 2016, Ms. A contacted the Special Representative of the Secretary-General at UNMIK (SRSG) to express her concerns about her reassignment as she was not able to work shifts as required by the new assignment due to family commitments and health reasons.[4]

[2] Impugned Judgment, paras. 1 and 2.
[3] *Ibid.*, para. 3.
[4] *Ibid.*, para. 4.

7. On 14 November 2016, in a meeting discussing her reassignment with AAR, as acting CSO, Ms. A informed AAR that she had been sexually harassed by the former CSO, that she had been reassigned by the former CSO after she had turned down his sexual advances, and that she was going to harm the former CSO personally and professionally because he had sexually harassed her and reassigned her. AAR, *inter alia*, reminded Ms. A of the options available to her, such as filing a complaint of prohibited conduct.[5]

8. Following a meeting with Ms. A on 24 November 2016, AAR learned that Ms. A had been telling colleagues that she had suffered a miscarriage after he (AAR) had shouted at her, and that she was writing to UNMIK senior management about him and the former CSO.[6]

9. On 5 December 2016, AAR sent an e-mail to the former CSO, informing him that Ms. A claimed her reassignment was due to her refusal of his "sexually oriented tenderness towards her".[7]

10. On 15 January 2017, Ms. A filed a report of misconduct with the UNMIK Conduct and Discipline Unit, alleging that she had been harassed, intimidated, and retaliated against by AAR in the context of her reassignment. The subsequent investigation did not discover evidence of any prohibited conduct by AAR.[8]

11. On 2 February 2017, Ms. A filed a protection against retaliation request (PAR request) with the United Nations Ethics Office (Ethics Office), alleging that AAR had retaliated against her. The subsequent investigation found no *prima facie* case of retaliation.[9]

12. On 22 February 2017, AAR was approached about the former CSO's alleged arrest for involvement in prostitution. AAR contacted the former CSO, who in turn e-mailed the SRSG to request that the "slandering of [his] character and professionalism" be addressed and identified Ms. A as the source of the rumour. By return e-mail this same day, the SRSG informed the former CSO that he would ask the Conduct and Discipline Unit (CDU) to open an investigation (slander case).[10]

[5] *Ibid.*, paras. 36 and 37.
[6] Annex 3 to application before the UNDT, Allegations Memorandum dated 5 November 2020.
[7] Annex 2 to AAR's appeal.
[8] Impugned Judgment, para. 6.
[9] *Ibid.*, paras. 7 and 9.
[10] Annex 4 to AAR's appeal.

13. On 9 March 2017, the CDU contacted AAR to discuss the case and forwarded the correspondence between the former CSO and the SRSG, entitled "Ms. A.".[11]

14. On 30 March 2017, while AAR was being interviewed as a subject of allegations of harassment and abuse of authority against him by Ms. A, AAR told the interview panel, without having been prompted, that Ms. A was the source of the rumours against the former CSO.[12]

15. On 5 April 2017, the CDU referred a case of alleged rumours against the former CSO (the rumour case) to AAR, as acting CSO, for investigation. AAR assigned Mr. F, Ms. A's First Reporting Officer at the time, to investigate the source of the rumours. AAR gave instructions to Mr. F regarding the first four witnesses to be interviewed (which included AAR), shared his views that Ms. A was the source of the rumours, approved witness questions, and participated and asked questions in witness interviews. When Mr. F had to depart on family emergency leave, AAR tasked Mr. T with completing the investigation and issuing its report. The report, issued on 27 June 2017, was inconclusive regarding the source of the rumours.[13]

16. On 13 June 2017, Ms. A filed a second PAR request with the Ethics Office, alleging that AAR retaliated against her, identifying five retaliatory acts.[14]

17. On 12 July 2017, the Ethics Office found a *prima facie* case of retaliation by AAR against Ms. A. with respect to three of the five reported acts and referred the matter to the Office of Internal Oversight Services (OIOS).[15]

18. On 12 October 2017, OIOS began its investigation after a three-month suspension for an attempted informal resolution of Ms. A.'s complaint. AAR was interviewed on 24 August 2018. On 31 December 2018, OIOS issued its investigation report in which it found reasonable grounds to conclude that AAR's conduct was inconsistent with the standards expected of a United Nations civil servant, having found that AAR had engaged in retaliatory conduct against Ms. A with respect to two of the three referred acts.[16]

[11] Reply before the UNDT, para. 25.
[12] Impugned Judgment, para. 49; Transcript of AAR's interview on 30 March 2017, Annex 4 to application before the UNDT; OIOS investigation report, para. 157, Annex 6 to AAR's appeal.
[13] Annex 10 to application before the UNDT.
[14] Impugned Judgment, para. 11.
[15] *Ibid.*, paras. 12 and 13.
[16] *Ibid.*, paras. 15 and 16.

