Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2014

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Chapter V

DECISIONS OF THE ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS[1]

A. United Nations Dispute Tribunal

In 2014, the United Nations Dispute Tribunal in New York, Geneva and Nairobi issued a total of 148 judgments. Summaries of seven selected judgments are reproduced below.

1. *Judgment No. UNDT/2014/040 (14 April 2014): Yakovlev* v. *Secretary-General of the United Nations*[2]

Late claim for separation entitlements—Personal standing of former staff member—Proper and lawful exercise of discretion to deny a request for an exception under staff rule 12.3(*b*)—Award of costs for abuse of process

The Applicant, a former staff member who had served as a procurement officer in the Secretariat, challenged the decision of the administration to dismiss his request, made six years after the expiry of the applicable time limit, to proceed with payment of several entitlements he claimed were due to him upon separation. The Applicant asserted that exceptional circumstances beyond his control had made it impossible for him to claim those entitlements in a timely manner. The administration denied the request for an exception but indicated that it might consider paying for tickets for the Applicant and his spouse if the Applicant could prove that he had no financial means to return to his home country. The Applicant did not respond or provide any proof. The issues before the Tribunal were whether the Applicant had standing to bring his application; whether the administration's discretion to deny the request for an exception was properly and lawfully exercised; and whether the Applicant had manifestly abused the proceedings and, if so, whether costs should be ordered under article 10.6 of the UNDT Statute.

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[1] In view of the large number of judgments which were rendered in 2014 by the administrative tribunals of the United Nations and related intergovernmental organizations, only those judgments which address significant issues of United Nations administrative law or are otherwise of general interest have been summarized in the present edition of the Yearbook. For the full text of the complete series of judgments rendered by the tribunals, namely, Judgments Nos. UNDT/2014/001 to UNDT/2014/148 of the United Nations Dispute Tribunal, Judgments Nos. 2014-UNAT-395 to 2014-UNAT-494 of the United Nations Appeals Tribunal, and Judgment Nos. 2014-1 to 2014-2 of the International Monetary Fund Administrative Tribunal, see, respectively, see the websites of the United Nations Dispute Tribunal (http://www.un.org/en/oaj/dispute/judgments.shtml), the United Nations Appeals Tribunal (http://www.un.org/en/oaj/appeals/judgments.shtml) and the Administrative Tribunal of the International Monetary Fund (https://www.imf.org/external/imfat/jdgmnts.htm).

[2] Judge Goolam Meeran (New York).

The Tribunal found that the Applicant had standing to bring his application, but failed to establish that the administration's decision to refuse to grant him an exception to the two-year time limit under staff rule 12.3(*b*) and proceed with payment was unlawful. The Tribunal further found that the Applicant manifestly abused the proceedings before it.

With regard to the issue of standing, the Tribunal referred to article 3, paragraph 1, of its Statute which provides that an application under the Statute may be filed by "any former staff member of the United Nations". The Tribunal also referred to staff rule 12.3(*b*) and the absence of language therein that would limit the application of the rule to current or former staff members in respect of entitlements that had not expired, and found that the rule encompassed exceptions that allowed the waiver of time limits provided for in the Staff Rules.

With respect to the exercise of discretion, the Tribunal observed that the Applicant asserted his own turpitude against the Organization as a ground for not having been able to comply with the Rules. The Tribunal noted that the Applicant had had ample opportunity to request a deferment of payment of his separation entitlements but had opted not to do so. The Tribunal also noted that the Applicant had effectively refused to prove that he was impecunious and thus obtain payment of the cost of return travel home. The Tribunal found that the Applicant failed to establish that the administration's decision to refuse to grant him an exception under staff rule 12.3(*b*) was unlawful.

With respect to abuse of process, the Tribunal considered that the Applicant chose deliberately to omit disclosing information with respect to the very same factors that led the administration to exercise its discretion to refuse his request, and chose to ignore the administration's willingness to consider, for humanitarian reasons, payment of his travel back home prior to filing his application with the Tribunal. By choosing to bring the matter before the Tribunal while the administration stood ready to reconsider its decision at least in part, the Applicant used up valuable resources and time that would otherwise have been devoted to other more urgent matters pending before the Tribunal. The Tribunal also rejected the Applicant's reliance on his incarceration (following his arrest and conviction for financial crimes he committed against the Organization) as *force majeure* and found it to be disingenuous, frivolous and unreasonable. There were no unpredictable or uncontrollable events that would have prevented the Applicant from filing his claim for separation entitlements. As a result, the Tribunal found that the Applicant had manifestly abused the proceedings before it and ordered the Applicant to pay costs in the sum of USD 5,000 for abuse of process.

2. *Judgment No. UNDT/2014/051 (14 May 2014): Nartey* v. *Secretary-General of the United Nations*[3]

Refusal to grant a lien on a post—Prohibited conduct of harassment, abuse of authority and retaliation for testifying as a witness before the Tribunal in another case—Receivability of application without prior resort to management evaluation—Award of compensation for procedural irregularities and moral damages—Referral to the Secretary-General pursuant to article 10, paragraph 8, of the Statute of the Tribunal

The Applicant contested, *inter alia*, the decision by the United Nations Office at Nairobi ("UNON") not to grant a lien on his post to enable him to undertake a mission assignment to the African Union/United Nations Hybrid Operation in Darfur ("UNAMID"). The Applicant asserted that the decision was taken as part of a series of prohibited conduct and retaliatory actions against him for having testified as a witness before the Tribunal in the case of *Kasmani* (UNDT/NBI/2009/67).

The Tribunal first considered whether the application was receivable. The Tribunal observed that it was clear that the administration's objection to the receivability of the case had at its core the failure of the Applicant to request management evaluation of each of his allegations of prohibited conduct and/or retaliation. It referred to ST/SGB/2008/5 and observed that prohibited conduct of harassment and abuse of authority against a staff member would most often be seen to have occurred over a period of time and involve a series of incidents. To argue that a victimized staff member must make a request to the Management Evaluation Unit ("MEU") on every occasion on which alleged prohibited conduct took place was untenable. Having regard to the peculiar characteristics and elements of prohibited conduct, the Tribunal held that the application was receivable.

The Tribunal then considered whether the Applicant was a victim of harassment and/or retaliation following his testimony in the *Kasmani* case. After considering the evidence and examining whether there were any actions, inactions, utterances and/or series of incidents which supported the Applicant's claim that he was a victim of prohibited conduct and retaliation at UNON, the Tribunal found that the administration had acted based on motives bent on exacting retaliation and forcing the Applicant out of UNON.

The Tribunal recalled that in the *Kasmani* case it made an order of protection from retaliation in favour of the witnesses in that case, which included the Applicant, and found that testifying before a Tribunal amounted to an "activity protected by the present policy" within the scope of section 1.4 of ST/SGB/2005/21.

The order in the *Kasmani* case also had directed that the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violations of the order. Subsequently, the Applicant submitted a complaint of discrimination, harassment, abuse of authority and retaliation by UNON to the Ethics Office. The Tribunal considered that the Ethics Office did not adequately act upon the report of retaliation filed by the Applicant in accordance with the provisions of ST/SGB/2005/21, failed to protect him, and failed to obey the order made in the *Kasmani* case.

The Tribunal awarded the Applicant six months' net base salary as compensation for procedural irregularities resulting from the failure of the administration to follow its

[3] Judge Nkemdilim Izuako (Nairobi).

own guidelines and its rules and procedures, together with moral damages in the sum of USD 10,000 for the stress caused to the Applicant over a period of years. The Tribunal also referred an official from UNON and an official from the Ethics Office for accountability under article 10.8 of the UNDT Statute.

3. *Judgment No. UNDT/2014/059 (5 June 2014): Ogorodnikov* v. *Secretary-General of the United Nations*[4]

Proportionality of disciplinary measure—Insufficient consideration of mitigating circumstances—Rescission and replacement of disciplinary measure—Award of compensation for loss of earnings

The Applicant, a civil affairs officer with the United Nations Assistance Mission in Afghanistan ("UNAMA"), sought rescission of a decision to separate him from service, with compensation in lieu of notice and with termination indemnities, as a disciplinary measure. Apparent irregularities in documents relating to his re-entry date to Afghanistan from leave prompted an investigation, on the basis of which it was found that the Applicant had forged a stamp in a copy of his United Nations *Laissez-Passer* ("UNLP") and provided false information in his annual leave report. The Applicant did not contest the facts but rather the proportionality of the disciplinary measure.

