Counsel for AAS:	Self-represented
Counsel for Secretary-General:	Amanda Stoltz

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

examining the evidence of AAS's health at relevant times and the fact that this evidence was not before the decision-maker at the time the contested decision was taken. The UNDT considered that it was entitled in law to undertake a consideration of whether there was a proper investigation into the allegations that led to the contested decision and upon which that

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assessed him as lacking credibility and therefore disregarded his account of relevant events connected with his conduct towards colleagues. It was erroneous for the IGO to default on its obligation to investigate all relevant information, both inculpatory and exculpatory evidence, including mitigating factors.[17]

25. Addressing the Secretary-General's defence to AAS's claim that he was already engaging in misconduct towards colleagues (i.e., creating a hostile working environment and making discriminatory comments) even before he suffered this medical condition, the UNDT concluded that such prior behaviours did not reach the evidentiary threshold of creating a hostile environment. Further, the UNDT determined that there was insufficient evidential certainty about the dates or timing of the relevant events for the IGO to have properly concluded that such conduct predated AAS's medical condition.[18]

26. The UNDT rescinded the contested decision but made no order for compensation instead of rescission. It remanded the case to UNHCR for re-decision and directed the Secretary-General to pay AAS the sum of USD 5,000 as moral damages for the effects of the unlawful manner of his treatment.

27. The Secretary-General submits that the UNDT exceeded its jurisdiction and erred in law and in fact by finding that the investigation procedure was unlawful. The Secretary-General asserts that the UNDT reached its conclusion based on three erroneous findings.

28. The UNDT's first error was that the IGO was duty bound to investigate AAS's medical condition, which, according to the Secretary-General, was never raised by AAS during the investigation or the disciplinary process. The UNDT erred by allowing AAS to raise this new argument and admitting new evidence in support of it. Furthermore, the Secretary-General disputes the UNDT's conclusion that some of AAS's medical symptoms were similar to the

[17] *Ibid*., para. 73.
[18] *Ibid*., paras. 80-85.

conduct for which he was sanctioned, emphasising AAS's psychiatrist's evidence that his condition could not have led him to make racist or homophobic comments.

29. The Secretary-General also argues that the UNDT erred in finding that the investigation record contained indications showing the potential pertinence of AAS's medical condition to

33. Therefore, the Secretary-General submits that the IGO had no obligation to investigate AAS's medical condition, that it properly investigated the allegations of misconduct and determined that they were established.

34. Next, the Secretary-General contends that the UNDT exceeded its jurisdiction and erred in law and in fact by finding that the disciplinary measure imposed was not proportionate. The Secretary-General emphasises the broad discretion of the Administration in disciplinary matters, submitting that the sanction imposed on AAS was not excessive, abusive or absurd and was not the most severe available. The Secretary-General also highlights that the Administration considered as mitigating factors that AAS suffered a brain tumour and underwent two brain surgeries.

35. The Secretary-General submits that even if the Appeals Tribunal were to conclude that the IGO was under an obligation to investigate AAS's medical condition, the UNDT nevertheless erred in finding that the disciplinary measure imposed by the Administra4 (stra)1t 7.1 (si)2.5 (d) (i

harm and the contested decision. Furthermore, given AAS's serious misconduct, the Secretary-General argues that he is not entitled to any compensation for moral damages.

37. Regarding the evidence of harm, the Secretary-General argues that the UNDT erred in relying on the medical report dated 7 September 2022 without assessing or analysing its authenticity.

ii) Did the UNDT act in excess of its jurisdiction by remanding the case to the

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> higher" and that he had insight into his invasive "logorrhoea".[25] His "control mechanisms" were described as "a bit loose" and on occasion he "worried about his future".[26] He was diagnosed as having "Adjustment Disorder F43.10".
>
> In a medical report dated 24 August 2018, Dr. L.H. described AAS's psychological state as "still irritated". He was trying to control his "disgust and anger" and was having "mood swings but not to a critical extent". He felt "a lot of anger and rage" in some situations but had begun to "handle it" and wished to get back to work. The diagnosis was then expanded to "PTSD F43.10 and Adjustment Disorder F43.20".

66. We will not attempt to interpret and make findings beyond describing what his medical adviser assessed before AAS's return to work. These assessments were available to be considered by the IGO investigators had they chosen to do so after obtaining AAS's consent. Given that AAS consented to its release at the UNDT stage, we infer he would also have given this consent earlier. The IGO and the Administration failed to appreciate or investigate these, or other effects of AAS's brain tumour and/or treatment as possibly contributing to or even causing aspects of his interpersonal relations with other staff.