19. On 4 March 2019, UNMIK referred AAR's case to the Office of Human Resources (OHR) for appropriate action.[17]

20. On 5 November 2020, the Director of the Administrative Law Division, OHR, informed AAR of the allegations of misconduct against him and referred him to Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), to which AAR submitted written comments on 22 January 2021.[18]

21. By letter dated 8 June 2021, the Assistant Secretary-General for Human Resources (ASG/OHR) informed AAR of the decision not to recommend the imposition of a disciplinary measure against him, after having considered the entire dossier, but to close the matter with the issuance of a written reprimand that would be placed in his Official Status File. Specifically, the ASG/OHR found that (i) under Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), it had been "wholly inappropriate [for him] as a manager and as [Ms. A's] Second Reporting Officer at the time, to share [her] allegations with [the former CSO], the alleged offender, no matter whether [he] believed [Ms. A's] allegations or not;" and (ii) having been aware of Ms. A's complaint against him and knowing that she had been identified by the former CSO as a potential subject in the slander case, he should have disclosed to his head of office this conflict of interest, as required by Staff Regulation 1.2(m), and recused himself from participating in any involvement in the investigation of the slander case, in accordance with Staff Rule 1.2(q).[19]

22. On 8 July 2021, AAR filed an application with the UNDT challenging the contested decision.[20]

23. On 22 December 2022, the UNDT issued Judgment No. UNDT/2022/133. The UNDT affirmed the contested decision but found that a delay of almost two and a half years to finalize the disciplinary process was unjustified. The UNDT stated that it is the responsibility of the Organization to conduct disciplinary matters in a timely manner "to avoid a breach of the staff member's due process rights" and to avoid keeping a staff member in "limbo" as to the outcome of a disciplinary

[17] *Ibid.*, para. 17.
[18] Annexes 6 and 7 to AAR's appeal.
[19] Annex 2 to application before the UNDT.
[20] Impugned Judgment, para. 21.

process.[21] After assessing AAR's alleged harm and evidence, the UNDT found "a causal link between the undue delay in completing the disciplinary process and the deterioration of [AAR's] mental health and well-being".[22] On this basis, the UNDT awarded AAR USD 5,000 for moral harm.

24. On 14 February 2023, AAR filed an appeal of Judgment No. UNDT/2022/133. The Secretary-General filed his answer on 24 April 2023.

25. On 20 February 2023, the Secretary-General also filed an appeal. AAR did not file an answer to the Secretary-General's appeal.

Submissions

AAR's Appeal

26. With respect to the scope of review, AAR claims that he has been "criticized for reasonable managerial decisions" which were "seen in isolation" because OIOS and the UNDT "ignored" Ms. A's prior unsubstantiated complaints; that the "starting point" for the Ethics Office inquiry and OIOS investigation should have been those prior complaints; that "no action" was taken against Ms. A; that the Ethics Office misrepresented to OIOS that AAR was the reason why an informal resolution with Ms. A had been unsuccessful, claiming he was kept "in the dark" by the Ethics Office; and that AAR was reprimanded for actions done as part of his official functions.

27. AAR claims that the UNDT erred in finding that the Administration had established by a preponderance of the evidence that he had disclosed confidential information to the former CSO regarding Ms. A's allegations of a sexual nature against the former CSO contrary to AAR's obligations under ST/SGB/2008/5, and thereby had committed misconduct. The UNDT's finding rests upon fundamental errors of fact and is "misplaced", because Ms. A did not make a sexual harassment complaint, but only a suggestion that her reassignment might have been improperly motivated. AAR claims that the UNDT did not cite any legal basis for "criticizing [his] reaction to [Ms. A's] threat to harm [the former CSO] as a protected disclosure of confidential information". AAR claims that the UNDT erred in law, contending that his disclosure of Ms. A's allegations to the former CSO was consistent with his duties under Staff Rule 1.2(c), as he was acting to help the former CSO make a

[21] *Ibid.*, para. 75.
[22] *Ibid.*, para. 83.

complaint to the SRSG. Lastly, AAR also contends that the "criticism" of his actions was "entirely removed from the context in which it occurred".