The Tribunal examined whether the procedure followed was regular, whether the facts in question were established, whether those facts constituted misconduct and whether the sanction imposed was proportionate to the misconduct committed. Upon review, the Tribunal concluded that the Applicant did not commit the misconduct of providing false information in his annual leave report but that the facts with regard to the remaining charge of misconduct were correctly established. However, the administration did not fully or correctly take into account all the mitigating circumstances when determining the appropriate disciplinary sanction.

The Tribunal identified as mitigating factors the fact that the Applicant never sought to obtain any personal gain or to prejudice the Organization, had continued to work with UNAMA for two more years after the conclusion of the investigation, had received a positive performance appraisal for the 2008–2009 and 2009–2010 cycles, was selected and appointed to a new position with the United Nations Stabilization Mission in Haiti ("MINUSTAH") starting in early 2011 and the delay between the initiation of the disciplinary process and the application of the sanction. The Tribunal found that the continued employment of the Applicant with UNAMA and his performance evaluations clearly contradicted the conclusion that his conduct was incompatible with further service and that the trust between the Applicant and the Organization was not temporarily or irremediably affected by his misconduct.

The Tribunal held that the disciplinary measure was disproportionate to the misconduct and unlawful. The Tribunal rescinded the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnities and replaced it with a written censure plus a fine of one month's net base salary. The administration was ordered to pay compensation for loss of earnings starting from 2 February 2011 until the date of expiration of the contract of the Applicant with MINUSTAH on 2 January 2012,

[4] Judge Alessandra Greceanu (New York).

less the fine of one month's net base salary and the amount of termination indemnity already paid to the Applicant. In the event that the administration decided not to reinstate the Applicant, the Tribunal ordered compensation in the amount of USD 5,000 plus compensation for loss of one year's net base salary and entitlements.

4. *Judgment No. UNDT/2014/112 (20 August 2014): Cocquet* v. *Secretary-General of the United Nations*[5]

Eligibility for After-service health insurance—Lack of continuous service—Literal interpretation of ST/AI/2007/3—Retroactive enrolment

The Applicant contested the administration's decision that she was ineligible for After-service health insurance ("ASHI"). The Applicant had held fixed-term appointments with the International Criminal Tribunal for the former Yugoslavia ("ICTY") from October 2006 to August 2009 and with the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") from October 2009 to November 2013, with a two-month voluntary break-in-service in between. Pursuant to section 2.1 of ST/AI/2007/3, if the Applicant was deemed to have been recruited before 1 July 2007 she would need to have been a participant in the contributory health insurance plan of the United Nations common system for a minimum of five years in order to qualify for ASHI, while if recruited on or after that date, the requisite period of time would be a minimum of 10 years. Relying on staff rule 4.17(*a*), the administration took the position that the effective recruitment date of the Applicant was that of her most recent re-employment with UNAKRT.

The Tribunal explained that the principal issue in this case was the determination of the applicable date of recruitment in the United Nations under section 2.1 of ST/AI/2007/3 on After-service health insurance in order to ascertain whether the Applicant qualifies for ASHI. The Tribunal observed that ST/AI/2007/3 was silent on the situation where a staff member had been employed by the United Nations before 1 July 2007 and again subsequently after that date, with a voluntary break-in-service in between. The Tribunal stated that the case was best resolved by the literal or plain meaning rule of construction, i.e., by establishing the plain meaning of the words in the context of the document as a whole, and that only if the wording was ambiguous should recourse be had to other documents or external sources to aid in the interpretation. The Tribunal found that the intended consequence of ST/AI/2007/3 was apparent from its face, and required cumulative contributory participation and not continuous service or continuous contributory participation. The Tribunal found that the administration's reliance on staff rule 4.17 was misguided, as it was not applicable to the question of ASHI.

As a result, the Tribunal held that since the Applicant entered into the United Nations common system in October 2006, she satisfied the eligibility criteria for ASHI. The Tribunal rescinded the administrative decision and directed the administration to enroll the Applicant in ASHI retroactively from 1 December 2013.

[5] Judge Ebrahim-Carstens (New York).

5. *Judgment No. UNDT/2014/115 (28 August 2014): Jansen* v. *Secretary-General of the United Nations*[6]

NON-RENEWAL OF FIXED-TERM APPOINTMENT—RECEIVABILITY OF APPLICATION FOLLOWING RELIANCE ON ERRONEOUS ADVICE FROM MANAGEMENT EVALUATION UNIT REGARDING STATUTORY TIME LIMITS—LAWFUL EXERCISE OF DISCRETION TO DISCONTINUE FIXED-TERM APPOINTMENT

The Applicant, a staff member at the P-5 level at the United Nations Economic Commission for Europe ("UNECE"), challenged the non-renewal of his fixed-term-appointment ("FTA") beyond its expiry. He was working as project manager on an extra-budgetary project funded exclusively by one member state. His FTA was limited to the particular post and department.

In July 2012, the Applicant was informed that his appointment would not be extended beyond 30 November 2012 because the donor no longer supported funding of the project. He filed a first request for management evaluation with the Management and Evaluation Unit ("MEU"). In early November 2012, the Applicant was informed that the donor had indicated it would discontinue the project by 1 June 2013 and the Applicant signed a FTA effective 1 December 2012 that provided it would expire without notice on 31 May 2013. On 15 November 2012, the Applicant contacted the MEU, referred to his pending case and requested the MEU to incorporate the decision not to extend his contract beyond 31 May 2013 in his first request for management evaluation, but to hold the entire request in abeyance until 28 February 2013, as informal resolution efforts were ongoing. The MEU extended the abeyance but did not acknowledge the inclusion of the new decision in the first request. On 19 February 2013, the Applicant requested the MEU to continue to hold his case in abeyance until 31 May 2013, since he had secured funding for the extension of his contract beyond 31 May 2013 but finalization of the funding was taking some time. The MEU responded to the effect that the November 2012 decision superseded the July 2012 decision, rendering his first case moot, and closed the file without having reviewed the November 2012 decision not to extend his contract beyond 31 May 2013.

On 29 May 2013, the Applicant was informed that, having exhausted all possible options, his contract would not be renewed beyond 31 May 2013. The Applicant submitted a new request for management evaluation on 31 May 2013 in respect of what he considered a new decision not to renew his contract beyond 31 May 2013 or, alternatively, not to request his exceptional placement on a temporary vacancy announcement ("TVA") against a vacant post. He was separated that same day.

The issues before the Tribunal were whether the application was receivable and whether the non-renewal decision was unlawful. With respect to receivability, the Tribunal found that an application could be considered receivable when, following erroneous advice from the MEU and good faith reliance on it, the Applicant failed to comply with the statutory time-limits.

With regard to the nature of the decision, the Tribunal stated that a decision which only repeated the original administrative decision without additional contents or grounds did not reset the clock for appeal. A legitimate expectation for renewal of appointment could only be created through an express promise, which had to be in writing. A decision not to renew a FTA, if based on legitimate grounds supported by evidence, constituted a lawful exercise of discretion. The administration did not have an obligation to place a staff

[6] Judge Thomas Laker (Geneva).

member whose FTA was limited to a specific post and department in another department or to otherwise secure his continued employment. It therefore rejected the application on the merits since the non-renewal decision was based on legitimate grounds and constituted a lawful exercise of discretion on the part of the administration.

6. *Judgment No. UNDT/2014/122 (13 October 2014): Tshika* v. *Secretary-General of the United Nations*[7]

Summary dismissal for fraud—Role of the Tribunal in disciplinary matters—Well-foundedness of the report of misconduct—Failure to satisfy the burden and standard of proof for taking the disciplinary measure—Compensation for monetary loss arising out of the unfair dismissal and for loss of opportunity to secure another job—Award of moral damages

The Applicant, a former staff member of the United Nations Organization in the Democratic Republic of the Congo ("MONUC"), contested the decision to summarily dismiss her from service for attempting to defraud the Organization by making a false claim for medical expenses.

The Tribunal commenced its consideration of the case with a review of the Tribunal's role in disciplinary matters. The role of the Tribunal was to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. In other words, the Tribunal was entitled to examine the entire case before it and to determine whether a proper investigation into the allegations of misconduct had been conducted.

With respect to the conduct of the investigation, the Tribunal referred to its jurisprudence and stressed that an investigation must be thorough and disclose an adequate evidential basis before a view is formed that a staff member may have committed misconduct. The Tribunal found that the investigation was poorly conducted.