67. This is not to say that the existence of these psychological consequences of AAS's neurological illness and its treatment should necessarily have persuaded the Administration to exonerate AAS of blame for his misconduct, or even that the sanction imposed on him should have been significantly less severe for this reason. But it was erroneous not to consider whether his misconduct was simply a matter of deliberate ill-discipline for which he was fully responsible,

76. In addition, the Organization has a sequential and separate role, along with an independent responsibility to consider and apply relevant factors in its decision-mak[(i)0.(24 ( )-0o Td( )Tj037

81. The Dispute Tribunal, having entered upon the merits of AAS's dismissal and indeed having determined that it was flawed, nevertheless remanded the case to the Administration to decide again what was to happen to AAS.

82. The following are the statutory provisions and restrictions in Article 10(4) of the UNDT Statute:[29]

> ... *Prior to a determination of the merits of a case,* should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulati Te2io83.9 (n)0-3.1.3 (l)-3.1 (a)-2.1 (-4.4

mechanism"; indeed, this was more a manifestation of serious conditions, namely PTSD and adjustment disorders. In these circumstances, we find no error of fact or law in the UNDT's relevant conclusion.

92. The Secretary-General's next point is that AAS's primary response to the allegations against him was that the conduct complained-of never happened, so that the focus was on whether it did, and was not whether his medical condition might have been a contributory factor. In this regard, the Secretary-General contends that the IGO and UNHCR fully investigated this issue and made conclusions about it.

sufficiently, for it to have bolstered that presumption of innocence, and the Secretary-General was under no duty to inquire further for that presumption to have remained for AAS's benefit. For reasons already set out, however, we do not accept this submission. There was enough material before the IGO investigators, provided not only by AAS but by other interviewees, to have triggered their obligation to consider and record potentially exculpatory evidence, but they did not do so.

96. The Secretary-General contends that the remand of the case to UNHCR for re-decision means that the sanction is still for pending review and thus, at most, only "potentially disproportionate". As we have already determined, the UNDT erred in law by purporting to remand the case to the Administration.

Was the UNDT's failure or refusal to award in lieu compensation lawful?

97. There is clear statutory language and authoritative case law stating that if the UNDT orders recission of an administrative decision 239 0 Td(.054Td(.05/P ⊀M.8 (o)-7.5t (o)-1..7 ()-7.1 (w)-8.1 (f)-1

and what should be done. So, we conclude that the UNDT was wrong to have directed the

The UNDT concluded, despite the establishment of the misconduct, it warranted compensation for the consequences of a significant due process failure.

103. We agree with the Secretary-General that the onus of proof of harm for which moral damages are sought lies with the claimant, that is the staff member. Furthermore, we agree that the burden of proof is to the balance of probabilities, meaning that it is more probable than not that harm was caused and that the breach was causative of the harm.

104. It is unnecessary for us in this case to explore whether the staff member's evidence alone may be enough to award compensation for harm because there was expert medical corroboration of AAS's evidence.

105. Indeed, the medical report dated 7 September 2022 shows that following AAS's psychological consultation sessions on 15 February 2021 and 3 March 2021, he was diagnosed with Obsessive-Compulsive Personality Disorder (OCPD) and Obsessive-Compulsive Disorder (OCD) and "[h]is condition require[d] systematic psychological treatment".

106. In this regard, the Secretary-General submits that the UNDT relied erroneously on AAS's psychiatrist's report dated 7 September 2022 to support its award of compensation, including as to its doubtful authenticity. The report was purportedly prepared some two years after the contested decision, did not specify the cause of the identified disorders or when they were first diagnosed.

107. We are unclear about the Secretary-General's questioning of the 7 September 2022 report's authenticity or why the UNDT erred by not questioning it. There is nothing inherently suspicious about the date of the report alone (which was prepared some two years after the contested decision). Unremarkably, it was prepared for the purpose of the UNDT's hearing. If the submission asserts that it might have been a fraudulent document, it was open to the Secretary-General to request the UNDT to have called for the author to be questioned about it at a hearing. We have little doubt that the UNDT would have allowed this. As for the criticism of the report's failure to attribute a cause to AAS's condition or a date of first diagnosis, any reliance on this report alone ignores the other medical reports prepared at the time of these events, linking the conditions suffered to the times of diagnosis of the tumour and the surgeries performed for it, thereby establishing probable cause and effect. Furthermore, the UNDT does not appear to have relied on it and, in any event, its relevance is marginal.

108. Furthermore, while it is true that the 7 September 2022 medical report does not mention any cause for the diagnosed disorders, the Tribunal notes that these disorders had never been mentioned (. Tj0.003 6c -0.003 Tw [(-47 (261.717 Td[(n)H.5 8o)1.5 (n)w4.4