28. AAR claims that the "criticism" of his failure to declare a conflict of interest and to recuse himself from participating in the slander case is based on mistakes of fact. The UNDT failed to recognize that the investigation of the slander case was an inquiry unrelated to Ms. A's complaint against him. The UNDT further failed to address why AAR needed to disclose his conflict of interest "if the SRSG and the [CDU] were already fully aware of [Ms. A's] complaint against him … but nevertheless chose to forward the inquiry to him for action as acting COS". The UNDT also failed to consider that his proposal that an external investigator handle the investigation had been refused and that he had taken steps to recuse himself "de facto" by appointing another staff member, Mr. F. AAR also claims that it is "unclear" how his role in the slander case investigation was "interference", claiming that evidence was "ignored", a relevant witness was not interviewed, and there was no "preponderance of the evidence" of his "interference". Finally, AAR claims that the UNDT "took no note" that Ms. A's other allegations that he had engaged in retaliation had been rejected and that the contested decision "violated the presumption of regularity in all administrative decision making".

29. AAR challenges the proportionality of the contested decision. He claims that it should not have been "the outcome of a faulty OIOS investigation or of the Respondent's having been unable to make its case", and the "suitability of the reprimand" had to be weighed against the impact upon his career as "it is now a factor in any UN job application".

30. AAR seeks (i) rescission of the contested decision; and (ii) additional compensation in the amount of two years' net base salary for moral damage to career, reputation, health and well-being, claiming that the compensation awarded is not sufficient to "address the extent of moral damage … produced". In support of his claim for additional moral compensation, AAR claims a "chilling effect" on his United Nations job applications due to the requirement to disclose that he has been the subject of an investigation and has been issued a reprimand, pointing as evidence to "numerous [unanswered] job applications" and the four medical records submitted before the UNDT.

31. Finally, AAR asks the Appeals Tribunal that he be granted anonymity in the publication of this Judgment.

The Secretary-General's Answer

32. The Secretary-General submits that AAR has failed to establish any error by the UNDT in its scope of review. AAR neither claims nor identifies any error by the UNDT in its identification of the scope of review of the present case. Even considering arguendo that AAR is claiming that the UNDT failed to consider whether a relevant matter was ignored by the Administration—namely, the context of Ms. A's prior complaints against him and her credibility—AAR's claim is without merit. Ms. A's prior complaints against him were summarized in the OIOS's report, the Allegations Memorandum, and the Secretary-General's Comments. Thus, contrary to his claim, the allegations against him at issue in the present case were not "seen in isolation". In addition, the UNDT considered and rejected AAR's claims regarding the relevance of Ms. A's prior complaints and the Ethics Office's purported failure to assess Ms. A's credibility, finding that the contested decision was based on OIOS's findings following its own investigation, not on the Ethics Office's recommendation.

33. The Secretary-General submits that the UNDT correctly concluded that AAR had unlawfully disclosed confidential information. As to AAR's claim that the UNDT's finding "rest[s] upon fundamental errors of fact", and is "misplaced", because Ms. A did not make a sexual harassment complaint, the record, including AAR's e-mail to the former CSO clearly shows that AAR had understood Ms. A's remarks as referring to sexual harassment. As the UNDT correctly found, AAR informed OIOS, both during his interview and in his written statement, that Ms. A had told him that the former CSO had sexually harassed her, he had informed her of her right to file a complaint against the former CSO and to follow the available UN mechanisms for reporting prohibited conduct, and he had acknowledged that "normally" Ms. A's allegations should have remained confidential. Thus, in light of AAR's own statements to OIOS, the UNDT did not err when it found that it was clear that AAR was aware of the gravity of Ms. A's allegations of a sexual nature and of their confidential character.

34. There is also no merit to AAR's claim that the UNDT did not cite any legal basis for "criticizing [his] reaction to [Ms. A's] threat to harm [the former CSO] as a protected disclosure of confidential information". The UNDT specifically cites sections 3.2 and 5.2 of ST/SGB/2008/5. Turning to AAR's claim that his disclosure of Ms. A's allegations to the former CSO was consistent with his duties under Staff Rule 1.2(c), as he was acting to help the former CSO make a complaint to the SRSG, the Secretary-General contends that his claim and reliance on Staff Rule 1.2(c) are misplaced. The former CSO was not an "official whose responsibility it is to take appropriate action" under Staff Rule 1.2(c).

He was the alleged offender. Moreover, contrary to AAR's contention that the UNDT erred by not looking at "the actual communication and its purpose" but instead relied upon the transcript of his OIOS interview, the UNDT directly excerpted, and relied upon, the "actual communication" (i.e., the text of the 5 December 2016 email). It was also entirely appropriate for the UNDT to consider AAR's statements to OIOS.