The Tribunal then turned to the recommendation that disciplinary proceedings be initiated against the Applicant and considered what evidence should satisfy a head of office or responsible officer that a report of misconduct was well-founded. The Tribunal noted that under ST/AI/371, it was the responsibility of the head of office or responsible officer to undertake a preliminary investigation where there was reason to believe that a staff member had engaged in unsatisfactory conduct and that the head of office or responsible officer appeared to be vested with wide discretion at the initial stage of a disciplinary matter. That discretion was to be exercised judiciously in the light of what the investigation had revealed. The head of office or responsible officer was compelled to carefully scrutinize the facts gathered during the investigation; see if there were any flaws or omissions in the facts gathered that needed to be remedied; assess whether all available and relevant witnesses had been interviewed; and call for supplementary investigation or clarification if need be. In this case, the Tribunal found that the responsible officers had not carefully scrutinized the investigation report so as to identify the flaws in the facts gathered and that, as a consequence, the threshold of "well-founded" was not reached because the conclusion was based on an investigation report that was flawed.

[7] Judge Vinod Boolell (Nairobi).

The Tribunal recalled that the administration had the burden of establishing that the alleged misconduct for which a disciplinary measure had been taken against a staff member occurred. An accused staff member could not be made to shoulder the flaws of a badly conducted investigation. The Tribunal stated that the whole investigation centered on the fact that no surgery was ever performed on the husband of the Applicant, and the charge against the Applicant was that she was claiming reimbursement for a surgery that never took place. At the oral hearing, the administration attempted to rely on hearsay evidence in support of the charge. The Tribunal indicated that caution should be exercised before acting on such evidence, especially in a disciplinary matter. The Tribunal held that the evidence was not clear and convincing so as to warrant an adverse finding against the Applicant. At the hearing, the Administration also attempted to establish that the amounts of the invoices and receipts produced by the Applicant and her husband had been manipulated, which was a charge that had never been put to the Applicant specifically in the charge sheet. After considering the evidence, the Tribunal was not persuaded that the administration had discharged the standard of proof required to establish that invoices and receipts were fraudulent and indicated that it would not embark on an analysis of what clearly appeared to be a new charge that had not the subject of an investigation.

As a result, the Tribunal concluded that the established facts did not legally amount to misconduct and that the disciplinary measure imposed on the Applicant was unlawful *ab initio* and therefore a violation of her rights. The Applicant was awarded one year's net base salary for monetary loss arising out of the unfair dismissal and for loss of opportunity to secure another job owing to the dismissal. The Tribunal also awarded the sum of USD 5,000 as moral damages based on the Applicant's testimony of harm.

7. *Judgment No. UNDT/2014/130 (30 October 2014): Karseboom* v. *Secretary-General of the United Nations*[8]

Claim for compensation under Appendix D of the Staff Rules—Appeals of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties—Failure to follow the procedure under article 17 of Appendix D of the Staff Rules—locus of burden of proof—Award of compensation in excess of two years' net base salary pursuant to article 10, paragraph 5(b), of the Statute of the Tribunal—Award of moral damages

The Applicant, a security guard at the United Nations Organization in the Democratic Republic of the Congo ("MONUC"), had a bicycle accident while on leave in Spain in April 2006 and suffered an injury to his lower back diagnosed as lytic spondylolisthesis. He received medical treatment in Spain and, following medical clearance, returned to full duty in September 2006. The Applicant had a second accident while on duty in October 2006, suffered severe injury to his left leg and did not return to his duties again. Following medical evacuation to Spain, an x-ray and an MRI of his back were performed. The Applicant was diagnosed with persisting low back pain secondary to lytic spondylolisthesis and told that his vertebrae required surgical repair. The Applicant underwent surgery twice in 2008.

The Applicant filed a claim for compensation under Appendix D of the Staff Rules. The Advisory Board on Compensation Claims ("ABCC") found that only the injury to his

[8] Judge Coral Shaw (Geneva).

left leg and knee was service-incurred. The Applicant filed a request for reconsideration under article 17 of Appendix D, to have his spinal back injury recognized as service-incurred and to be awarded compensation for permanent loss of function under article 11.3(*c*) of Appendix D. The ABCC, upon the advice of the Medical Director, recommended to the Secretary-General that the spine injury not be recognized as service-incurred and that the Applicant not receive compensation for permanent loss of function. The advice of the Medical Director was based on the medical report of an independent practitioner prepared in connection with the request by the Applicant for a disability benefit that was being considered by the United Nations Staff Pension Committee under the United Nations Joint Staff Pension Fund ("UNJSPF") Regulations. The Secretary-General approved the recommendation by the ABCC.

The Tribunal found that article 17 of Appendix D provided for a specific process to determine a request for reconsideration of a claim for compensation and that it was mandatory to convene a medical board if the appealed touched on medical aspects. The administration failed to follow the correct procedure when it did not convene a medical board and could not rely on the independent medical evaluation as an alternative thereto. The Tribunal further stressed that the independent medical evaluation failed to address the issue of causation of the spinal injury and that the administration could not rely on the absence of evidence in that report to support a conclusion that the October 2006 accident had no impact on the back injury of the Applicant.

The Tribunal rejected the administration's submission that it was for the Applicant to prove that his spinal injuries were attributable to the work-related accident; rather, it was for the administration to establish that the advice given by the ABCC was based on well-founded evidence. The obligation of the Applicant was to demonstrate that the process provided for in the relevant article was disregarded. The Tribunal found that the ABCC made its recommendations based on uncertain facts and inferences which were derived, improbably, from the absence of evidence. As a result, the ABCC recommendations and consequent administrative decision were not well-founded.

The Tribunal considered it was not competent to make an award under Appendix D, as this would have involved making findings on medical matters, but could award compensation for material damage resulting from a violation of a staff member's rights and for moral damages for the impact of the breach on the Applicant. When there were no alternative means of assessing material damage under Appendix D, it was necessary to consider the likelihood that, but for the procedural errors, the ABCC would have reached a different conclusion about the cause of a claimant's permanent injuries. That was not a medical assessment, but an evaluation of the claimant's loss of opportunity. Where the medical evidence about causation was in dispute, the probability that a claimant would have succeeded in his claim for compensation could be estimated at 50 per cent, which was the basis on which material damage had to be assessed.

The Tribunal, referring to *Mmata* 2010-UNAT-092, considered that the case was an exceptional one under article 10.5(*b*) of its Statute, justifying an award greater than two years' net base salary. On the balance of probabilities that the ABCC would have reached a different conclusion had the proper procedure been followed, and since the medical issue of causation was in dispute, the Tribunal awarded USD 150,104 as material damages, corresponding to 50 per cent of the maximum amount the Applicant would have obtained

under article 11.3 of Appendix D for permanent loss of function. The Tribunal also awarded three months' net base salary as moral damages. The Tribunal reiterated that the purpose of compensation was to place a staff member in the same position he/she would have been in had the Organization complied with its contractual obligations. To deprive the Applicant of the appropriate level of compensation for loss of chance measured against the compensation he may have received under Appendix D and of any compensation for moral damage would have been unjust and warranted an exception under article 10.5(*b*) of its Statute.

B. Decisions of the United Nations Appeals Tribunal

The United Nations Appeals Tribunal (UNAT) held its first session in 2014 from 24 March to 2 April in New York. It held its second session in 2014 in Vienna from 16 to 27 June. Its third session was held in New York from 6 to 17 October. The Appeals Tribunal issued a total of 100 judgments in 2014. The summaries of nine of those judgments are reproduced below.

1. *Judgment No. 2014-UNAT-410 (2 April 2014): Igbinedion* v. *Secretary-General of the United Nations*[9]

Suspension of the implementation of a contested decision pending management evaluation—Principle of *stare decisis* regarding jurisprudence by the Appeals Tribunal—Obligation to respect an order by the Dispute Tribunal until overturned by the Appeals Tribunal—Inherent authority to conduct contempt proceedings—Referral for accountability in pursuant to article 10, paragraph 8, of the UNDT Statute

The Applicant was a staff member of the United Nations Human Settlements Programme ("UN-Habitat") who had requested management evaluation of the decision not to extend his appointment. At the same time, the Applicant had requested that the United Nations Dispute Tribunal ("UNDT") order the suspension of the implementation of the contested decision, which the UNDT granted. Following the decision of the Management Evaluation Unit ("MEU") that the request of the Applicant was time-barred, the Secretary-General filed a motion to vacate the order to suspend the decision not to extend the appointment. The UNDT ordered to keep the decision suspended until the case was reviewed on the merits. The Secretary-General filed an appeal against this order and UN-Habitat did not extend Applicant's appointment based on its view that the MEU decision superseded the UNDT order. Applicant then filed an application for contempt by UN-Habitat for its failure to comply with the order of the UNDT.

In its judgment on contempt,[10] the UNDT concluded, *inter alia*, that the Executive Director of UN-Habitat, the Director of the Programme Support Division of UN-Habitat and the Office of Legal Affairs were in contempt of its authority. It decided to refer the Executive Director, the Legal Officer serving as the representative of the Secretary-General before the UNDT and the Office of Legal Affairs to the Secretary-General for possible action to enforce accountability. It also recommended to subsequently report the Legal

[9] Judge Mary Faherty, Presiding, Judge Inés Weinberg de Roca, Judge Sophia Adinyira, Judge Luis María Simón, Judge Richard Lussick, Judge Rosalyn Chapman.

[10] *Igbinedion* v. *Secretary-General of the United Nations*, Judgment No. UNDT/2013/024.

Officer to the Bar association of his national jurisdiction for engaging in conduct not befitting an officer of the court. The Secretary-General also appealed against this judgment.

In relation to the first appeal by the Secretary-General,[11] the Appeals Tribunal had held that the orders issued by the UNDT violated article 2(2) of the Tribunal Statute, which provides for suspension of the implementation of a contested decision only during the pendency of the management evaluation, and article 10(2) of the UNDT Statute, which prohibits the suspension of the implementation of the contested decision in cases of appointment, promotion, or termination.

In a decision by the full bench, the Appeals Tribunal held with regard to the second appeal by the Secretary-General that the UNDT had acted unlawfully in issuing an order in direct contravention of the established jurisprudence of the Appeals Tribunal that the UNDT cannot order a suspension of the implementation of a contested decision beyond the pendency of a management evaluation.[12] Notwithstanding the foregoing, the Appeals Tribunal held that a party before the UNDT must obey its binding decision and that a decision by the UNDT remains legally valid absent a decision of the Appeals Tribunal to vacate it. Noting that its jurisprudence was clear on this point,[13] the Appeals Tribunal found the refusal by the Secretary-General to comply with the order of the Tribunal to be vexatious.

The Appeals Tribunal also considered that even without explicit statutory power a court had the inherent power to conduct contempt proceedings as part of its judicial powers to promote and protect the court and to regulate its proceedings.

The Appeals Tribunal also held that the power of the UNDT to make referrals for accountability in accordance with article 10(8) of its Statute is independent of the inherent judicial powers relating to contempt and was not predicated upon such a finding. In the present case, the Appeals Tribunal vacated the referrals for accountability as it considered that the UNDT exercised its statutory authority improperly in making the referrals under article 10(8) under the guise of sanctions for contempt.

2. *Judgment No. 2014-UNAT-416 (2 April 2014): Charles* v. *Secretary-General of the United Nations*[14]

Contestation of non-selection decision—Staff selection system pursuant to ST/AI/2010/3—Selection from the roster without prior consideration of non-rostered candidates

The Respondent (Applicant in the first instance), and Appellant), a staff member of the United Nations Secretariat in New York, contested two non-selection decisions. In both selection exercises, the hiring manager selected a staff member from a pre-approved roster list and did not take into consideration any of the other candidates for the post, including the Respondent, who was not on the roster list for either post.

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[11] *Igbinedion* v. *Secretary-General of the United Nations*, Judgment No. 2011-UNAT-159.

[12] *Tadonki* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005; *Kasmani* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.

[13] *Igunda* v. *Secretary-General of the United Nations*, Judgment No. 2012-UNAT-255; *Villamoran* v. *Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160.

[14] Judge Richard Lussick, Presiding, Judge Inés Weinberg de Roca, Judge Luis María Simón.

For each of the selection exercises, the United Nations Dispute Tribunal ("UNDT") in Judgment No. UNDT/2013/040 and Judgment No. UNDT/2013/041, respectively, awarded the Respondent USD 1,000 in compensation for the breach of his right to receive full and fair consideration and for the resultant harm. The UNDT held that the selection of a rostered candidate without consideration of other candidates was contrary to the requirements of Article 101(3) of the Charter and staff regulation 4.2. The UNDT considered that ST/AI/2010/3, which established the staff selection system and was consistent with Article 101(3) of the United Nations Charter of the United Nations and staff regulation 4.2, did not provide for priority consideration of rostered candidates. It only exempted them from referral to the central review bodies for approval. Given that he was only one of 153 and 128 candidates applying for the respective posts, the UNDT considered it speculative to estimate his chances of success and therefore found the sum of USD 1,000 sufficient. The Secretary-General appealed the UNDT Judgment and the Respondent cross-appealed.

The Appeals Tribunal held that the plain wording of section 9.4 of ST/AI/2010/3 made it clear that the head of department/office had the discretion to make a selection decision from candidates included in the roster. It considered that there was no requirement in section 9.4 for the head of department to first review all the non-rostered candidates, noting that section 9.4 had been amended to specifically remove such a requirement. The Appeals Tribunal held that the UNDT erred in law in deciding that the appointment of a rostered candidate prior to reviewing all non-rostered candidates was contrary to ST/AI/2010/3 and the Appeals Tribunal accordingly vacated the award of damages in favour of the Respondent.

3. *Judgment No. 2014-UNAT-430 (27 June 2014): Diallo* v. *Secretary-General of the International Civil Aviation Organization*[15]

TERMINATION OF APPOINTMENT DUE TO RESTRUCTURING—BREACHES FUNDAMENTAL IN NATURE WARRANTING THE AWARD OF MORAL DAMAGES—BROAD DISCRETION OF ADJUDICATING TRIBUNAL TO ADMIT EVIDENCE

The Appellant appealed against the decision taken by the Secretary-General of the International Civil Aviation Organization ("ICAO") to terminate her appointment due to the abolition of her post as a result of cost-cutting measures.

At the time of the contested decision, the Appellant worked as a G-7 Field Operations Assistant in the Technical Cooperation Bureau ("TCB"), in a newly created Project Financing and Development ("PFD"), to which she had been reassigned from the Field Operations Section ("FOS"). The letter informing the Appellant of the contested decision referred to the PFD post number and indicated that ICAO would endeavour to find alternative employment for her within ICAO, but if such employment could not be found, her appointment would end on 31 July 2011 and she would be paid termination indemnity in the amount of three months' net base salary. After administrative review, which upheld the contested decision, the Appellant appealed to the Advisory Joint Appeals Board ("AJAB") of ICAO.

The AJAB determined that: (*a*) there were no grounds to uphold the Appellant's assertion that she was retaliated against by the Secretary-General of ICAO because of an appeal by her husband; (*b*) the decision of ICAO to restructure the TCB by means of restructuring certain posts was within its discretion and not tainted by improper motives; (*c*) as of

[15] Judge Sophia Adinyira, Presiding, Judge Mary Faherty, Judge Richard Lussick.

31 July 2011, the Appellant still held her post in FOS and the decision to abolish her post was partly based on an error of fact since the ICAO administration attempted to abolish a post in PFD that had never been established; (*d*) ICAO did not show good faith in its efforts to find the Appellant an alternative post; (*e*) the Appellant failed to adduce substantive evidence of harassment and threat by the Secretary-General of ICAO; and (*f*) ICAO had violated the Appellant's right to have access to all pertinent documents in her personnel and confidential files.

The AJAB recommended to the Secretary-General of ICAO that ICAO pay the Appellant her full salary and entitlements from the date on which her contract was terminated (i.e. 31 July 2011) through the end of her contract on 11 December 2011 as well as compensation in the amount of two months' net base salary. The Secretary-General, while not fully concurring with the conclusions of AJAB, accepted the recommendations to pay the above amounts, conditioned upon the Appellant agreeing to waive her rights to an appeal and make no further claims against ICAO in this matter.

The Appellant challenged the decision by the Secretary-General of ICAO on the grounds that the AJAB failed to render her full justice as the compensation was not commensurate with the loss of career opportunities as well as with her "level of suffering, due to [her] abusive dismissal". The Appellant further averred that the AJAB erred in procedure and in fact, resulting in a manifestly unreasonable decision, by rejecting the written testimony of her immediate supervisor and the evidence of her second reporting officer which clearly showed that the Secretary General planned "to get rid of [her]".

The Appeals Tribunal found merit in the appeal concerning the amount of compensation awarded to her in terms of moral damages. The AJAB had made a number of findings in her favour indicating that her rights as a staff member were abused during the restructuring process. The Appeals Tribunal considered those breaches to be fundamental in nature so as to warrant an award of moral damages and substituted the AJAB-recommended award of two months' net base salary with the sum of six months' net base salary. The Appeals Tribunal did not disturb the award of the payment of her full salary and all entitlements up to the end of her contract on 11 December 2011.

The Appeals Tribunal found no merit in the appeal against the rejection by AJAB of the testimonies of her immediate supervisor and her second reporting officer. It held that the approach of the AJAB was consistent with its jurisprudence in *Messinger*[16] and *Larkin*.[17] The Appeals Tribunal held that the AJAB, in a position similar to that of an adjudicating tribunal or trier of fact, had broad discretion to determine the admissibility of any evidence and the weight to attach to such evidence. The Appeals Tribunal affirmed the finding by the AJAB that the Appellant could not adduce substantial evidence of harassment and threat by the ICAO Secretary-General and that the Appellant's claim that the ICAO Secretary-General had targeted her for dismissal could not be supported.