35. The Secretary-General further submits that the UNDT correctly concluded that the Administration had established that AAR had unlawfully failed to disclose a conflict of interest and recuse himself. As the UNDT correctly found, by the time the slander case was assigned to AAR's office on 5 April 2017, he had a conflict of interest that should have been disclosed, because AAR had already been interviewed as a subject in Ms. A's complaint against him and he already knew that Ms. A had been identified as the likely source of the rumours against the former CSO. AAR was under an affirmative duty to disclose his conflict of interest and recuse himself from the slander case investigation, regardless of whether other individuals may have been aware of the actual or possible conflict of interest. AAR's reliance on the facts that he had suggested that the slander case be assigned to an external investigator and that he had assigned another staff member to conduct the investigation is inapposite. There was no evidence, as the UNDT correctly found, that he ever disclosed his conflict of interest or recused himself from the investigation; rather, he played an "active role". AAR's claims are contradicted by the record and do not establish any error.

36. As to AAR's claim that it is "unclear" how his role in the slander case investigation was "interference", the UNDT clearly set forth why, based on the record, it found that AAR had played an "active role" in the investigation, including the fact that AAR had participated in the investigation by, inter alia, approving questions prepared by Mr. F, giving instructions regarding the witnesses to be interviewed (including AAR), attending two witness interviews, and questioning one of the witnesses. AAR's claims that the UNDT failed to consider that Ms. A's other allegations that he had engaged in retaliation had been rejected and that the contested decision "violated the presumption of regularity in all administrative decision making" are inapposite and misguided. It is of no consequence whether Ms. A's prior allegations had been found to be unsubstantiated. In addition, his actions and omissions do not constitute administrative decisions which enjoy a presumption of regularity. In view of the foregoing, the UNDT correctly concluded that the Administration had established that AAR had unlawfully failed to disclose a conflict of interest and recuse himself.

37. The Secretary-General contends that the UNDT correctly found that the contested decision was proportionate to AAR's misconduct. The UNDT made its finding after considering the applicable legal framework, its prior findings with respect to the nature of AAR's misconduct, and AAR's submissions. Indeed, the UNDT correctly found that reprimands "are important for upholding standards of proper conduct and promoting accountability", and that the contested decision was issued following a disciplinary process against the Appellant. Accordingly, it fell within the Administration's discretion and was entirely reasonable. AAR's complaint that he is obligated to disclose in job applications that he has been issued a reprimand is inapposite and does not render the contested decision disproportionate. In view of the foregoing, the UNDT correctly found that the contested decision was proportionate to AAR's misconduct.

38. AAR is not entitled to the relief requested. There is no legal basis upon which to grant either rescission or compensation as the contested decision was lawful, and AAR has failed to demonstrate otherwise. Accordingly, in the absence of any illegality, his requests should be rejected. Second, there is no merit to AAR's request for additional compensation. AAR has not presented any evidence that the purported lack of a response to his job applications is due to the disclosure or that it otherwise has had a "chilling effect" on AAR's job prospects. Also, none of the medical reports refer to these concerns. AAR is therefore not entitled to the relief requested.

39. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

The Secretary-General's Appeal

40. The Secretary-General submits that the UNDT erred in law and in fact when it awarded compensation (i) in the absence of any illegality, (ii) without any extenuating circumstances, and (iii) without an established nexus between the alleged harm and the "undue delay" in completing the disciplinary process.

41. There was no illegality on the part of the Administration with respect to the contested decision, AAR's due process rights, and/or the applicable legal framework. Consistent with UNAT jurisprudence, the UNDT erred in law when awarding AAR compensation in the absence of any illegality.

42. Moreover, the UNDT erred in law when it failed to consider, as required by the UNAT, the existence of extenuating circumstances prior to awarding compensation to a staff member found to

have committed misconduct. The circumstances of this case are similar to those in *AAD*, in which the UNAT found that an investigation and disciplinary process of three years did not constitute an extenuating circumstance. As in *AAD*, the "undue" and "unjustified" delay in completing the disciplinary process, as found by the UNDT in the present case, does not constitute an extenuating circumstance warranting an award of compensation to the staff member, who was found to have committed misconduct. As in *AAD*, the investigation and disciplinary process in AAR's case had its own complexities justifying the lengthy process, including the sensitive nature of the underlying complaint of prohibited conduct as well as workflow disruptions resulting from the COVID-19 pandemic. As compared to the lengthy investigation and disciplinary process in *AAD* (three years), AAR's case took a comparable amount of time (three years and nine months) between the referral to OIOS and the contested decision. Accordingly, the UNDT erred in law by failing to consider, and by failing to find, any extenuating circumstances warranting compensation.

43. The Secretary-General claims that the UNDT erred in law and in fact when it found an "undue" and "unjustified" delay in completing the disciplinary process. First, the UNDT's conclusion contradicts its prior finding that AAR's due process rights had been respected. Second, the UNDT's finding of an "undue" and "unjustified" delay was an error of law as neither ST/SGB/2017/2/Rev.1 nor ST/AI/2017/1 establishes a required timeframe for the completion of an investigation or a disciplinary process. Absent a statutory requirement for the disciplinary process to have completed within a specified period of time, there was no legal basis for finding an "undue delay in completing the disciplinary process". Third, the UNDT's finding of an "undue" and "unjustified" delay was an error of fact resulting in a manifestly unreasonable decision. The time taken to complete the disciplinary process was not "unjustified" or otherwise unreasonable. The UNDT failed to consider relevant factors on record impacting the start of the disciplinary process as well as the reasonable pace with which the disciplinary process proceeded once it began. The UNDT found that the undue delay was to "complete the disciplinary process". However, the disciplinary process itself took approximately seven months. Accordingly, there was no undue delay in completing the disciplinary process.

44. The Secretary-General contends that there was no nexus between the alleged harm and the alleged "undue" delay in completing the disciplinary process. Under the UNAT's jurisprudence, to obtain compensation, the claimant bears the burden of proving negative consequences attributable to an illegality "on a cause-effect lien". Further, the Tribunal may grant moral damages when a

claimant provides the Tribunal with evidence—through a medical, psychological report, or otherwise—of harm, stress, or anxiety caused to the claimant, which is directly linked, or reasonably attributed to, a breach of the claimant's substantive or procedural rights. However, AAR's medical reports do not support the UNDT's finding that the medical reports showed the required causal link or nexus between the "undue" delay in completing the disciplinary process and AAR's alleged harm. There is no evidence that AAR suffered harm or was prejudiced by the time taken to resolve this matter. Procedural fairness was respected throughout the investigation and the disciplinary process. AAR suffered no pecuniary injury since he worked and was paid during the whole period.

45. The Secretary-General requests that the UNAT reverse the UNDT's award of compensation for moral harm, otherwise affirm the impugned Judgment, and dismiss AAR's application in its entirety. In the alternative, the Secretary-General requests that the UNDT reduce the compensation awarded.

Considerations

46. The following issues are before us for proper determination: a) Whether the UNDT erred in concluding that AAR had unlawfully disclosed confidential information; b) whether the UNDT erred in concluding that the Administration had established that AAR had unlawfully failed to disclose a conflict of interest and to recuse himself; c) whether the UNDT erred in finding that the contested decision was proportionate to AAR's misconduct; and d) whether AAR is entitled to compensation We shall address these matters in turn.

Whether the UNDT erred in concluding that AAR had unlawfully disclosed confidential information

47. At the times relevant to this case, AAR served as acting CSO with UNMIK. That position was at the supervisory/managerial level and by dint of Section 3.2 of ST/SGB/2008/5 imposed a duty on AAR to promote a harmonious work environment and uphold the highest standards of conduct.

48. Section 3.2 of ST/SGB/2008/5 provides that:

> Managers and supervisors have a duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the

> part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

49. Further, Section 5.2 of ST/SGB/2008/5 provides that "[a]ll reports and allegations of prohibited conduct shall be handled with sensitivity in order to protect the privacy of the individuals concerned and ensure confidentiality to the maximum extent possible".

50. These rules are obviously in place to guard against possible retaliation that may arise out of the unauthorized disclosure of information given in confidence. Consequently, we find that AAR was under a duty to keep the communications of 14 November 2016 between himself and Ms. A confidential. He therefore acted in breach of that duty by sending the 5 December 2016 e-mail to the former CSO, informing him that Ms. A claimed her reassignment was due to her refusal of his "sexually oriented tenderness towards her".

51. Before us, AAR contends that Ms. A did not make a sexual harassment complaint, against her former boss but only a suggestion that her reassignment might have been improperly motivated. Nonetheless, in the light of Sections 3.2 and 5.2 of ST/SGB/2008/5, we find that even if the communication between AAR and Ms. A were mere suggestions, they were bound to be kept confidential. Thus, AAR's action to communicate those "suggestions" to a third party was tacitly unlawful.