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[16] *Messinger* v. *Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

[17] *Larkin* v. *Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134.

4. *Judgment No. 2014-UNAT-436 (27 June 2014): Walden* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*[18]

Wilful misrepresentation of academic credentials on application—Diploma fraud—Termination of appointment for misconduct

The Respondent (Applicant in the first instance) was appointed to the post of senior procurement officer with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA") on 20 July 2000. His Personal History Form ("PHF") and *curriculum vitae* submitted with respect to this appointment indicated that he had a Master of Business Administration from a particular college. On 16 October 2007, as a result of having applied for a P-5 post and submitted his PHF and *curriculum vitae*, the Respondent was notified that the college was on the list of a report entitled "Diploma Mills: A Report on Detection and Prevention of Diploma Fraud" by the United Nations Office for Human Resources Management.

An investigation was carried out regarding the Respondent's degree. On the basis of the investigation report, the Commissioner-General determined that the Respondent had committed misconduct by submitting a non-accredited degree in support of his application and had thereby misrepresented his academic credentials, in direct violation of a statement that he had signed in his PHP. The Respondent's case was referred to the Staff Joint Disciplinary Committee ("JDC") which found that the Respondent had knowingly misrepresented his academic qualifications and recommended dismissal. By letter dated 27 May 2009, the Commissioner-General informed the Respondent of her agreement with the JDC's findings and the decision to terminate his appointment for misconduct effective 1 June 2009. The Respondent challenged this decision before the UNRWA Dispute Tribunal.

In Judgment No. UNRWA/DT/2013/011, the UNRWA Dispute Tribunal reversed the decision, finding that there was no clear and convincing evidence that the Respondent had knowingly misrepresented his academic qualifications and that the facts did not establish misconduct and therefore the sanction was disproportionate. The UNRWA Dispute Tribunal also found that the decision was tainted and prejudiced and that the Respondent was denied due process. The UNRWA Dispute Tribunal ordered re-instatement of the Respondent in his post or in the alternative, and bearing in mind the exceptional circumstances of the case, an amount of compensation of two years' net base salary plus six months' net base salary as compensation.

On appeal, the Appeals Tribunal found that it was undisputed that the Respondent had knowingly presented non-existent credentials despite having questioned the ethics of accepting a diploma based on "recognition of prior learning" with no attendance requirement. The Appeals Tribunal found that the facts established that the Respondent failed to meet the high standard of integrity required for an international civil servant as set forth in the United Nations Charter. The Appeals Tribunal noted that UNRWA International Staff Regulation 10.2 provided that the Commissioner-General might impose disciplinary measures on staff members whose conduct was unsatisfactory and further, that he might summarily dismiss a staff member for serious misconduct. The Appeals Tribunal therefore considered that termination was not disproportionate to the offence taking into account

[18] Judge Inés Weinberg de Roca, Presiding, Judge Mary Faherty, Judge Luis María Simón.

that the Respondent's recruitment, in the first instance, was based on a non-degree which would not have qualified him for selection by the Organization.

5. *Judgment No. 2014-UNAT-457 (27 June 2014): Wasserstrom* v. *Secretary-General of the United Nations*[19]

Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations—Findings of the Ethics Office as reviewable administrative decisions—Award of costs for abuse of judicial process

The Respondent (Appellant and Respondent), the former Head of the Office for the Coordination of Oversight of Publicly Owned Enterprises in the United Nations Interim Administration Mission in Kosovo ("UNMIK"), filed a complaint to the Ethics Office alleging that he had been retaliated against for whistleblowing pursuant to ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

The Ethics Office found a *prima facie* case of retaliation and submitted the case to the Investigations Division of the Office of Internal Oversight Services ("OIOS"), which conducted an investigation into the matter. Based on the OIOS investigation report, the Ethics Office informed the Respondent that certain alleged retaliatory acts appeared to be disproportionate, but that those acts were not considered to be linked to the protected activities. The Ethics Office therefore made no findings of retaliation.

The Respondent challenged the decision that no retaliation had taken place before the United Nations Dispute Tribunal ("UNDT"). In a preliminary order on receivability, the UNDT found that the decision of the Ethics Office that no retaliation had taken place was an administrative decision within the meaning of article 2(1)(*a*) of the UNDT Statute.[20] In Judgment No. UNDT/2012/092 on liability, the UNDT upheld the Respondent's complaint of retaliation and found that the Ethics Office had not carried out an independent and proper review of the OIOS investigation report. The UNDT considered that the Ethics Office had not made inquiries into the factual inconsistencies in the report and its annexes and that it erred in law by accepting uncritically the OIOS report conclusion.

The UNDT separately delivered Judgment No. UNDT/2013/053 on relief. It awarded the Respondent USD 50,000 as moral damages and USD 15,000 as costs against the Secretary-General because he had refused to disclose the full OIOS investigation report despite being ordered to do so. The UNDT considered the deliberate and persistent refusal to abide by its orders a manifest abuse of proceedings. The Secretary-General appealed against the preliminary order as well as both judgments on liability and relief. The Respondent partly appealed against the judgment on relief.

The Appeals Tribunal, referring to a definition developed by the former Administrative Tribunal,[21] considered that the key characteristic of an administrative decision subject to judicial review was that the decision must produce direct legal consequences affecting a staff

[19] Judge Mary Faherty, Presiding, Judge Inés Weinberg de Roca, Judge Rosalyn Chapman.

[20] *Wasserstrom* v. *Secretary-General of the United Nations*, Order No. 19 (NY/2010).

[21] Former Administrative Tribunal, Judgment No. 1157, Andronov (2003), para. V. The definition has been confirmed by the Appeals Tribunal, see *Gehr* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-365; *Gehr* v. *Secretary-General of the United Nations*, Judgment

member's terms or conditions of appointment. It held, with one Judge dissenting, that the Ethics Office is limited to making recommendations to the administration and thus considered those recommendations not as administrative decisions subject to judicial review. The Appeals Tribunal further pointed out that the Respondent had not been precluded from seeking management evaluation of several of the alleged retaliatory actions taken by the Administration, yet had not done so. The award for moral damages was accordingly vacated.

In her dissenting opinion, Judge Mary Faherty held that the Ethics Office's determination of no retaliation clearly and unequivocally impacted on the Respondent's terms and conditions of employment and accordingly constituted a reviewable administrative decision.

Considering that the UNDT exercised its discretion correctly in awarding costs against the Secretary-General for abuse of the judicial process, the Appeals Tribunal upheld the award for costs.

6. *Judgment No. 2014-UNAT-465 (17 October 2014): Gonzalez-Hernandez* v. *United Nations Joint Staff Pension Board*[22]

Partial Payment of retirement benefits directly to former spouse under—Execution of national court order—Conflicting national jurisdictions—Observance of article 45 of the regulations of the United Nations Joint Staff Pension Fund

The Appellant, a national of Portugal, retired from the United Nations Industrial Development Organization ("UNIDO") on 31 October 1999 after 32 years of service. He opted for a reduced retirement benefit, taking out a lump-sum.

In 2005, the Appellant was living in Portugal while his wife and two sons were living in Austria. His wife sued him for alimony and for sole custody of his children in the Viennese courts and won. She contacted the United Nations Joint Staff Pension Fund ("UNJSPF") to request the application of article 45 of its Regulations on the basis of a judgment by an Austrian trial court, providing for spousal support.

On 3 March 2011, the Appellant obtained a divorce in Portugal at the Lisbon family court, with no alimony to be paid to his former wife.

On 13 May 2012, the Appellant's wife provided UNJSPF with a copy of a final and executable judgment from the Austrian Appeals Court ordering the Appellant to pay, in addition to child support, spousal support as of the beginning of January 2009 for an undetermined period. The Applicant claimed that he was no longer subject to the Austrian court judgments even though his Portuguese divorce judgment stated that Austrian law applied in the divorce.

On 17 December 2012, UNJSPF concluded that the documents on file fully established that the Appellant had a legal obligation to pay spousal and child support and decided to apply article 45 in the case. Thus, a percentage of his monthly gross pension benefit was to be paid directly to his ex-spouse on a prospective basis. On 25 March 2013, the Appellant challenged the decision to apply article 45 before the Standing Committee of the Pension

No. 2013-UNAT-313; *Al-Surkhi* et al. v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-304.

[22] Judge Luis María Simón, Presiding, Judge Richard Lussick, Judge Mary Faherty.