52. Additionally, AAR argues that his disclosure of Ms. A's allegations to the former CSO was consistent with his duties under Staff Rule 1.2(c), as he was acting to help the former CSO make a complaint to the SRSG. Staff Rule 1.2(c) provides that: Staff members have a duty to report any breach of the Organization's regulations and rules to officials who are responsible for taking appropriate action. Staff members shall cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

53. By reason of the foregoing and in the context of this case, it is clear that Staff Rule 1.2(c) only imposes a duty to report to officials who are responsible for taking appropriate actions, and not to a former colleague to take appropriate action. By sending the e-mail to the former colleague, AAR created a possibility of retaliation. The words of the Staff Rule are unequivocal and should not be construed to suit an unfounded narrative. Therefore, AAR was obliged to report Ms. A's concerns to

the UNMIK Conduct and Discipline Unit and not to the former CSO. The latter act was unlawful, and we agree with the Secretary-General that the former CSO was not an "official whose responsibility it is to take appropriate action" under Staff Rule 1.2(c).

54. Accordingly, the Dispute Tribunal did not err in concluding that AAR had unlawfully disclosed confidential information.

Whether the UNDT erred in concluding that AAR had unlawfully failed to disclose a conflict of interest and to recuse himself

55. Staff Regulation 1.2(m)[23] stipulates 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 potential conflict of interest does arise, the conflict shall be disclosed by the staff members to their head of office, mitigated by the Organization and resolved in favour of the interest of the Organization.

56. AAR in his appeal submits that the Dispute Tribunal failed to address why he needed to disclose his conflict of interest "if the SRSG and the [CDU] were already fully aware of [Ms. A's] complaint against him … but nevertheless chose to forward the inquiry to him for action as acting COS". A reading of Staff Regulation 1.2 (m) above reveals that the obligation to disclose a conflict of interest rests on the staff member and not on the Organization. The Staff Regulation does not impose a duty on the UNDT to provide reasons why a staff member should disclose his conflict of interest. In addition, by use of the word "shall", Staff Regulation 1.2(m) is formulated in mandatory terms. Therefore, the obligation to disclose an actual or a potential conflict of interest is obligatory. Consequently, we find no merit in AAR's arguments.

57. Furthermore, Secretary-General's Bulletin ST/SGB/2016/9 [24] as noted in *Lanla* [25] provides the following commentary on Staff Regulation 1.2(m):

[23] Secretary-General's Bulletin, ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).
[24] Secretary-General's Bulletin, ST/SGB/2016/9 (Status, basic rights and duties of United Nations staff members).
[25] *Lanla Fatma Kamara-Joyner v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1400, para. 76.

> The regulation clarifies that actual as well as potential conflicts must be avoided, disclosed and resolved … Staff are obliged to disclose even possible conflicts and to follow instructions on how to resolve the situation, including to avoid and remove the conflict or the circumstances that make it a possible conflict. Failure by a staff member to disclose an actual or possible conflict can seriously disrupt operations of the Organization and pose detriment to the Organization's integrity and reputation as a whole, and may lead to the imposition of disciplinary measures against the staff member.

58. From the foregoing, a staff member being aware of an actual or potential or possible conflict of interest is obliged to avoid, disclose and resolve same. A major step towards resolving such conflicts is to remove the issues of conflict or person(s) with conflicting interests or at the very least the conflict should be disclosed. As a result, common sense would require that a person tasked to investigate another with whom he/she had previous dealings or confrontations is under a duty to recuse himself or herself or disclose such conflict rather than purportedly recusing himself or herself by a "de facto" appointment of another associated staff member. The potential conflict in this case is not limited to the parties, that is, the investigating officer (AAR) and the suspect (Ms. A), but affects the harmonious functioning of the Organization, as a whole. Thus, AAR had a duty to disclose the conflict or recuse himself and not to "de facto" recuse himself by appointing another person. Such an appointment did not fall within the purview of the law. We therefore agree with the Secretary-General that AAR was under a positive duty to disclose his conflict of interest and recuse himself from the slander case under investigation, regardless of whether other individuals may have been aware of the actual or possible conflict of interest.

59. Consequently, we find that the UNDT did not err in concluding that the Administration had established that AAR had unlawfully failed to disclose a conflict of interest and recuse himself.