Board. The Standing Committee affirmed the decision of UNJSPF. The Appellant appealed against this decision.

The Appeals Tribunal noted that in accordance with article 2(9) of its Statute, an appeal before it submitted against a decision adopted by the Standing Committee of the Pension Board could only succeed if it was found that the Regulations of UNJSPF were not observed. The Appeals Tribunal stated that the Appellant bore the burden of satisfying the Tribunal that the impugned decision was defective. The Appeals Tribunal found no error of law or fact that would vitiate the contested decision that established the deduction of a percentage of the Appellant's monthly pension benefit and payment of that amount directly to his former spouse.

In particular, the Appeals Tribunal held that UNJSPF correctly applied article 45 of its Regulations and relied on an internationally binding judgment about spousal and child support, issued by an Austrian court, which was not contradicted by the divorce decree issued by the Portuguese court. The Appeals Tribunal found that there was no basis for the Appellant to question the validity of the Austrian court judgment or the binding obligations imposed on him by order of the Austrian court. The Appeals Tribunal considered that UNJSPF acted properly and within its statutory remit after obtaining the necessary information and adopted a reasoned and well-founded decision. The appeal was dismissed in its entirety.

7. *Judgment No. 2014-UNAT-466 (17 October 2014): Saffir and Ginivan* v. *Secretary-General of the United Nations*[23]

Non-interference by management and United Nations Internal Justice System in United Nations Staff Union election matters—Refusal to carry out investigation as reviewable administrative decision—No right to appeal of prevailing party without concrete grievance stemming from contested decision

The Respondents (Applicants in the first instance) voted in the elections for the 44th Staff Council and Leadership for the United Nations Staff Union ("UNSU") held from 7 to 9 June 2011 organized and conducted by UNSU polling officers. Both Respondents alleged that polling officers and the chairperson committed numerous violations in the conduct of the election.

The UNSU Arbitration Committee reviewed their complaints and found that that they were unsubstantiated. The Respondents then requested the Secretary-General to conduct an investigation into the alleged irregularities of the elections alleging inadequacy of the UNSU's internal arbitration mechanism. In the absence of a reply, the Respondents filed requests for management evaluation. The Under-Secretary-General for Management responded with a letter to the counsel of the Respondents explaining that management would not interfere with UNSU internal election matters. The Respondents then filed applications with the United Nations Dispute Tribunal ("UNDT").

In Judgments Nos. UNDT/2013/109 and UNDT/2013/110, the UNDT found that the claims regarding the elections of the UNSU and, in particular, the claims for relief, were not receivable, but that the refusal to carry out the requested investigation was an administrative decision subject to review. On the merits, the UNDT noted that the UNSU Arbitration Committee had already examined and rendered a binding decision on the

[23] Judge Luis María Simón, Presiding, Judge Rosalyn Chapman, Judge Mary Faherty.

matter. Finding that neither staff rule 8.1 nor UNDT jurisprudence indicated that the Secretary-General was obliged to intervene in the conduct of UNSU elections, the UNDT held that the decision of the Administration not to investigate the UNSU elections was lawful. The Secretary-General appealed the UNDT's determination that the decision not to investigate UNSU election matters was receivable.

The Appeals Tribunal found by majority that the appeal by the Secretary-General was not receivable since a party may not appeal against a judgment in which it had prevailed.[24] The Appeals Tribunal noted that although the UNDT reviewed the merits of the decision despite the Secretary-General's argument that the decision was non-receivable *ratione materiae*, the UNDT held in favour of the Secretary-General. The Appeals Tribunal therefore considered that without negative impact to the Secretary-General, there was no right to appeal even if the judgment contained errors of law or fact, including with respect to its jurisdiction or competence. The Appeals Tribunal held that a party must present a concrete grievance as a direct consequence of the outcome of the contested decision that could be addressed by the appellate body through a change in the decision.

Judge Rosalyn Chapman noted in her dissenting opinion that the Secretary-General had appealed on two valid grounds under article 2(1) of the UNAT Statute, i.e., the UNDT erred on a question of law and the UNDT exceeded its competence in finding that it had jurisdiction *ratione materiae*. The dissenting opinion considered that the UNDT erred in law and failed to properly apply the correct definition of an appealable administrative decision. The dissenting opinion also considered that the appeal should have been heard for the purpose of providing guidance to the UNDT and to avoid future applications challenging staff elections and election procedures by staff members.

8. *Judgment No. 2014-UNAT-480 (17 October 2014): Oh* v. *Secretary-General of the United Nations*[25]

Disciplinary proceedings and dismissal for serious misconduct of sexual exploitation—Due process rights—Reliance on anonymous witness statements corroborated by further evidence—OIOS investigation not criminal in nature—Statements do not require signature—Lifting of confidentiality of the appellant

The Appellant was dismissed from service in August 2010 after an investigation by the Office of Internal Oversight Services ("OIOS") concluded that he had engaged in sexual exploitation and abuse while serving with the United Nations Operation in Côte d'Ivoire ("UNOCI") in Abidjan.

The Appellant filed an application with the United Nations Dispute Tribunal ("UNDT") challenging his dismissal and claiming that the statements by anonymous victims relied upon by OIOS relied were fabricated. In Judgment No. UNDT/2013/131, the UNDT rejected the claims of fabrication and found that there was sufficient proof that the Appellant had engaged in sexual exploitation and abuse considering the totality of the evidence on record. In reaching its conclusion, the UNDT relied on the Appellant's statements to OIOS; the statements of two of the anonymous victims, VO3 and VO4, to OIOS; the testimony of the lead investigator; and the identification of the Appellant by two of the

[24] See *Sefraoui* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048.

[25] Judge Sophia Adinyira, Presiding, Judge Rosalyn Chapman, Judge Luis María Simón.

anonymous victims in a photographic array. The UNDT held that it was not disputed that the women had to remain anonymous as they had been removed from a human trafficking ring and were traumatised. The UNDT considered the jurisprudence of the Appeals Tribunal in *Liyanarachchige*[26] and *Applicant*[27] and concluded that the right to cross-examination was not an absolute right and that "the requirements of due process rights will [have] been met in relation to witness statements … if the witness […] statements have been provided to the staff member and the staff member has had an opportunity to comment on, and respond to, the statements". The UNDT concluded that the Appellant's due process rights had been respected, and that summary dismissal was proportionate to the offence. Accordingly, the UNDT dismissed the application of the Appellant.

On appeal, the Appellant claimed, *inter alia*, that the UNDT erred in finding that his due process rights had been respected because he had had the opportunity to comment on the anonymous witness statements. Furthermore, the UNDT Judgment could not be reconciled with the ruling of the Appeals Tribunal in *Liyanarachchige*, which had held that a disciplinary measure could not be founded solely upon anonymous statements without violating the requirements of adversary procedure. The Appellant also sought to distinguish the *Applicant* case on its facts as in that case, the complainants' identities were known to the staff member and the witness statements were signed by the complainants.

The Appeals Tribunal affirmed the UNDT judgment and upheld the decision to terminate the Appellant for serious misconduct of sexual exploitation. It found that although the factual circumstances of the case were the same as in *Liyanarachchige*, the matter was distinguishable insofar as the disciplinary measure in this case was founded not only on anonymous witness statements, but also on statements made by the Appellant to OIOS that corroborated the witness statements, as well as on photographic identification. Furthermore, the Appeals Tribunal confirmed that the due process rights of a staff member are complied with as long as he or she has a meaningful opportunity to mount a defence and question the veracity of the statements against him or her. Both of these requirements were considered satisfied in the instant case. Insofar as the Appellant also challenged the record of his statements to OIOS, the Appeals Tribunal held that the fact that the Appellant did not sign the written or typed notes did not amount to a procedural irregularity. Witness statements did not have to be signed according the OIOS Investigations Manual as such investigations were not criminal in nature.

The Appeals Tribunal also lifted the confidentiality previously ordered by the UNDT with respect to the Appellant's name, considering that he failed to demonstrate any substantive reason to justify anonymity.

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[26] *Liyanarachchige* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

[27] *Applicant* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.

9. *Judgment No. 2014-UNAT-488 (17 October 2014): Chocobar* v. *Secretary-General of the United Nations*[28]

Lack of jurisdiction upon withdrawal of application—Article 36 of the Tribunal Rules of Procedure cannot serve to augment the jurisdiction of the Tribunal in violation of article 2 Tribunal Statute

The Respondent (Applicant in the first instance) filed an application with the United Nations Dispute Tribunal ("UNDT") contesting a selection decision in which another candidate was selected from a pre-approved roster for a position-specific job opening without any interviews or written tests being conducted. She claimed that the selection was unlawful and breached her right to full and fair consideration for the post.