Whether the UNDT erred in finding that the contested decision was proportionate to AAR's misconduct

60. AAR challenges the proportionality of the contested decision. He claims that it should not have been "the outcome of a faulty OIOS investigation or of the Respondent's having been unable to make its case", and the "suitability of the reprimand" had to be weighed against the impact upon his career as "it is now a factor in any UN job application". In reply, the Secretary-General argued that the contested decision was proportionate to AAR's misconduct on the basis that the

reprimands "are important for upholding standards of proper conduct and promoting accountability". The Secretary-General further argued that the contested decision was issued following a disciplinary process against the Appellant and was entirely reasonable.

61. The Appeals Tribunal has held that:[26]

> Although the reprimand is not a disciplinary measure but an administrative one, because of its adverse impact on the concerned staff member's career, it must be warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of 'preponderance of evidence', and be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure the protection of individuals, which otherwise would be compromised.

62. Staff Rule 10.2(b) permits the imposition of administrative measures that shall not be considered disciplinary measures, and a reprimand falls into this category. "Such measures are not intended to be punitive in nature but are aimed at efficiency and performance management in the interests of the Organization".[27] The purpose of these measures is largely remedial rather than punitive, unlike disciplinary sanctions. Accordingly, the requirement of proportionality in the exercise of discretion in issuing administrative measures is not similar to those in disciplinary measures.

63. In issuing disciplinary measures, the administrative action should not be more excessive than is necessary for obtaining the desired result.[28] The Appeals Tribunal held in *Pakkala* that "[i]f there is a rational connection between the purpose of Staff Rule 10.2(b), the purpose of the decision to impose the administrative measures, the information upon which the decision is based and the reasons for the decision, then the exercise of discretion will pass the test of rationality and will be lawful".[29] We do not find it irrational for the Administration to impose a written reprimand on a staff member who has unlawfully disclosed confidential information, and against whom the Administration has established that he failed to disclose a conflict of interest and recuse himself. Holding otherwise would be counterproductive to the requirements of

[26] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40
[27] *Leila Gharagozloo Pakkala v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1268, para. 34.
[28] *Sanwidi Judgment, op cit.,* para. 39.
[29] *Pakkala Judgment, op. cit.,* para. 34.

efficiency and performance management in the interests of the Organization as contemplated by Staff Rule 10.2(b).

64. It is a fact that despite being an administrative measure as opposed to a disciplinary one, the imposition of a written reprimand may carry some stigma against the staff member concerned. Nevertheless, as we held in *Pakkala*, "since the imposition of administrative measures does not require any finding of misconduct or inflicting a penalty, there is no need to establish the facts justifying them on clear and convincing evidence".[30]

65. For that reason, we find that the UNDT did not err in finding that the contested decision was proportionate to AAR's misconduct.

Whether the UNDT erred in awarding compensation to AAR and alternatively, whether the UNDT erred in determining the amount of compensation

66. The UNDT in the impugned Judgment affirmed the contested decision, yet awarded AAR the sum of USD 5,000 as compensation for moral damages. Nonetheless, AAR seeks additional compensation in the amount of two years' net base salary for moral damage to career, reputation, health and well-being, claiming that the compensation awarded is not sufficient to "address the extent of moral damage … produced".

67. The Secretary-General submits that the UNDT erred in law and in fact when it awarded compensation (i) in the absence of any illegality, (ii) without any extenuating circumstances, and (iii) without an established nexus between the alleged harm and the "undue delay" in completing the disciplinary process. The Secretary-General urges us to reverse the UNDT's award of compensation for moral harm, otherwise affirm the Judgment, and dismiss AAR's application in its entirety. In the alternative, he asks that the UNDT reduce the amount of compensation awarded.

68. Here, the critical issue for our determination is whether AAR is entitled to compensation at all or whether the UNDT erred in awarding compensation to AAR (i) in the absence of any illegality, (ii) without any extenuating circumstances, and (iii) without an established nexus between the alleged harm and the "undue delay" in completing the disciplinary process.

[30] *Ibid.*, para. 35.

69. The Secretary-General contends that the Dispute Tribunal erred, when it held that in paragraph 74 of the impugned Judgment that almost two and a half years to decide the matter was unjustified and warranted compensation in light of the undue delay in completing the disciplinary process. According to the Secretary-General, the conclusion of UNDT in the impugned Judgment contradicts its prior finding that AAR's due process rights had been respected: the Dispute Tribunal however, failed to explain how these two findings were consistent.

70. We have consistently held that there can be no compensation without an illegality. In *ADD* citing *Kebede*, we opined that "[i]n order to award compensation for harm, there must be evidence to support the existence of harm, an illegality, and a nexus between the two".[31] This universally accepted principle was firmly established by us in *Kebede* and a multitude of cases.