After a confidential settlement agreement, the Respondent filed a motion seeking leave to withdraw the application. In Order No. 233 (NY/2014), the UNDT noted that following the Respondent's withdrawal of the application there was no case to adjudicate and declared the case closed. It nonetheless proceeded to make findings regarding a substantive issue raised in the Respondent's application considering the continued use of pre-approved rosters incorrect. It therefore referred the matter to the Secretary-General pursuant to article 7 of the UNDT Statute and article 36 of its Rules of Procedure.

The Secretary-General appealed against this order claiming, *inter alia*, that the UNDT exceeded its competence in issuing the order despite the withdrawal of the application. Citing the principle of *stare decisis*, he also contended that the UNDT had no authority to re-open the issue of the use of pre-approved rosters in selection processes, as the issue had already been decided by the Appeals Tribunal in *Charles*[29].

The Appeals Tribunal held that the UNDT lacked jurisdiction and exceeded its competence to a significant degree. It found that the UNDT did not have a case before it when it made the contested order since the Respondent had withdrawn the application. Noting the limited jurisdiction of the UNDT, the Appeals Tribunal held that there was no provision in the UNDT Statute empowering the UNDT to issue this order. Article 36 of the UNDT Rules of Procedure could not provide a legal basis. In the absence of a case to adjudicate the UNDT Rules of Procedure could not serve to augment the jurisdiction of the UNDT in violation of article 2 of the UNDT Statute. The Appeals Tribunal therefore vacated the order with the exception of the closure of the case. The concerns brought forward by the Secretary-General regarding the re-opening of the issue of pre-approved rosters were dismissed by the Appeals Tribunal as the order was without legal force.

C. Decisions of the Administrative Tribunal of the International Labour Organization[30]

The Tribunal rendered a total of 149 judgments in 2014 (61 in its 116th session, 25 in its 117th session and 63 in its 118th session). The summary of one judgment is included herein.

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[28] Judge Richard Lussick, Presiding, Judge Rosalyn Chapman, Judge Inés Weinberg de Roca, Judge Sophia Adinyira, Judge Luis María Simón, Judge Mary Faherty.

[29] *Charles* v. *Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416 (see decision No. 2 above).

[30] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the

Judgment No. 3333 (9 July 2014): A.S. v. *Universal Postal Union (UPU)*[31]

Application for view of a previous judgment of the Tribunal—Principle of res judicata—Review under exceptional circumstances and on limited grounds—No review of a judgement on the merits of an application

The Applicant requested the review of Judgment No. 3134, delivered on 4 July 2012, by which the Tribunal set aside the decision of 11 March 2010 concerning the payment to the complainant of a withdrawal settlement in respect of the rights he had accumulated with the UPU's Provident Scheme.

The Tribunal remitted the case to the UPU so that it could calculate the financial loss sustained by the complainant from the failure to transfer his rights to the United Nations Joint Staff Pension Fund, in which he had been a participant with effect from 1 November 2004.

The second paragraph of consideration 9 of the judgment concerning the remittal read as follows:

> "The case will therefore be remitted to the UPU so that it can calculate the loss sustained by the complainant through its negligence, on the basis that the sum it has to pay him by way of damages will take account of the sum of 75,504.80 Swiss francs already received by the complainant, and cannot exceed the sum claimed by him on 16 February 2010, i.e. 36,570.65 francs."

The Applicant contended that the Tribunal mistakenly considered that a letter of 16 February 2010 constituted a formal request "which would have frozen the scope of the dispute for the remainder of the proceedings" and that it failed to take account of the sum "of approximately 386,000 francs" that he claimed in his rejoinder in compensation for his alleged financial loss.

The Tribunal stated that pursuant to article VI of its Statute, the Tribunal's judgments are final. Accordingly, they were subject to the application of the principle of *res judicata*. While it is nevertheless accepted that they may be reviewed, such a review might only occur in exceptional circumstances and on limited grounds. The Tribunal could entertain an application for review only where the judgment concerned failed to take account of specific facts, was based on a material error, i.e. a mistaken finding of fact which, unlike a mistake in the appraisal of the facts, involved no exercise of judgment, or failed to rule on a claim, or where the complainant discovered new facts, i.e. facts which he or she discovered too late to cite in the original proceedings. Moreover, the matter invoked as a ground for review must be likely to have a bearing on the outcome of the case.[32]

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staff regulations of international organizations that have recognized the competence of the Tribunal. For a list of those organizations, see http://www.ilo.org/tribunal/membership/lang--en/index.htm. For more information about the Administrative Tribunal of the International Labour Organization and the full texts of its judgments, see the Triblex case-law database of the ILO at http://www.ilo.org/tribunal/lang--en/index.htm.

[31] Mr. Claude Roullier, Mr. Seydou Ba, Mr. Patrick Fryman and Mr. Dražen Petrović, Judges.

[32] See Judgment No. 442, paragraph 3 of the considerations; Judgment No. 748, paragraph 3 of the considerations; Judgment No. 1252, paragraph 2 of the considerations; Judgment No. 1294, paragraph 2 of the considerations; Judgment No.1504, paragraph 8 of the considerations; Judgment No. 2270, paragraph 2 of the considerations; Judgment No. 2693, paragraph 2 of the considerations; and Judgment No. 3244, paragraph 4 of the considerations.

The Tribunal concluded that the Applicant's criticisms challenge the Tribunal's appraisal in Judgment No. 3134 of the merits of the application. Hence they did not constitute grounds for review. Furthermore, as he did not identify any omission or material error on the part of the Tribunal, his application had to be dismissed.

D. Decisions of the World Bank Administrative Tribunal[33]

The Tribunal rendered 18 decisions and issued two orders in 2014. The World Bank Administrative Tribunal decisions and orders are available at the website of the Tribunal.

E. Decision of the Administrative Tribunal of the International Monetary Fund[34]

1. *Judgment No. 2014–1 (February 25, 2014): Ms. "JJ"* v. *International Monetary Fund*[35]

Request for anonymity in cases challenging performance assessments—Discretion of management in assessing performance—Balanced assessment of performance—Performance shortcoming coinciding with unusual work pressure—Merit Allocation Ration directly dependent upon Annual Performance Review—Discretion to place staff on Performance Improvement Plan

The Applicant, a staff member of the Fund, challenged her performance rating of "5" for the Fiscal Year 2009 Annual Performance Review ("FY2009 APR"), her Merit Allocation Ratio ("MAR") of zero for the same review period, and the decision that, as a result of her rating on the FY2009 APR, she would be placed on a Performance Improvement Plan ("PIP") following her return from a two-year external assignment.

As an initial matter, the Tribunal granted the Applicant's request for anonymity pursuant to Rule XXII of its Rules of Procedure. While reaffirming that anonymity

[33] The World Bank Administrative Tribunal is competent to hear and pass judgment upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for the Settlement of Investment Disputes (collectively "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reasons of the staff member's death and any person designated or otherwise entitled to receive payment under any provision of the Staff Retirement Plan. For more information on the World Bank Administrative Tribunal and full texts of its decisions, see https://webapps.worldbank.org/sites/WBAT/Pages/default.aspx.

[34] The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is competent to pass judgment upon any application: a) by a member of the staff challenging the legality of an administrative act adversely affecting him; or b) by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant. For more information on the Administrative Tribunal of the International Monetary Fund and the full texts of its judgments, see https://www.imf.org/external/imfat/.

[35] Catherine M. O'Regan, President, Andrés Rigo Sureda, Jan Paulsson.

of applicants remains the exception and not the rule in the Tribunal's judgments, the Tribunal concluded that Ms. "JJ" had met the requirement of showing "good cause" for anonymity, given that key evidence in the case related to the assessment of her job performance. Referring to its earlier decision in *Mr. "HH"* v. *International Monetary Fund,*[36] the Tribunal confirmed that granting anonymity to applicants in cases challenging performance assessments encourages candour in the performance appraisal process.

Turning to the merits of the case, the Tribunal considered the Applicant's contention that the Fund had abused its discretion in assessing her performance as "5" on the FY2009 APR, the lowest of the possible performance ratings. The Tribunal considered the following questions: Did the Applicant's supervisors provide her with adequate, timely, and constructive feedback of performance shortcomings? Was the Applicant given the necessary guidance and training to help her remedy the shortcomings in her performance? Did the FY2009 APR provide a balanced assessment of the Applicant's performance over the rating period, taking account of relevant evidence? Was there a reasonable and observable basis for the assessment? Was the Applicant's FY2009 APR improperly motivated? Was the decision on the Applicant's FY2009 APR taken in accordance with fair and reasonable procedures? On each of these points, the Tribunal concluded that the Applicant had not met her burden of showing abuse of discretion.

Having reviewed the record of the case, the Tribunal concluded that over a substantial period of time the Applicant was advised that her performance was falling short of key requirements. The Tribunal observed that the Applicant's performance shortcomings became acute when work demands increased and that her supervisors' response was to be assessed in the light of those circumstances:

> "The facts of the instant case highlight the difficulties encountered when weak staff performance coincides with unusual work pressures for the team. In the view of the Tribunal, it was neither unreasonable nor unfair to Applicant that guidance on performance weaknesses necessarily took somewhat of a back seat to the exigencies of the team's completing its tasks on mission. Nor was it unreasonable of Applicant's supervisors to relieve her of those responsibilities in which they perceived her work to be inadequate or unreliable in the interest of successfully completing the pressing work at hand." (para. 79)

The Tribunal concluded that the exact point of time at which feedback is given was a matter of managerial judgment, provided that it was not withheld and was given in a timely manner. In assessing whether the Applicant was given adequate feedback, the Tribunal also considered that the Applicant was a mid-career economist whose supervisors could not be expected to provide feedback as frequently as in the case of more junior staff.

The Tribunal also considered whether the Applicant was given the necessary guidance and training to help her remedy her performance weaknesses. The record indicated that the Applicant's supervisors considered that her performance shortcomings would not have been resolved by further guidance or training and that it was for this reason that they encouraged her to seek out opportunities in other Fund departments that might provide a better match for her talents. The Tribunal did not consider that approach an abuse of discretion and held that Applicant had failed to show that those suggestions were improperly

[36] *Mr. "HH"* v. *International Monetary Fund, IMFAT* Judgment No. 2013–4 (9 October 2013).

motivated or otherwise tainted. The record also showed that Applicant's second mission chief did try to provide her with guidance but that the guidance did not succeed.

The Tribunal next considered whether the Applicant's FY2009 APR provided a balanced assessment of her performance over the rating period, taking account of relevant evidence. The Tribunal noted that the "Overall Assessment" portion of the APR was not meant to cover all tasks performed during the year. Rather, it covered key areas of performance, areas which the Applicant herself had emphasized in describing her "Key Achievements and Objectives" for the year. The Tribunal considered the precise weighting given to the assessment of each work area to be non-justiciable as long as the overall assessment was fair and balanced. The Tribunal held that the assessment was a balanced one, identifying both positive and negative elements of Applicant's performance.

The Tribunal also considered the unusual demands of the Applicant's work environment during the rating period and concluded that the evidence showed that the Applicant did not respond to those demands in the manner that would be expected of a staff member with her level of experience. This conclusion was supported by the fact that, even before the crisis demands arose, the Applicant's performance assessments were consistent in identifying the weaknesses that ultimately proved dispositive of her FY2009 APR rating. The Tribunal also noted testimony that the rating decision had emerged as the unanimous view of the departmental roundtable and that the Human Resources Department ("HRD") also had been consulted in the matter.

The Tribunal accordingly concluded that there was a reasonable and observable basis for the Applicant's performance rating of "5". The Tribunal found no basis for the Applicant's allegation that her FY2009 APR rating was improperly motivated or that it was not taken in accordance with fair and reasonable procedures.

Having concluded that the Fund did not abuse its discretion in assigning the Applicant a performance rating of "5", the Tribunal consequently found the Applicant's challenge to her zero percent merit increase to be without basis. That determination, found the Tribunal, flowed automatically from the APR decision and was not a discretionary decision.

The Tribunal also found no merit in the Applicant's challenge to the decision that, as a result of her FY2009 APR rating, she would be placed on a PIP upon her return from a two-year external assignment. The record supported the view that it was the Fund's practice to place staff members on PIPs when they were rated in the lowest performance rating category. The Applicant had not shown that the Fund had abused its discretion in deciding that the intervening external assignment would not obviate the need for the PIP, given that the PIP decision responded to deficiencies in Applicant's performance in the position to which she would be expected to return.

Having concluded that it was not able to sustain any of Applicant's challenges to the career decisions at issue, the Tribunal concluded that her claim of "career mismanagement" also failed. Accordingly, the Application of Ms. "JJ" was denied.

2. *Judgment No. 2014–2 (February 26, 2014): Mr. E. Weisman* v. *International Monetary Fund*[37]

Request for anonymity—Anonymity no substitute for enforcement of policy against retaliation—Wide discretion by management to design programs to carry out the mission of the organization—Challenge to regulatory decision on grounds of discrimination—Rational nexus between purpose of rule and differential treatment required

The Applicant, a staff member of the Fund, challenged the rule by which Time-in-Department ("TID") is calculated for purposes of the A15 Mobility Support Program ("A15 MSP"), a program in which Grade A15 fungible economists, such as the Applicant, who hold titled managerial positions and have served in their current departments for seven years or longer, and have been at Grade A15 for five years or longer, are required to participate.

As an initial matter, the Tribunal denied the Applicant's request for anonymity pursuant to rule XXII of the Tribunal's Rules of Procedure. The Tribunal observed that the Applicant had brought a direct challenge to a "regulatory decision" of the Fund and that his personal circumstances were not pertinent to the Tribunal's consideration of the essential issues of the case. Regarding the Applicant's concern that he might be subject to reprisal for seeking recourse to the Fund's dispute resolution system, the Tribunal considered the Fund's policy against retaliation sufficient noting that anonymity must not become a substitute for the robust enforcement of these rules. The Tribunal accordingly concluded that the Applicant had failed to show "good cause" for granting anonymity, as required by Rule XXII.

Turning to the merits of the case, the Tribunal considered the Applicant's contention that the TID rule was unfair and unreasonable in treating a period of two years or more on secondment to another international organization as "freezing time" for purposes of counting the time that the staff member had spent in his department. Under the rule, the counting of time resumes when the staff member returns to his department following the external assignment. The applicant contended that time spent on secondment should instead "restart the clock" upon the staff member's return, thereby delaying the time when participation in the A15 MSP would be required. In the Applicant's view, the TID rule should treat in the same manner time spent on secondment to an external organization as time spent on "internal mobility," i.e., assignment for two years or more to another Fund department. The Applicant sought as relief revision of the rule.

The Tribunal noted that Fund management enjoyed wide discretion in designing programs to carry out the mission of the organization. It also observed that the Applicant did not challenge the A15 MSP program itself or its mandatory component. Rather, he challenged a narrow element of the rules governing the calculation of time when a Grade A15 fungible economist such as himself becomes subject to the mandate of transferring departments. In particular, he questioned the fairness of the rule in treating differently time spent on secondment to an external organization and time spent on internal mobility.

When deciding a challenge to a regulatory decision on the ground that it allegedly discriminates impermissibly among groups of Fund staff, the Tribunal asked whether there was a "rational nexus" between the purpose of the rule and the differential treatment. Applying that test, the Tribunal concluded that it was entirely consistent with the purposes

[37] Catherine M. O'Regan, President, Andrés Rigo Sureda, Francisco Orrego Vicuña.

of the A15 MSP that only interdepartmental transfer—and not time spent on external secondment—will restart the period for calculating years in the department.

The Tribunal noted that the Applicant's essential argument was that secondment to another international organization had similar benefits to the staff member and to the Fund as interdepartmental mobility. In the view of the Tribunal, however, the similarities between secondments and interdepartmental mobility were not relevant to the purposes of the MSP, which seeks to ensure "cross-fertilization of knowledge, ideas and expertise" within the Fund, and improve "communication between departments by mitigating the 'silo effect'." These purposes, concluded the Tribunal, are not furthered by secondment. It therefore held the differentiation in question to be neither irrational nor arbitrary. On the contrary, the Tribunal considered it to be "directly related to the purposes of the MSP."

The Tribunal also found no merit to the Applicant's contention that the treatment of secondments for purposes of the TID rule was unreasonable in the light of rules governing eligibility for promotion. Those rules, concluded the Tribunal, do not treat secondment and internal mobility as "equivalent," and, in any event, they respond to policies and purposes that may differ from the purposes of the MSP.

Finally, the Tribunal did not find any support for the Applicant's allegation that the rule governing the treatment of secondments for purposes of calculating TID was designed with any particular staff member in mind. The Tribunal accordingly concluded that there was no merit to his argument that adoption of the rule was improperly motivated by animus against him.

The Tribunal concluded that Applicant had not met his burden of showing that the Fund abused its discretion in adopting a rule that treats time spent on secondment as "freezing time," rather than "restarting the clock," for purposes of calculating the time served in a single Fund department before interdepartmental mobility is required of Grade A15 fungible economists. Accordingly, the Application of Mr. Weisman was denied.