71. But according to the Appeals Tribunal's consistent case law, for a delay to warrant compensation, "the staff member's due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights".[32]

72. We acknowledge and approve the established principles on non-pecuniary damages or moral damages laid down by our jurisprudence and consistent with the legislative intent found in the amendment of Article 10(5)(b) of the UNDT Statute by General Assembly Resolution 69/203 of 18 December 2014 which sought to ensure that compensation may only be ordered for harm and that the existence of such harm must be proven and supported by appropriate evidence. In *Kallon*, the full bench of UNAT held that "a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated".[33] This principle is at the heart of the amendment of Article 10(5) (b) of the UNDT Statute adopted by General Assembly Resolution 69/203.

73. However, in more recent cases, prolonged procedural delays have occasionally been construed as a violation of the due process rights of the investigation subject or witness and any infringement may amount to an abuse of their dignity and worth as human beings. We established further in *Kallon* that the "presence of certain circumstances may lead to the presumption of moral

[31] *Kebede v. Secretary-General of the United Nations*, Judgment No.2018-UNAT-874, para. 20.
[32] *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2013-UNAT-292, para. 46.
[33] *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 62.

injury–the application of the doctrine of *res ipsa loquitur* whereby the nature of the breach speaks for itself and the harm can be established by the operation of the evidentiary presumption of law".[34] Therefore, in some cases, the evidentiary presumption that damages will normally follow as a consequence to an average person being placed in a certain situation, may apply.

74. The UNAT further held:[35]

> 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.

75. The increasingly prevalent abuse of power by the Administration in its non-respect of deadlines has caused us to occasionally derogate from the general principle above to award moral damages where these circumstances so warrant. In *Abu Nada*, we reiterated the Dispute Tribunal's assertion that the Agency's delay of 26 months in handling an investigation breached the principle of natural justice as well as directly caused the applicant to suffer stress and anxiety.[36]

76. Although there may be no statutory time limit for the completion of an investigation and/or disciplinary proceedings, this cannot be completely open-ended. They should be concluded in a period that is reasonable, having regard to all the relevant circumstances of the particular case. In addition to a delay such as incurred in the instant matter being unduly stressful and hurtful to any reasonable staff member, there was in this case ample expert evidence to substantiate the consequences suffered by AAR as a result of the prolonged delay in investigating his matter. The impugned Judgment adequately illustrates these. While AAR was not exonerated, the misconduct finding against him was relatively insignificant, warranting only a reprimand rather than any disciplinary action.

[34] *Ibid.*, para. 63.
[35] *Ibid.*, para. 66.
[36] *Abu Nada v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-514.

77. While we agree that any award for moral damages for established illegality must be compensatory, the delay of three years and nine months from complaint to resolution was unconscionable even if allowing for an appropriate period when informal resolution was explored. This was not a complex investigation of a substantial number of charges. The reasonably expected duration of such proceedings was well and truly exceeded in the instant case. A process that began with a complaint in late 2016 but was not concluded until mid-2021 must be marked by an award of compensation for the adversely affected staff member.

78. For that reason, the Dispute Tribunal did not err in awarding compensation for moral damages in the absence of any illegality.

79. In the instant case, we agree with the Dispute Tribunal that a delay of three years and nine months in investigating AAR's alleged misconduct tacitly violated his inherent worth and dignity as a human being as well as the principle of natural justice elucidated above. Such must attract moral damages especially as AAR's testimony was corroborated by expert medical evidence. This is consistent with our decision in *AAM* where we affirmed the Dispute Tribunal's finding that an undue delay of nearly two and half years to obtain a substantive decision from the Administration coupled with the fact that AAM presented medical opinion of his psychiatrist to support his request for moral damages established the required nexus between his harm and the protracted process.[37]

Whether this Tribunal should grant AAR's request for anonymity

80. AAR sought and obtained anonymity before the Dispute Tribunal. Pursuant to Section II.C of UNAT Practice Direction No. 1, "[a] person who has been granted anonymity by the UNDT … need not request it at UNAT as such order will remain in effect, unless there is a challenge to such anonymity on appeal and UNAT has given its judgment on the issue". There has been no challenge by the Secretary-General to that aspect of the UNDT's Judgment. The UNDT's order granting anonymity thus subsists.

[37] *AAM v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1372, para. 61.

Judgment

81. The Appeals Tribunal dismisses the appeals and affirms Judgment No. UNDT/2022/133.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Forbang, Presiding	Judge Ziadé	Judge Colgan

Judgment published and entered into the Register on this 29th day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar