



**UNRWA Dispute Tribunal**

**Handbook on UN  
Administrative Law**

**March 2021**

## Disclaimer

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The present Handbook is for informational purposes only. It represents a compilation of jurisprudence of the United Nations Appeals Tribunal (UNAT) by topics. It does not represent the views of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) or the UNRWA Dispute Tribunal (UNRWA DT). It should not be relied upon as authoritative interpretations of the judgments referred to therein. For the authoritative texts, please refer to the judgments or orders rendered by the respective Tribunals.

The Handbook is, for the time being, a working document. Suggestions, comments and corrections are highly appreciated. It is also the intention of the Registry to update it, at the latest, on a yearly basis. For any inaccuracies, suggestions and comments, please contact the Registry of the UNRWA DT at [registrar-unrwa.dt@unrwa.org](mailto:registrar-unrwa.dt@unrwa.org).

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## Foreword

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I introduce this Handbook representing the work of Mr. Halil Göksan who has been the Tribunal's Legal Officer for more than four years. The Handbook is an extensive work and it is intended to give to the Tribunal's stakeholders a working knowledge of the UNAT's jurisprudence on particular important topics. This is the reason why I decided to make it available to a large audience through the Tribunal's website.

The Handbook is not an official record of the Tribunal's or the UNAT's case law and it is not a substitute for reading in full the judgments. It is a working document and any substantive comments are welcomed. I would like to thank Halil for this excellent work.

Judge Jean-François Cousin

## **Acknowledgments**

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The present Handbook was prepared by the Tribunal's Legal Officer, Mr. Halil Göksan and is the result of Mr. Göksan's tireless efforts in conducting extensive research on UNAT's jurisprudence, including the judgments delivered up to December 2020, and in drafting the analysis of this extensive research by topic. Mr. Göksan's compilation was thoroughly reviewed by the Tribunal's Registrar, Ms. Laurie McNabb, for the preparation of the Handbook for publication, as well as by the Tribunal's Legal Consultant, Ms. Simona Rasalaite, the Tribunal's Linguist, Mr. Mohammad Sweidan, and the Tribunal's Legal Support Officer, Ms. Jumana Alkhateeb.

## **Introduction**

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The United Nations Dispute Tribunal (UNDT) and UNAT were established by the United Nations General Assembly (UNGA) in resolution 63/253 on 24 December 2008. Accordingly, the new system of administration of justice of the United Nations came into effect on 1 July 2009. In line with this new system, UNRWA established its own first instance Dispute Tribunal effective 1 June 2010 and UNRWA DT became operative on 1 June 2011. The latest amendment to the Statutes of UNAT and UNDT were adopted in UNGA resolution 71/266 on 23 December 2016, and came into effect on 1 January 2017. With respect to UNRWA, the latest amendment to the Statute of the UNRWA DT entered into force on 1 January 2018.

When referring to both UNDT and UNRWA DT, the term of Dispute Tribunal (DT) will be used. The Appeals Tribunal will always be referred to as “UNAT”. Also, unless specified otherwise, all reference to management evaluation also include decision review, which is the equivalent of management evaluation in the context of UNRWA.

## Abbreviations and acronyms

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AAA	Acting Appointment Allowance
ABCC	Advisory Board on Compensation Claims
ALWOP	Administrative Leave Without Pay
APT	Appointment, Promotion or Termination
ASG/OHRM	Assistant Secretary-General, of the Office of Human Resources Management
CRP	Central Review Panel
DSA	Daily Subsistence Allowance
EOD	Entry on duty
ePAS	Electronic Performance Appraisal System Report
EVR	Early Voluntary Retirement
EVS	Exceptional Voluntary Separation
FTA	Fixed-term Appointment
GA	General Assembly
ICAO	International Civil Aviation Organization
ICAO AJAB	International Civil Aviation Organization's Advisory Joint Appeals Board
ICSC	International Civil Service Commission
IOM	International Maritime Organization
IOM SAB	International Maritime Organization's Staff Appeals Board
LDC	Limited Duration Contract
MEU	Management Evaluation Unit
OIOS	Office of Internal Oversight Services
OSF	Official Status File
OSLA	Office of Staff Legal Assistance
SG	Secretary-General
SLWFP	Special Leave With Full Pay
SLWOP	Special Leave Without Pay
SPA	Special Post Allowance
ST/AI/1999/17	Administrative Instruction – Special post allowance

ST/AI/2017/1	Administrative Instruction – Unsatisfactory conduct, investigations and the disciplinary process
ST/AI/371	Administrative Instruction – Revised disciplinary measures and procedures
ST/SGB/2008/5	Secretary-General’s Bulletin on Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority
TA	Temporary appointment
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAdT	United Nations Administrative Tribunal (former)
UNAT	United Nations Appeals Tribunal
UNDT	United Nations Dispute Tribunal
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNJSPB	United Nations Joint Staff Pension Board
UNJSPF	United Nations Joint Staff Pension Fund
UNMIL	United Nations Mission in Liberia
UNSPC	UNJSPF’s Staff Pension Committee
WMO	World Meteorological Organization
WMO JAB	World Meteorological Organization’s Joint Appeals Board

# **PART I: Procedural Matters**

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## 1. Receivability

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DT “is competent to review its own jurisdiction, whether or not it has been raised by the parties.”<sup>1</sup> “This competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law and the Statute prevents the UNDT from receiving a case which is actually non-receivable.”<sup>2</sup> UNAT also emphasised that, “[i]rrespective of whether or not the Respondent participated in the proceedings, the issue of receivability had to be determined by the UNWRA DT as a matter of law.”<sup>3</sup> In a number of instances, UNAT also confirmed DT’s *sua sponte* considerations of whether it had jurisdiction or competence to review an application.<sup>4</sup>

In accordance with UN Staff Rule 11.2 (a), prior to filing an application before the UNDT, a staff member must submit the impugned decision to the Management Evaluation Unit (MEU) for an administrative management evaluation, with the exception of a contested disciplinary measure that was imposed on a staff member.<sup>5</sup> DT is required to assess whether or not the staff member complied with the time limit associated with the request for management evaluation, regardless of whether the MEU raised these concerns.<sup>6</sup>

With respect to the issue of receivability, “in assessing its own competence, the Dispute Tribunal can choose to proceed by way of summary judgment without taking any argument or evidence from the parties.”<sup>7</sup>

In cases where an application was found to be non-receivable, DT “is not permitted to assess any evidence or argument regarding the merits of [an applicant’s] claim.”<sup>8</sup>

### A. Ratione Personae

Jurisdiction *ratione personae* concerns who is entitled (or not) to submit an application before DT.<sup>9</sup> To start with, “a staff representative acting on behalf of staff members does not have standing to bring an application in the UNDT challenging an administrative decision. The UNDT Statute is quite clear that the right to challenge an administrative decision in the UNDT is an individual right.”<sup>10</sup>

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<sup>1</sup> *O’Neill* 2011-UNAT-182, para. 31.

<sup>2</sup> *Christensen* 2013-UNAT-335, para. 21.

<sup>3</sup> *Al Surkhi et al.* 2013-UNAT-304, para. 39. See also, *Gehr* 2013-UNAT-313, para. 23; *Kazazi* 2015-UNAT-557, para. 42.

<sup>4</sup> See, *inter alia*, *Chahrour* 2014-UNAT-406, para. 25; *Babiker* 2016-UNAT-672, para. 45.

<sup>5</sup> In the case of UNRWA, UNRWA staff members must submit the contested decision for a decision review in accordance with Area Staff Rule 111.2 for Area staff members and International Staff Rule 11.2 for International staff member. The other difference between the UNRWA Staff Rules and UN Staff Rules is that, for UNRWA staff members, decision review is also a mandatory step in contesting disciplinary measures before an application can be submitted to UNRWA DT.

<sup>6</sup> *Larkin* 2011-UNAT-135, para. 22.

<sup>7</sup> *Kazazi* 2015-UNAT-557, para. 42.

<sup>8</sup> *Ghahremani* 2011-UNAT-171, paras. 28-29; *Reda (Ben Osmane)* 2018-UNAT-871, para. 14; *Sawenja* 2020-UNAT-986, para. 31.

<sup>9</sup> Article 3, UNDT/UNRWA DT Statute.

<sup>10</sup> *Faye* 2016-UNAT-657, para. 32.

As UNRWA has its own Statute and its own Dispute Tribunal, UNDT has no jurisdiction over UNRWA staff members.<sup>11</sup>

DT Statute is clear about its lack of jurisdiction *ratione personae* over applications filed by non-staff personnel, such as Individual Service Providers and interns.<sup>12</sup> In addition, UNAT also clarified that Judges of UNDT and UNAT are not staff members.<sup>13</sup> As they are elected by UNGA, they are not subject to the authority of the SG and they enjoy “the same terms and conditions of appointment determined by the General Assembly in terms of Article 32 of the Statute of the International Court of Justice.”<sup>14</sup>

Nevertheless, one exception about non-staff personnel which has arisen in the jurisprudence relates to quasi-contractual obligations. UNAT held that “following the issuance of an offer of employment whose conditions have been fulfilled and which has been accepted unconditionally [by a potential staff member], while not constituting a valid employment contract before the issuance of a letter of appointment [...], does create obligations for the Organization and rights for the [potential staff member], if acting in good faith.”<sup>15</sup> Accordingly, such a potential staff member has access to the system of administration of justice and is considered as a staff member “for this purpose only”.<sup>16</sup>

With respect to the standing of former staff members willing to contest an administrative decision, “there must be a sufficient nexus between the former employment and the impugned decision.”<sup>17</sup> For example, UNAT held that the decision to prohibit the entry of a former staff member to the UN’s premises was not considered to be in non-compliance with the staff member’s terms of appointment or contract of employment; thus, the application was non-receivable *ratione personae*.<sup>18</sup>

In *Ross*, UNAT held that a former staff member, who was “allowed to apply [to an] internally advertised vacancy”, would be equal to a current staff member in that respect and therefore he/she would have “standing to challenge [...] any decision stemming from the post advertised.”<sup>19</sup>

For staff members who are in a situation of secondment or loan within an organisation under UNDT’s jurisdiction, “as a consequence of the reimbursable loan agreement”, the concerned organisation undertakes “to extend the protection of the system of administration of justice to [those staff members] [...] during the term of the loan.”<sup>20</sup> In the case of *Iskandar*, the Applicant

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<sup>11</sup> *Elhabib* 2016-UNAT-655, paras. 28-29.

<sup>12</sup> *Basenko* 2011-UNAT-139, para. 11; *Di Giacomo* 2012-UNAT-249, para. 19.

<sup>13</sup> *Mindua* 2019-UNAT-921, para. 23. However, that is not the case for the Judges of the UNRWA DT.

<sup>14</sup> *Mindua* 2019-UNAT-921, para. 23.

<sup>15</sup> *Gabaldon* 2011-UNAT-120, para. 28.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Shkurtaj* 2011-UNAT-148, para. 29.

<sup>18</sup> *Ghahremani* 2011-UNAT-171, para. 4.

<sup>19</sup> *Ross* 2020-UNAT-1000, para. 75.

<sup>20</sup> *Iskandar* 2011-UNAT-116, para. 2.

was on loan from the WFP to UNAMID and therefore his application contesting UNAMID's administrative decision was receivable.<sup>21</sup>

## B. Ratione Materiae

### B.1. General Principles

In terms of *ratione materiae*, it is only possible to contest “an administrative decision that is alleged to be in non-compliance with the terms or conditions of appointment or the contract of employment.”<sup>22</sup> In this regard, the crucial matter is to determine what an administrative decision is.

“In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.”<sup>23</sup> “In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.”<sup>24</sup>

Thus, “what constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.”<sup>25</sup> “What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.”<sup>26</sup>

UNAT has consistently relied on *Andronov* Judgment of the UN Administrative Tribunal to better unfold what is an administrative decision.<sup>27</sup> Accordingly, administrative decisions subject to judicial review are characterized by the fact that they are (1) taken by the Administration, (2) unilateral and of (3) individual application, and that (4) they carry direct legal consequences.<sup>28</sup>

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<sup>21</sup> *Iskandar* 2011-UNAT-116, paras. 1-2.

<sup>22</sup> Article 2, UNDT/UNRWA DT Statute.

<sup>23</sup> *Andati-Amwayi* 2010-UNAT-058, para. 17.

<sup>24</sup> *Ibid.*, para. 18.

<sup>25</sup> *Ibid.*, para. 19.

<sup>26</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 62. See also, *Bauza Mercere* 2014-UNAT-404, para. 18; *Pedicelli* 2015-UNAT-555, para. 25; *Obino* 2014-UNAT-405, paras. 18-21; *Reid* 2015-UNAT-563, para. 33; *Harb* 2016-UNAT-643, para. 26.

<sup>27</sup> For a recent critique of UNAT's standing jurisprudence following a plain reading of the Article 2 of UNDT's Statute, see the dissenting opinion of Judge Colgan in *Fairweather* 2020-UNAT-1003.

<sup>28</sup> This principle has been repeatedly reaffirmed by UNAT in many cases citing UNAdT Judgment No. 1157, *Andronov* (2003) such as in *Hamad* 2012-UNAT-269, para. 23; *Al Surkhi et al.* 2013-UNAT-304, para. 26; *Ngokeng* 2014-UNAT-460, para. 26; *Gehr* 2014-UNAT-475, paras. 16-17; *Lee* 2014-UNAT-481, para. 48; *Terragnolo* 2015-UNAT-517, para. 31; *Reid* 2015-UNAT-563, para. 32; *Staedtler* 2015-UNAT-578, para. 30.

In principle, “a staff member is required to clearly identify the administrative decision which is contested.”<sup>29</sup> “A statutory burden is placed upon an applicant to establish that the administrative decision in issue was in non-compliance with the terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant’s contractual rights.”<sup>30</sup>

Yet, it often arises that the contested administrative decision is not sufficiently clear. In these situations, “the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review.”<sup>31</sup>

It is also frequently seen subsequent or multiple decisions rendered in a case, and the question arises as to whether there has been a new or superseding decision. In this regard, UNAT has consistently held that “an unambiguous re-examination by the Administration of an earlier decision would give rise to a new and separate administrative decision. This situation is to be distinguished from the cases where the Administration merely confirms or restates an earlier decision. In the case of the latter, a new and separate administrative decision does not arise.”<sup>32</sup> This analysis has proved to be critical in terms of determining the actual date of the contested decision and whether or not the application is receivable.

In the same vein, when a directive/decision is “merely a consequence, confirmation and execution of an earlier decision”, this directive/decision “cannot be impugned independently.”<sup>33</sup> For example, in *Saeed*, a first administrative decision was related to the approval of a new workflow. Later, a directive was circulated in accordance with the new workflow. In this respect, UNAT held that this directive cannot be impugned independently. “As the basis of the Appellant’s grievance arose from the original decision to approve a new workflow, which he had failed to impugn on time through decision review, Mr. Saeed was prevented from challenging the subsequent execution of the first decision in respect of the workflow.”<sup>34</sup>

The same applies to intermediary decisions. For example, “the decision to refer [a staff member] to a formal [Opportunity to Improve (OTI) performance] process [is] not a final decision; it [is] only an intermediate step [...] [and does not affect a staff member’s] terms of employment or conditions of service.”<sup>35</sup>

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<sup>29</sup> *Argyrou* 2019-UNAT-969, para. 32. See also, *Haydar* 2018-UNAT-821, para. 13.

<sup>30</sup> *Haydar* 2018-UNAT-821, para. 13.

<sup>31</sup> *Massabni* 2012-UNAT-238, para. 26.

<sup>32</sup> *Abu Malluh et al.* 2016-UNAT-690, para. 47. See also, *Fiala* 2015-UNAT-516, paras. 38-41.

<sup>33</sup> *Saeed* 2016-UNAT-617, paras. 10-11.

<sup>34</sup> *Ibid.*, para. 11.

<sup>35</sup> *Ibid.*, para. 12.

In addition, DT “has no jurisdiction to hear appeals against administrative decisions which may *potentially* affect a staff member’s terms of appointment or contract of employment in the future”, as there has been no past or present direct negative effect.<sup>36</sup>

In *Mirella et al.*, the dependent spouse allowance was in place to compensate the Applicants for the decrease in their salaries, and “it [was] yet uncertain whether this allowance [would] ever be reduced or abolished. Consequently, UNAT held that there was “no direct negative effect”.<sup>37</sup>

UNAT also held that the Secretary-General’s (SG) decisions to waive immunity are not administrative decisions subject to judicial review. They are rather “executive or policy decisions”.<sup>38</sup>

In certain cases, in terms of *ratione materiae*, the application is not receivable for more than one reason, for example, for an untimely submission of management evaluation as well as for the lack of a contestable administrative decision. In such a situation, DT should dismiss the application as non-receivable based on the lack of contestable administrative decision.<sup>39</sup> The logic is obvious because if there is no contestable administrative decision, there is nothing to submit for management evaluation. Also, in cases where the receivability of an application is not clear, and the issues at stake are of general interest, DT might decide to address the case on the merits.<sup>40</sup>

In another example, the question was whether or not “the decision not to re-arrange the managerial role of the Deputy Director *vis-à-vis* the Appellant did [...] create any legal consequences regarding his terms of employment and was thus [...] an administrative decision” or not.<sup>41</sup> However, the Respondent did not argue on the non-receivability of the application before UNAT. “For that reason, and because in the end there is no practical difference in outcome, [UNAT] proceed[ed] [with the merits of the case] on the assumption that the contested decision was an administrative decision.”<sup>42</sup>

## **B.2. By the Administration**

In accordance with the aforementioned UNAT’s jurisprudence, the first characteristic of an administrative decision is that it is taken by the Administration.

### ➤ Judicial review in case of GA resolutions

It is clear that DT and UNAT lack the jurisdiction to review GA resolutions, as these are not administrative decisions taken by the Administration.<sup>43</sup> In practice, there is a wide-range of administrative decisions related to the GA resolutions, such as decisions implementing these

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<sup>36</sup> *Mirella et al.* 2018-UNAT-842, para. 42, emphasis added.

<sup>37</sup> *Mirella et al.* 2018-UNAT-842, para. 42.

<sup>38</sup> *Kozul-Wright* 2018-UNAT-843, paras. 62-64.

<sup>39</sup> *Farzin* 2019-UNAT-917, paras. 34-42.

<sup>40</sup> *Haq and Kane* 2019-UNAT-922, paras. 35-38.

<sup>41</sup> *Applicant* 2020-UNAT-1030, para. 21.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ovcharenko* 2015-UNAT-530, para. 35.

resolutions. In this respect, often the SG has “little or no choice in the implementation of the General Assembly resolutions.”<sup>44</sup> “The power he exercises [in this context] is a purely mechanical power, more in the nature of a duty.”<sup>45</sup> “[S]uch exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision.”<sup>46</sup> Thus, they are administrative decisions. However, purely mechanical powers are “rarely susceptible to review on the ground of reasonableness”, but they are reviewable on the ground of legality.<sup>47</sup>

For example, in *Reid*, Mr. Reid challenged a “deliberate and considered policy change by the General Assembly to the nature and entitlements of staff members on temporary contracts.”<sup>48</sup> UNAT held that “UNDT did not have the competence to examine administrative and budgetary decisions taken by the GA, including decisions on the entitlements to be accorded to different categories of staff members.”<sup>49</sup> Accordingly, Mr. Reid’s application challenging GA’s resolution, was found not receivable.<sup>50</sup> The same decision and reasoning has also been applied to challenges to the abolition of posts made pursuant to decisions of the GA.<sup>51</sup>

UNAT also held that DT does not “have jurisdiction or competence to review whether or not General Assembly resolutions are constitutionally inconsistent with the Charter.”<sup>52</sup> In the same vein, DT would exceed its jurisdiction if it ventured into a review of the legality of Staff Rules and Regulations.<sup>53</sup>

For example, in *Oglesby*, Mr. Oglesby contested that Mr. Nurdin, his spouse, “who (unlike a heterosexual spouse) will not receive a survivor’s benefit after Mr. Oglesby’s death.”<sup>54</sup> The decision was based on the fact that Mr. Nurdin “could not have legally married Mr. Oglesby at the relevant time due to past discrimination on grounds of sexual orientation.”<sup>55</sup> UNAT found that there was merit in Mr. Oglesby’s line of argument, however, unfortunately, it did not have the “prerogative to apply the Charter or the UDHR directly, nor the power to strike down internal or subsidiary legislative provisions” that conflicted with the principles therein.<sup>56</sup>

➤ Lack of an administrative decision

Not taking a decision is also a challengeable administrative decision.<sup>57</sup>

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<sup>44</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 65.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Reid* UNDT/2014/095, para. 42.

<sup>49</sup> *Reid* 2015-UNAT-563, para. 36.

<sup>50</sup> *Ibid.*, paras. 30-36. See also, *Pedicelli* 2015-UNAT-555, para. 28.

<sup>51</sup> *Kagizi et al.* 2017-UNAT-750, paras. 21-23. See also other identical Judgments in *Wanza et al.* 2017-UNAT-751; *Baguma et al.* 2017-UNAT-752; *Kiluwe et al.* 2017-UNAT-753; *Kisubi et al.* 2017-UNAT-754; *Ramazani et al.* 2017-UNAT-755; *Nkashama et al.* 2017-UNAT-756.

<sup>52</sup> *Latimer* 2019-UNAT-901, para. 39.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Oglesby* 2019-UNAT-914, para. 36.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, para. 37.

<sup>57</sup> *Tabari* 2010-UNAT-030, para. 17; *Nwuke* 2010-UNAT-099, para. 25.

➤ Notification of an administrative decision

There is no express stipulation in UN Staff Rule 11.2(c) that a valid notification of an administrative decision must be given in writing.<sup>58</sup> A notification of the contested decision can be either verbal and/or in writing<sup>59</sup>, as UN Staff Rule 11.2(c) does not explicitly require a written notification as a prerequisite to contest an administrative decision. A verbal communication can be considered as a notification of a decision if: the verbal communication of the decision was not an informal or casual communication; its content is not disputed; and it was communicated in a clear and unambiguous way with sufficient gravitas.<sup>60</sup>

For instance, in *Houran et al.*, UNAT reiterated that “if there is a meeting wherein a staff member is verbally advised of an administrative decision, the Appeals Tribunal will review whether there are subsequent written communications including minutes, if they were ‘unsigned, undated and not shared’ at the time, and whether the meetings had the ‘aim of notification of the administrative decision’ or some other topic. If not, the verbal communication does not constitute ‘notification’ as required by the Area Staff Rule.”<sup>61</sup>

With respect to terms of “clear and unambiguous” and “sufficient gravitas”, UNAT held as follows regarding a meeting held with the staff members: “The [...] meeting seemed to have some ‘gravitas’ given the participation of the Chief and appeared to be for the purpose of discussing the [contested decision]. However, it is not known whether the discussion wherein they were advised of the contested decision was ‘clear and unambiguous’. There are no details available as to the content of the meetings other than the Appellants were advised of the [contested] decision.”<sup>62</sup>

➤ Implied administrative decision

The absence of a response to a staff member’s request, claim and/or complaint may constitute an *implied* administrative decision.<sup>63</sup> For example, in *Cohen*, UNAT held that “[t]he implied administrative decision to deny Ms. Cohen compensation for the harm she suffered denied her the effective remedy to which she was contractually entitled.”<sup>64</sup> “There is accordingly a legal basis for Ms. Cohen’s claim for compensation.”<sup>65</sup>

UNAT also held that a delay of 14 days in responding, in itself, *does not* constitute an implied administrative decision.<sup>66</sup>

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<sup>58</sup> The equivalent provision in the context of the UNRWA’s regulatory framework is International Staff Rule 11.2(c) and Area Staff Rule 111.2 (3).

<sup>59</sup> *Jean* UNDT/2016/044, paras. 49-52.

<sup>60</sup> *Auda* 2017-UNAT-746, paras. 25-32. It is also important to read the dissenting opinion of Judge Halfeld, which is also based on the jurisprudence in the case *Babiker* 2016-UNAT-672.

<sup>61</sup> *Houran et al.* 2020-UNAT-1019, para. 30. See also, *Jean* 2017-UNAT-1743, para. 23.

<sup>62</sup> *Houran et al.* 2020-UNAT-1019, para. 34.

<sup>63</sup> *Tabari* 2010-UNAT-177, para. 21.

<sup>64</sup> *Cohen* 2017-UNAT-716, para. 37.

<sup>65</sup> *Ibid.*, para. 37.

<sup>66</sup> *Terragnolo* 2015-UNAT-566, para. 36.

UNAT refers to the principle of an *implied* administrative decision as the “*Rosana test*”<sup>67</sup> indicating that “silence from the [Administration] in response to a request ordinarily constitutes a negative reply, resulting in an implied administrative decision.”<sup>68</sup>

“A payment to a staff member which is not in accordance with the terms of his or her appointment constitutes an [implied] administrative decision.”<sup>69</sup> Accordingly, the staff member must raise the discrepancy between his letter of appointment and his payslip through management evaluation.<sup>70</sup>

Recently, UNAT also held that “before it can be found that there was an implied administrative decision, there must be evidence that it was challenged by a specific request to desist and a refusal or failure by the Administration to desist or an implied decision in the form of a failure to take any decision in that regard.”<sup>71</sup>

### **B.3. Individual case**

The second characteristic of an administrative decision is that there must be an individual application of the contested decision.<sup>72</sup> If the matter is “of a general application”, the administrative decision in question is not subject to judicial review.<sup>73</sup> For example, In *Pedicelli*, UNAT held that the SG is “duty bound to implement decisions of the ICSC [International Civil Service Commission]”, as directed by the GA in resolution 67/241, and, “for the most part, such decisions are of a general application and therefore are not reviewable.”<sup>74</sup>

However, a decision of the ICSC can be challenged if its adverse and direct impact on a staff member is proved. UNAT stated that “it is an undisputed principle of international labour law [...] that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an ‘administrative decision’ [...] and a staff member who is adversely affected is entitled to contest that decision.”<sup>75</sup> On that basis, UNAT remanded *Pedicelli* to UNDT by concluding that it was receivable.<sup>76</sup> Ms. *Pedicelli* also appealed UNDT’s decision on the merits. UNAT, this time, affirmed the decision on the basis that Ms. *Pedicelli* failed to demonstrate the adverse impact of the ICSC’s decision on her terms of appointment.<sup>77</sup> During the remand before UNDT,

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<sup>67</sup> *Rosana* 2012-UNAT-273, para. 25.

<sup>68</sup> *Abu Nqairah* 2018-UNAT-854, para. 20. This was also confirmed in *Fitsum* 2017-UNAT-804, para. 19.

<sup>69</sup> *Atome (De Bondt)* 2018-UNAT-877, para. 16.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Argyrou* 2019-UNAT-969, para. 33; *Larriera* 2020-UNAT-1004, para. 35.

<sup>72</sup> *Al Surkhi et al.* 2013-UNAT-304, para. 28.

<sup>73</sup> *Pedicelli* 2015-UNAT-555, para. 28.

<sup>74</sup> *Pedicelli* 2017-UNAT-758, para. 16. See also, *Ovcharenko* 2015-UNAT-530, paras. 34-35, with respect to the ICSC’s decision about implementation of a pay-freeze. For the issuance of secondary salary scales and the freeze of then-existing salary scales, see, *Tintukasiri* 2015-UNAT-526, para. 35-39. Regarding the ICSC’s decision to reclassify two duty stations, see, *Obino* 2014-UNAT-405, paras. 21-22.

<sup>75</sup> *Pedicelli* 2015-UNAT-555, para. 29.

<sup>76</sup> *Ibid.*, paras. 24-32.

<sup>77</sup> *Pedicelli* 2017-UNAT-758, paras. 17-29.

facts were clarified, and it was, in fact, determined that Ms. Pedicelli’s erroneous submissions misled UNAT to consider her application as receivable.<sup>78</sup>

UNAT also reiterated in *Lloret Alcañiz et al.* that, “where the [GA] takes regulatory decisions which leave no scope for the [SG] to exercise discretion, the [SG’s] decision to execute such regulatory decisions, depending on the circumstances, may not constitute administrative decisions subject to judicial review.”<sup>79</sup> “Only in cases where the implementation of the regulatory decision involves an exercise of discretion by the Administration – including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria – is subject to judicial review.”<sup>80</sup>

#### **B.4. Direct legal consequences**

As noted before, the key characteristic of an administrative decision subject to judicial review is that it must produce direct legal consequences affecting a staff member’s terms of appointment.<sup>81</sup> “[C]ertain administrative processes<sup>[82]</sup> [...] are preparatory decisions or one of a series of steps leading to an administrative decision. Such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences.”<sup>83</sup>

In certain cases, the existence of direct legal consequences might be linked to the merits of the case and one might contend that it would be “improper to examine it as part of the receivability assessment.”<sup>84</sup> In this regard, UNAT held that this “is not persuasive since the possible adverse impact of an administrative decision on a staff member’s terms and conditions of appointment is one of the requisite key characteristics of an appealable administrative decision (*force exécutoire*) and, therefore, goes to the receivability *ratione materiae* context.”<sup>85</sup>

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<sup>78</sup> *Ibid.*, paras. 18-22.

<sup>79</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 59, emphasis added.

<sup>80</sup> *Ibid.* This was also confirmed previously in *Reid* 2015-UNAT-563, para. 36; *Tintukasiri* 2015-UNAT-526, paras. 38-39; *Obino* 2014-UNAT-405, para. 21.

<sup>81</sup> *Ngokeng* 2014-UNAT-460, paras. 26-27; *Wasserstrom* 2014-UNAT-457, paras. 34-35. This principle has been repeatedly reaffirmed by UNAT in many cases citing UNAdT Judgment No. 1157, *Andronov* (2003) and *Andati-Amwayi* 2010-UNAT-058 such as in *Saffir and Ginivan* 2014-UNAT-466, para. 18; *Gehr* 2014-UNAT-475, para. 18; *Lee* 2014-UNAT-481, para. 49; *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 29; *Terragnolo* 2015-UNAT-517, para. 31; *Ovcharenko* 2015-UNAT-530, para. 31; *Kazazi* 2015-UNAT-557, para. 28; *Birya* 2015-UNAT-562, para. 44; *Staedtler* 2015-UNAT-578, para. 31; *Harb* 2016-UNAT-643, para. 27; *Michaud* 2017-UNAT-761, para. 50.

<sup>82</sup> “[S]uch as a selection process in *Ishak* [*Ishak* 2011-UNAT-152, para. 29], and the Administration’s proposal of an alternative rebuttal panel in an ongoing performance appraisal rebuttal process in *Gehr* [*Gehr* 2013-UNAT-313, para. 19]”. See also, *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 33.

<sup>83</sup> *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 33. See also, *Ishak* 2011-UNAT-152, para. 29; *Gehr* 2013-UNAT-313, para. 19; *Birya* 2015-UNAT-562, para. 47; *Staedtler* 2015-UNAT-578, para. 35; *Michaud* 2017-UNAT-761, para. 50.

<sup>84</sup> *Kennes* 2020-UNAT-1073, paras. 49.

<sup>85</sup> *Ibid.* See also, *Handy* 2020-UNAT-1044, para. 34.

Administrative leave: “A decision to terminate administrative leave and not to pursue disciplinary action has no adverse legal consequences or impact and is accordingly not an ‘administrative decision’.”<sup>86</sup>

Positive decision: “[B]eing selected for a [...] job [...] and subsequently accepting the offer” is not “an appealable administrative decision in that it [does] not have any adverse legal consequences for [the concerned staff member]”.<sup>87</sup>

Selection process: “[A] selection process may only be challenged in the context of an appeal against the outcome of that process.”<sup>88</sup>

Entry on duty (EOD) date: In *Avramoski*, UNAT held that “there was no evidence [...] that the EOD date or the refusal to amend it had a direct impact or legal consequences on the [Applicant’s] terms of appointment or contract of employment. The Dispute Tribunal stated that there ‘may be numerous’ benefits that could be negatively affected ‘including: eligibility for continuous appointment, accrual of various entitlements, regime determining retirement age and access to after service health insurance’. However, the Dispute Tribunal did not reference what benefits were specifically affected in this case nor what evidence substantiated the direct impact or legal consequences to these benefits. [...] As there was no direct impact or legal consequences to either the EOD date or the refusal to amend it, neither can be an ‘administrative decision’.”<sup>89</sup>

Decision not to pursue disciplinary proceedings following the staff member’s resignation: UNAT held that, “the decision of the Administration not to complete the disciplinary process and instead resume it, should Mr. Kennes become staff member again in the future, did not constitute an appealable administrative decision [...], as it did not have a present and direct adverse impact on the terms and conditions of Mr. Kennes’ employment.”<sup>90</sup> UNAT added that “the Administration has no duty to proceed with, and lacks capacity to conduct, a disciplinary measure once a staff member has left the Organization, as its authority to complete a disciplinary process is predicated on the fact that a staff member has an ongoing employment relationship with the Organization.”<sup>91</sup>

Decision to put a note on the staff member’s OSF: In *Kennes*, the note in question was of “mere informative and instructive nature [...] [and] did not involve a certain and present adverse impact on [the Applicant’s] status as a former staff member.”<sup>92</sup>

Abolition of post: The abolition of a post is “not a reviewable [decision] as it had no direct impact on [the Applicant’s] terms of appointment or contract of employment. It merely constituted an act leading up to the final decision not to renew [the Applicant’s] fixed-term

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<sup>86</sup> *Maloof* 2017-UNAT-806, para. 34.

<sup>87</sup> *Nouinou* 2020-UNAT-981, paras. 55-56.

<sup>88</sup> *Kawamleh* 2018-UNAT-818, para. 14. See also, *Ishak* 2011-UNAT-152, para. 29.

<sup>89</sup> *Avramoski* 2020-UNAT-987, paras. 41-42.

<sup>90</sup> *Kennes* 2020-UNAT-1073, paras. 44.

<sup>91</sup> *Ibid.*, para. 45.

<sup>92</sup> *Ibid.*, para. 49.

appointment.”<sup>93</sup> In that sense, only a decision following from the abolition decision is the administrative decision subject to judicial review.<sup>94</sup> For example, in *Lee*, UNAT held that “[a]lthough Ms. Lee cannot challenge the discretionary authority of the SG to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made.”<sup>95</sup>

Investigative process: “Initiating an investigation is merely a step in the investigative process and is not an administrative decision [...] [subject to judicial review]”.<sup>96</sup>

“Both the SG’s budgetary proposal and the GA’s adoption by resolution of the budget proposal are merely acts prefatory to or preceding an administrative decision that would ‘produce [] direct legal consequences’.”<sup>97</sup>

In *Dufresne*, The Applicant wanted to pay her and the Organization’s contributions to the Pension Fund during her SLWOP. According to the UNJSPF’s regulatory framework, these payments cannot be done retroactively. The Applicant failed to pay a portion of these contributions and when she was back to duty, she inquired about making the remainder of her payments retroactively. The Acting Chief of Payroll responded that the UNJSPF’s rules do not allow retroactive payments. With respect to the question whether this response was administrative decision, UNAT held that “[w]hile it is doubtful that the Acting Chief of Payroll had the authority or discretion to authorise such a payment without the concurrence of the UNJSPF, his refusal to pursue the matter was nonetheless a decision in the exercise of a function adversely affecting the rights or interests of Ms. Dufresne, which had a direct legal effect in her relationship with the Organisation.”<sup>98</sup>

➤ Not an administrative decision

“Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.”<sup>99</sup> “What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.”<sup>100</sup>

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<sup>93</sup> *Nouinou* 2019-UNAT-902, para. 38. See also, *Loeber* 2018-UNAT-844, para. 25.

<sup>94</sup> *Nouinou* 2019-UNAT-902, paras. 35-38.

<sup>95</sup> *Lee* 2014-UNAT-481, para. 51.

<sup>96</sup> *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 34.

<sup>97</sup> *Lee* 2014-UNAT-481, para. 51.

<sup>98</sup> *Dufresne* 2020-UNAT-1041, para. 28.

<sup>99</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 62, citing *Lee* 2014-UNAT-481, para. 50, in turn citing *Bauza Mercere* 2014-UNAT-404, para. 18, and citations therein. See also, *Kalashnik* 2016-UNAT-661, para. 25.

<sup>100</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 62. See also, *Olowo-Okello* 2019-UNAT-967, para. 32; *Handy* 2020-UNAT-1044, para. 27.

A public statement that a staff member has no future in the Organization does not constitute an administrative decision, as it does not have any legal consequences.<sup>101</sup>

Publishing an order in the section “President’s Orders” of DT’s website does not constitute a challengeable administrative decision.<sup>102</sup>

“[A] comment made in a satisfactory appraisal [...] [is] not a final administrative decision. It did not detract from the overall satisfactory performance appraisal and has no direct legal consequences for [the Applicant’s] terms of appointment”.<sup>103</sup> Also, “the order to place [a staff member] on a [performance improvement plan (PIP)] is not an appealable final administrative decision. [...] PIP is merely a preliminary step instituted to address a staff member’s shortcomings during a performance cycle [...] [and] preliminary steps or actions are not administrative decisions subject to appeal.”<sup>104</sup>

“Ethics Office is limited to making recommendations to the Administration [...] [and] these recommendations are not administrative decisions subject to judicial review and as such do not have any ‘direct legal consequences’.”<sup>105</sup>

Appointment of a candidate is the consequence of the administrative decision not to appoint another candidate and not a second administrative decision.<sup>106</sup>

“[A] statement by the Administration that a final decision [...] [will] be taken following the receipt of [the staff member’s] comments, [is] not an appealable administrative decision [...], as it [does] not qualify as a final decision having a direct adverse impact on the individual situation of [the staff member]”.<sup>107</sup>

In *Handy*, UNAT held that, “a good final rating, which *in abstracto* is a favourable decision, does not constitute an ‘administrative decision’ able, by itself, to have a direct and negative impact on a staff member’s rights and, accordingly, there is no legal basis [...] for a staff member to file an application before the Dispute Tribunal.”<sup>108</sup> “Nevertheless, [...] the determination on whether a specific decision [...] constitutes an appealable administrative decision is done *in concreto* on a case-by-case basis by UNDT Judge, who takes into consideration, *inter alia*, the particular circumstances, the nature of that decision as well as its relevant decision context and consequences on the staff member’s terms and conditions of employment.”<sup>109</sup> Especially, UNAT held that “the decisive factor in determining whether a negative comment in an ePAS constitutes an administrative decision was the ‘direct legal

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<sup>101</sup> *Buscaglia* 2012-UNAT-202, para. 29.

<sup>102</sup> *Gehr* 2013-UNAT-365, para. 14.

<sup>103</sup> *Ngokeng* 2014-UNAT-460, para. 31.

<sup>104</sup> *Gnassou* 2018-UNAT-865, para. 31.

<sup>105</sup> *Wasserstrom* 2014-UNAT-457, para. 41. See also, *Gehr* 2014-UNAT-475, para. 18; *Nguyen-Kropp & Postica* 2016-UNAT-673, paras. 34-42. See also, *Dissenting Opinion of Judge Faherty*. He opposed to the majority’s decision first in *Wasserstrom* and reiterated his dissenting opinion in *Nguyen-Kropp & Postica*.

<sup>106</sup> *Roig* 2013-UNAT-368, paras. 18-19.

<sup>107</sup> *Olowo-Okello* 2019-UNAT-967, para. 33.

<sup>108</sup> *Handy* 2020-UNAT-1044, para. 33. See also, *Staedtler* 2015-UNAT-546, para. 38; *Ngokeng* 2014-UNAT-460, para. 31.

<sup>109</sup> *Handy* 2020-UNAT-1044, para. 34.

consequences' flowing from that comment – not the degree by which the negative comments detracted from the overall satisfactory appraisal.”<sup>110</sup> UNAT also concluded that “the[] unfavourable disparaging narrative comments in the [...] ePAS, which are final and unappealable [...], negated [the Applicant's] positive overall performance appraisal and effectively turned it into an unfavourable one, since they directly have had an adverse impact on his moral and ethical stature and professionalism and might be taken into consideration by the Administration at any time as a basis for his performance rating in the course of his career development, without [the Applicant] being able, due to the individual character of the [...] ePAS, to incidentally challenge their validity [...]. The harmful effect of the [...] negative comments, which detract from the overall satisfactory rating, on [the Applicant's] employment status is not purely hypothetical [...] but direct and tangible.”<sup>111</sup>

Also, in *Zaqqout*, UNAT affirmed UNRWA DT's judgment by noting that, “several decisions to extend” the Applicant's appointment “advantaged him by adding [...] six months to his last [contract].”<sup>112</sup> As such, they were not subject to judicial review.

➤ Cases of an administrative decision

A staff member who alleges that he/she has been subjected to harassment may challenge a decision not to investigate a claim of discrimination.<sup>113</sup>

“The services provided by OSLA and the manner in which the representation is implemented can have an impact on a staff member's terms of appointment and therefore can fall within the jurisdiction of UNDT, without interfering with the professional independence of counsel.”<sup>114</sup>

➤ One coherent decision vs. distinct decisions

In *Gisage*, UNAT held that “UNDT's conclusion that the contested decisions formed one coherent decision ignores the fact that each decision was taken at different stages of the process and on a fresh assessment of different sets of facts as they existed at the relevant time. The UNDT accordingly erred in concluding that the application was receivable in its entirety.”<sup>115</sup>

**B.5. Absence of (timely) management evaluation**

“Management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary”.<sup>116</sup> “An application is only receivable when a staff member has previously submitted the impugned administrative decision for management evaluation”.<sup>117</sup>

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<sup>110</sup> *Ibid.*, para. 40.

<sup>111</sup> *Ibid.*, para. 42.

<sup>112</sup> *Zaqqout* 2020-UNAT-1055, para. 32.

<sup>113</sup> *Nwuke* 2010-UNAT-099, paras. 36-37.

<sup>114</sup> *Larkin* 2011-UNAT-135, para. 21. This was also confirmed in *Worsley* 2012-UNAT-199, para. 31; *Scheepers* 2012-UNAT-211, para. 41; *Staedtler* 2015-UNAT-577, para. 29.

<sup>115</sup> *Gisage* 2019-UNAT-973, para. 32.

<sup>116</sup> *Pirnea* 2013-UNAT-311, para. 42; *Neault* 2013-UNAT-345, para. 33. This was also confirmed in *Applicant* 2013-UNAT-381, para. 37; *Nagayoshi* 2015-UNAT-498, para. 36; *Faust* 2016-UNAT-695, para. 40.

<sup>117</sup> *Ajdini et al* 2011-UNAT-108, para. 23. This was also confirmed in *Gehr* 2013-UNAT-299, para. 17; *Wamalala* 2013-UNAT-300, para. 32; *Christensen* 2013-UNAT-335, para. 20; *Servas* 2013-UNAT-349, para. 22; *Amany*

Correspondence with non-competent authorities “cannot substitute [the] obligation to request management evaluation.”<sup>118</sup> It is enough to “send” the request for management evaluation within the 60-days, and it is not required that the Administration “receives” it within the time limit.<sup>119</sup>

Where an applicant has failed to file the statutorily required request for management evaluation, DT lacks jurisdiction *ratione materiae* over the case.<sup>120</sup>

“[T]he Administration’s response to a request for management evaluation is not a reviewable decision. The response is an opportunity for the Administration to resolve a staff member’s grievance without litigation – not a fresh decision”.<sup>121</sup> The same applies to a recommendation by the Management Evaluation Unit (MEU). In *Nwuke*, UNAT noted that “UNDT [erroneously] sought to distinguish the [...] case from its own jurisprudence, [...] [about] the Administration’s response to a request for management evaluation [being] not a reviewable decision.”<sup>122</sup> UNAT stated that “UNDT was mistaken in its interpretation of the MEU’s letter [...] which recommended an investigation.”<sup>123</sup>

“[T]he use of a specific ‘form’ is not a mandatory requirement for there to be a valid request for management evaluation.”<sup>124</sup> Nevertheless, the use of the standard form is preferable for an unambiguous request.<sup>125</sup>

Evidently, the requirement for management evaluation is applicable for both staff members and former staff members.<sup>126</sup>

Finally, claims that have not been raised in the request for management evaluation are not receivable *ratione materiae*.<sup>127</sup>

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2015-UNAT-521, para. 17; *El-Shobaky* 2015-UNAT-564, para. 23; *James* 2015-UNAT-600, para. 28; *Mohanna* 2016-UNAT-687, para. 29; *Muhsen* 2017-UNAT-793, paras. 12-14.

<sup>118</sup> *James* 2016-UNAT-600, para. 30.

<sup>119</sup> *Webster* 2020-UNAT-983, para. 34.

<sup>120</sup> *Servas* 2013-UNAT-349, paras. 21-22. This was also confirmed, *inter alia*, in *Monarawila* 2016-UNAT-694, para. 34.

<sup>121</sup> *Kalashnik* 2016-UNAT-661, paras. 27-29. This was also confirmed in *Nwuke* 2016-UNAT-697, para. 20; *Nadeau* 2017-UNAT-733, para. 36; *Auda* 2017-UNAT-740, paras. 22-23; *Kalashnik* 2017-UNAT-803, paras. 23-27.

<sup>122</sup> *Nwuke* 2016-UNAT-697, para. 20.

<sup>123</sup> *Ibid.*, para. 24.

<sup>124</sup> *Lemonnier* 2016-UNAT-679, para. 51.

<sup>125</sup> *Ibid.*, para. 51.

<sup>126</sup> *Gehr* 2013-UNAT-293, paras. 30-33.

<sup>127</sup> *Luvai* 2014-UNAT-417, para. 28; *Seyfollahzadeh* 2016-UNAT-620; para. 29. See also, *Pirnea* 2013-UNAT-311, para. 42; *Survo* 2015-UNAT-595, paras. 84-85.

### C. Ratione Temporis

➤ 60 days to submit a request for management evaluation

An application, for which the Applicant had submitted his request for management evaluation after the 60-day time limit, is not receivable.<sup>128</sup>

➤ 90 days to submit an application to DT

“‘[W]here a management evaluation of the contested decision is not required’, Article 8(1)(d)(ii) provides that ‘[a]n application shall be receivable’ by the UNDT if it is filed ‘within 90 calendar days of the applicant’s receipt of the administrative decision.’”<sup>129</sup>

“‘[A]n application challenging a disciplinary measure is a case where management evaluation of the contested decision is not required within the meaning of Article 8(1)(d)(ii) [of UNDT’s Statute]’.”<sup>130</sup>

“Article 8(1)(d)(ii) of the Statute provides, in part, that an application for judicial review ‘shall be receivable if ... [t]he application is filed within ... 90 calendar days of the expiry of the relevant response period for the decision review if no response to the request was provided.’”<sup>131</sup>

“When [a response to a request for] management evaluation is received after the deadline of [30/45] calendar days but before the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT”.<sup>132</sup>

Nevertheless, if a response to a request for management evaluation is not received after the deadline of 30/45 calendar days and not during the following 90 days for seeking judicial review, but only after that, this receipt of the response will not result in setting a new deadline for seeking judicial review before DT.<sup>133</sup>

“Resubmitting a request for decision review cannot, and does not, reset the date decision review is sought or the date from which the limitations period commences to run for filing an application for judicial review.”<sup>134</sup>

Also, an applicant’s reliance on incorrect information provided by the MEU with respect to the deadlines to submit an application before DT would not render his/her application time-barred.<sup>135</sup>

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<sup>128</sup> *Eggesfield* 2014-UNAT-402, para. 18. This was also confirmed in *Seyfollahzadeh* 2016-UNAT-620, para. 28; *Survo* 2016-UNAT-644, para. 34.

<sup>129</sup> *Cooke* 2012-UNAT-275, para. 25.

<sup>130</sup> *Nikwigize* 2017-UNAT-731, para. 14

<sup>131</sup> *Al-Dawoud* 2016-UNAT-664, para. 12.

<sup>132</sup> *Neault* 2013-UNAT-345, para. 34. See also, *Faraj* 2013-UNAT-331, para. 21; *De Aguirre* 2016-UNAT-705, para. 29.

<sup>133</sup> *Lemonnier* 2016-UNAT-679, paras. 34-37. See also, *Babiker* 2016-UNAT-672, paras. 47-50.

<sup>134</sup> *Al-Dawoud* 2016-UNAT-664, para. 19. This was also confirmed in *Dieng* 2019-UNAT-941, para. 34.

<sup>135</sup> *Dieng* 2019-UNAT-941, paras. 38-41. See also, *Faraj*, 2013-UNAT-331, for an example of incorrect information provided by decision-maker.

➤ 60 days to submit an appeal to UNAT after the first instance judgment

UNAT applies strictly the 60-day time limit to file an appeal to UNAT after the first instance judgment. In *Shehadeh*, UNRWA DT issued its judgment on 11 February 2016. The 60-day time limit to file an appeal expired on 11 April 2016, at 11:59 p.m., New York time. UNAT held that, as Mr. Shehadeh had filed his appeal on 12 April 2016, at 4:42 a.m., New York time – 4.5 hours late, his appeal was not receivable.<sup>136</sup>

➤ Direct access to UNDT in the case of technical bodies

The SG determines, pursuant to Staff Rule 11.2(b), what constitutes a technical body. In *Gehr*, UNAT held that a rebuttal panel is not a technical body.<sup>137</sup> In *Masyllkanova*, it was determined that a fact-finding panel or an investigation panel established under ST/SGB/2008/5 was not a technical body.<sup>138</sup> The UNFPA Compliance Review Board is also not a technical body.<sup>139</sup>

In *James*, the direct access to UNDT without a request for management evaluation was denied. In this case, the Applicant sought special consideration for compensation for the loss of his eye and for his immediate separation from UNMIL on grounds of health disability. Since the condition was not service-incurred, there was no need to address questions relating to disability and permanent loss of function. UNAT held that “a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D. Similarly, the responses that Mr. James viewed as negative decisions on his request for separation on health grounds were not decisions based on the advice of technical bodies.”<sup>140</sup>

➤ Three-year time limit

The regulatory limit of three-years under Article 8(4) of DT Statute cannot be suspended or waived.<sup>141</sup>

➤ Misfiled application

An application that “failed to comply with the formal requirements” but is filed before the deadline and is later corrected and submitted with the Registry’s instructions is receivable.<sup>142</sup>

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<sup>136</sup> *Shehadeh* 2016-UNAT-689, para. 21. This was also confirmed in *Ali* 2017-UNAT-773, para. 13. See also, *Delaunay* 2019-UNAT-939, para. 44, for another example how strict UNAT is in enforcing various time-limits.

<sup>137</sup> *Gehr* 2014-UNAT-479, paras. 22-27.

<sup>138</sup> *Masyllkanova* 2014-UNAT-412, para. 18. See also, *Faust* 2016-UNAT-695, para. 38; *Fayek* 2017-UNAT-739, paras. 11-12.

<sup>139</sup> *Diallo* 2019-UNAT-936, para. 29.

<sup>140</sup> *James* 2015-UNAT-600, paras. 24-25.

<sup>141</sup> *Borg-Olivier* 2011-UNAT-146, para. 1; *Reid* 2013-UNAT-389, para. 14. This was also confirmed in *Bangoura* 2012-UNAT-268, para. 30; *Ibom* 2015-UNAT-551, para. 19; *Achkar* 2015-UNAT-579, para. 22; *Hayek* 2015-UNAT-606, para. 24; *Kouadio* 2015-UNAT-558, para. 19; *Khan* 2017-UNAT-727, paras. 23-24.

<sup>142</sup> *Crichlow* 2010-UNAT-035, para. 29. See also, *Abu Hamda* 2010-UNAT-022, para. 23; *Doleh* 2010-UNAT-025, para. 16.

#### D. Time limits

To begin with, UNAT very strictly enforces the various time limits.<sup>143</sup> In that regard, “it is the staff member’s responsibility to ensure that [he/she] is aware of the applicable procedures [...] [and] ignorance cannot be invoked as an excuse.”<sup>144</sup> For instance, *Kataye* is a case with respect to the calculation of the last date of submission to UNAT on the occasion of official holidays.<sup>145</sup>

Time limits do not begin to run anew simply because an Applicant was “provided with a reasonable belief that there were grounds to request management evaluation” of a decision that had been notified at an earlier stage.<sup>146</sup>

DT has no jurisdiction to waive the deadline for submitting a request for management evaluation.<sup>147</sup>

##### ➤ Implied administrative decision

Regarding time limits in the case of an implied administrative decision, DT must first determine the date on which the staff member knew or reasonably should have known of the decision he or she contests. Accordingly, “time limits only start to run as of the moment where all relevant facts for a particular decision were known, or should have reasonably been known.”<sup>148</sup>

##### ➤ Date of an administrative decision

“The date of an administrative decision is based on objective elements that both parties [...] can accurately determine.”<sup>149</sup> In that sense, “a staff member’s knowledge of a decision is not necessarily the same thing as a staff member receiving notification of a decision.”<sup>150</sup> “An [applicant] may not unilaterally determine the date of the administrative decision by sending

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<sup>143</sup> *Mezzoui* 2010-UNAT-043, paras. 20-21. This principle was confirmed in *Laeijendecker* 2011-UNAT-158, para. 33; *Sanbar* 2012-UNAT-279, para. 19; *Romman* 2013-UNAT-308, para. 16; *Kissila* 2014-UNAT-470, para. 23; *Kazazi* 2015-UNAT-557, para. 38; *El-Saleh* 2015-UNAT-594, para. 26; *Ocokoru* 2015-UNAT-604, para. 40. See also *Delaunay* 2019-UNAT-939, para. 44, for another example how strict UNAT is in enforcing various time limits.

<sup>144</sup> *Jennings* 2011-UNAT-184, para. 26. This principle was also reaffirmed in *Christensen* 2012-UNAT-218, para. 39; *Kissila* 2014-UNAT-470, para. 24; *Amany* 2015-UNAT-521, para. 18; *Khan* 2015-UNAT-559, para. 31; *Selim* 2015-UNAT-581, para. 33; *Gehr* 2016-UNAT-613, para. 15; *Babiker* 2016-UNAT-672, para. 49; *Vukasovic* 2016-UNAT-699, para. 14; *Abdellaoui* 2019-UNAT-929, para. 28.

<sup>145</sup> *Kataye* 2018-UNAT-835, paras. 15-18.

<sup>146</sup> *Rahman* 2012-UNAT-260, para. 23. This was also confirmed in *Perrin* 2020-UNAT-995, para. 11.

<sup>147</sup> *Costa* 2010-UNAT-036, para. 1. This was also confirmed in *Samardzic* 2010-UNAT-072, para. 21; *Mezoui* 2010-UNAT-043, para. 21; *Ajdini et al* 2011-UNAT-108, para. 5; *Muratore* 2012-UNAT-191, para. 38; *Wu* 2013-UNAT-306, para. 26; *Roig* 2013-UNAT-368, paras. 16-17; *Egglesfield* 2014-UNAT-402, paras. 22-23; *Nianda-Lusakueno* 2014-UNAT-472, paras. 26-29; *Kouadio* 2015-UNAT-558, paras. 16-17; *Terragnolo* 2015-UNAT-566, paras. 29-30; *Gehr* 2016-UNAT-613, paras. 10-12; *Pavicic* 2016-UNAT-619, paras. 19-21; *Survo* 2016-UNAT-644, paras. 31-32.

<sup>148</sup> *Krioutchkov* 2016-UNAT-691, para. 21. This was also confirmed in *Chahrour* 2014-UNAT-406, para. 31. See also, *Rosana* 2012-UNAT-273; *Awan* 2015-UNAT-588, paras. 18-19; *Survo* 2016-UNAT-644, paras. 25-26; *Cohen* 2017-UNAT-716, para. 37.

<sup>149</sup> *Rosana* 2012-UNAT-273, para. 25. This principle was also confirmed in *Collas* 2014-UNAT-473, para. 40; *Terragnolo* 2015-UNAT-566, para. 36; *Awan* 2015-UNAT-588, para. 19; *Survo* 2016-UNAT-644, para. 25; *Jean* 2017-UNAT-743, para. 24; *Handy* 2020-UNAT-1044, para. 26.

<sup>150</sup> *Babiker* 2016-UNAT-672, para. 41. This was also confirmed in *Jean* 2017-UNAT-743, para. 23. See also, *Bernadel* 2011-UNAT-180, para. 24.

an e-mail to the Administration expressing an ultimatum to adopt a decision.”<sup>151</sup> Also, “the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made.”<sup>152</sup>

For example, in *Said*, the Applicant wrote to the Administration on 20 April 2015, and received a response on 6 May 2015. Yet, the Applicant never timely challenged this response, but instead wrote to the Administration a year later challenging a response that he received on 16 May 2016, which referred back to the 6 May 2015 letter as being a comprehensive response to the Applicant’s requests. Therefore, the application was not receivable *ratione temporis*.<sup>153</sup>

“An administrative decision will have the effect of triggering the running of a time limit [in other words, resetting the clock for the time limits,] if it is intended to have final effect in the form of direct legal consequences on the rights and obligations of the staff member.”<sup>154</sup>

For example, in *Ruyffelaere*, UNAT held that, despite an earlier verbal communication to the staff member regarding the decision not to initiate an investigation to his/her complaint of harassment, a formal written response, two years later, would re-set the clock for filing a request for management evaluation.<sup>155</sup>

In *Avramoski*, UNAT held that if the staff member “had had any issue with the terms of his new appointment, he should have protested in a timely fashion by requesting a management evaluation. He cannot challenge the Administration’s [...] decision on the calculation of his entitlement to termination indemnity by [...] impugning the [...] administrative decision [made at the time of his appointment] about his EOD date.”<sup>156</sup>

In *Kapsou* and *Omwanda*, UNAT found the applications non-receivable, even though DT had concluded that the applications were receivable.<sup>157</sup> In *Jean*, even though DT dismissed the application as non-receivable, UNAT remanded the case to DT as it concluded that the application was receivable.<sup>158</sup>

➤ Exceptional circumstances

DT and UNAT may suspend or waive the deadlines only in exceptional cases and upon a written request by an applicant.<sup>159</sup> These are cumulative conditions.<sup>160</sup> A request for suspension

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<sup>151</sup> *Rosana* 2012-UNAT-273, para. 24. This principle has been reaffirmed by UNAT in *Rabee* 2013-UNAT-296, paras. 18-19; *Terragnolo* 2015-UNAT-566, para. 36.

<sup>152</sup> *Staedtler* 2015-UNAT-546, para. 46. This principle has also been reaffirmed by UNAT in *Sethia* 2010-UNAT-079, para. 20; *Odio-Benito* 2010-UNAT-196, para. 19; *Cremades* 2012-UNAT-271, para. 29; *Cooke* 2012-UNAT-275, para. 38; *Kazazi* 2015-UNAT-557, para. 31; *Wesslund* 2019-UNAT-959, paras. 27-32.

<sup>153</sup> *Said* 2018-UNAT-813, paras. 16-20.

<sup>154</sup> *Afeworki* 2017-UNAT-794, para. 28.

<sup>155</sup> *Ruyffelaere* 2020-UNAT-993, paras. 19-21.

<sup>156</sup> *Avramoski* 2020-UNAT-987, para. 46; *Omwanda* 2019-UNAT-906, para. 34.

<sup>157</sup> *Kapsou* 2011-UNAT-170, paras. 28-30 and *Omwanda* 2019-UNAT-906, paras. 33-36.

<sup>158</sup> *Jean* 2017-UNAT-743, paras. 23-26.

<sup>159</sup> Article 8 of UNDT’s Statute.

<sup>160</sup> *Cooke* 2012-UNAT-275, para. 28-30; *Czaran* 2013-UNAT-373, para. 25; *Eng* 2015-UNAT-520, para. 24; *Gallo* 2015-UNAT-552, para. 16; *El Saleh* 2015-UNAT-594, para. 27; *El Rush* 2016-UNAT-627, para. 23.

or waiver of time limit by an applicant must be submitted prior to the filing of an application, so that DT can exercise its discretion.<sup>161</sup> Otherwise, DT would have no jurisdiction to consider whether there were exceptional circumstances to waive the deadline.<sup>162</sup> In the same vein, an applicant or appellant cannot submit a request for a waiver of the time limits for filing a late application or appeal along with his/her untimely (or belated) application or appeal.<sup>163</sup> Nevertheless, a request for an extension of time to file an application can be submitted after the end of 90-day time limit. UNAT held that “Article 8(3) uses the alternative words ‘suspend’ and ‘waive’ in relation to allowing an out-of-time application. Suspension contemplates an expiry that is to happen in the future while a waiver contemplates an expiry that has already occurred.”<sup>164</sup>

With respect to what is an exceptional circumstance, UNAT held that “only circumstances ‘beyond his or her control that prevented the applicant from exercising the right of appeal in a timely manner’ may be considered ‘exceptional circumstances’ justifying a waiver of a time limit or deadline.”<sup>165</sup> Regarding the onus of proof, “[i]t is an applicant’s responsibility to pursue her or his case and, where she or he fails to do so, to convince the [DT] of the existence of exceptional circumstances justifying a waiver of the applicable time limits.”<sup>166</sup>

UNAT also held that “[t]he exercise of discretion by [DT] may be overturned on appeal only if the decision taken appears to be clearly unreasonable.”<sup>167</sup> It is important to underline that “the degree of lateness [*de minimis* delay, such as a few hours,] has no relevance for the finding of exceptional circumstances.”<sup>168</sup>

However, it is important to make a distinction between the lateness in submitting an application and in submitting a request to suspend or waive the time limit to submit an application. The degree of lateness is irrelevant with respect to the submission an application. However, the degree of lateness will be taken into account “for the purpose of determining an application to suspend or waive (or extend) that time limit.”<sup>169</sup>

Regarding the situations of exceptional circumstances, in *Scheepers*, UNAT held that reliance on “the erroneous advice provided by OSLA [would] not bring the case within the ambit of an ‘exceptional case’”.<sup>170</sup> In *Gelsei*, OSLA Counsel submitted an application through online system, but there was a technical problem and the application was not transmitted to the Tribunal. This was the 90<sup>th</sup> day and the Counsel only realised the problem the day after and

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<sup>161</sup> *Thiam* 2011-UNAT-144, para. 18; *Nikwigize* 2017-UNAT-731, paras. 17-19.

<sup>162</sup> *Nikwigize* 2017-UNAT-731, para. 20

<sup>163</sup> *Ibid.*, para. 19.

<sup>164</sup> *Gelsei* 2020-UNAT-1035, para. 20.

<sup>165</sup> *Shehadeh* 2016-UNAT-689, para. 19. See also, *El-Khatib* 2010-UNAT-029, para. 14; *Diagne et al.* 2010-UNAT-067, para. 1; *Bofill* 2014-UNAT-478, para. 19.

<sup>166</sup> *Scheepers* 2012-UNAT-211, para. 42.

<sup>167</sup> *Abu-Hawaila* 2011-UNAT-118, para. 30. See also, *Gallo* 2015-UNAT-552, para. 16; *Eng* 2015-UNAT-520, paras. 23-24; *Ruger* 2016-UNAT-693, para. 12.

<sup>168</sup> *Ruger* 2016-UNAT-693, para. 18.

<sup>169</sup> *Gelsei* 2020-UNAT-1035, para. 22.

<sup>170</sup> *Scheepers* 2012-UNAT-211, para. 44. For another example, see also, *Bezziccheri* 2015-UNAT-538, paras. 40-41.

requested a waiver. DT concluded that the Applicant “had not proved the electronic system’s failure to a high standard, even when this explanation for the breach had not been challenged by the Respondent.”<sup>171</sup> UNAT held that, “in the absence of challenge to its account of them, [...] the Tribunal ought to have accepted the credibility of OSLA’s account on its face, focused on whether the circumstances were exceptional.”<sup>172</sup> The case was remanded to DT for its decision on the merits.

#### E. **Other receivability matters**

##### ➤ *Mootness*

UNAT provided a comprehensive definition for the case of mootness in *Kallon*. It held that “a judicial decision [would] be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance.”<sup>173</sup> The mootness doctrine is a corollary to UNAT’s refusal to give advisory opinions or *res judicata* doctrine.<sup>174</sup>

UNAT also added that “[s]ince a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution.”<sup>175</sup> UNAT held that “a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct.”<sup>176</sup>

It is also important to clarify that, if the events rendering an application moot took place before the submission of the application to DT, the application must be found not receivable due to mootness. However, if the events took place after the submission of the case, the application would be receivable, but must be dismissed as moot.<sup>177</sup>

In *Crichlow*, the SG paid the compensation ordered by UNDT and cross-appealed the award of compensation following the Applicant’s appeal of UNDT’s judgment. UNAT held that the cross-appeal was moot.<sup>178</sup>

In *Handy*, the Applicant contested the non-renewal of his fixed-term appointment. Before the end of management evaluation, the Applicant’s contract was renewed on a month to month basis. DT held that the application was moot. Nevertheless, UNAT held otherwise. As the impugned decision was not expressly rescinded, and the Applicant was told that the non-renewal was not related to his performance, UNAT held that “the decision to not renew the

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<sup>171</sup> *Gelsei* 2020-UNAT-1035, para. 33.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Kallon* 2017-UNAT-742, para. 44.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, para. 45.

<sup>176</sup> *Ibid.*

<sup>177</sup> For other examples regarding the issue of mootness, see *Crotty* 2017-UNAT-763, paras. 16-18; *Alsado* 2017-UNAT-766; and *Wright* 2017-UNAT-767.

<sup>178</sup> *Crichlow* 2010-UNAT-035, para. 34.

fixed-term appointment and the decision to renew on a month to month basis were different, unrelated decisions based on different considerations and rationales.”<sup>179</sup>

With respect to a contested decision placing a staff member on SLWFP, upon the end of the special leave, the decision in question would be moot.<sup>180</sup>

➤ Amicable settlement efforts

“[M]ediation has to be pursued by either party [and] such informal dispute resolution is carried out through the Office of the Ombudsman [and] the time limits may be tolled when the [...] Ombudsman’s Office is involved in settlement or mediation discussions [and] the staff member may file an application within 90 calendar days of the breakdown of the mediation”.<sup>181</sup> “[T]here is absolutely no legal authority for [DT] to commence the running of the sixty-day limitation period from the end of the Ombudsman’s settlement negotiations, rather than from ‘the date on which the staff member received notification of the administrative decision to be contested’.”<sup>182</sup> However, in certain circumstances, DT may infer that “the Ombudsman’s participation in the settlement negotiations amounted to the [SG’s] implicit extension of the management evaluation deadline for the period of the negotiations.”<sup>183</sup> However, this is not a general principle.<sup>184</sup> “Usually, an explicit decision of the [SG about extension of the management evaluation deadline] in favour of the staff member is necessary before [DT].”<sup>185</sup>

Furthermore, “the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute [...] applies only to informal dispute resolution conducted through the Office of the Ombudsman ... [and] because of its exceptional character [,] [this] must be interpreted strictly and [is] not subject to extension by analogy.”<sup>186</sup>

For example, in *Dzuverovic*, UNAT held that the “e-mail correspondence between Ms. Dzuverovic and the Ombudsman did not take place during the period in which the time for making a request for management evaluation was running, and in any event, the e-mail correspondence addressed matters other than the contested decision.”<sup>187</sup> “Moreover, the Ombudsman never became involved in resolving the contested decision or the dispute between Ms. Dzuverovic and [the Administration]”.<sup>188</sup> UNAT concluded that DT had correctly ruled that the application was not receivable *ratione materiae*.<sup>189</sup>

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<sup>179</sup> *Handy* 2020-UNAT-1015, paras. 26-34.

<sup>180</sup> *Hamdan* 2020-UNAT-1050, para. 32.

<sup>181</sup> *Applicant* 2015-UNAT-590, para. 51.

<sup>182</sup> *Wu* 2013-UNAT-306, para. 26.

<sup>183</sup> *Ibid.*, para. 25.

<sup>184</sup> *Wu* 2013-UNAT-306, para. 25; *Egglefield* 2014-UNAT-402, para. 19.

<sup>185</sup> *Ngoga* 2018-UNAT-823, para. 36.

<sup>186</sup> *Abu-Hawaila* 2011-UNAT-118, para. 29. See also, *Scheepers* 2012-UNAT-211, paras. 36-37; *Cremades* 2012-UNAT-271, paras. 25-27; *Cooke* 2012-UNAT-211, paras. 37-38; *Applicant* 2015-UNAT-590, paras. 49-51.

<sup>187</sup> *Dzuverovic* 2013-UNAT-338, para. 30.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

In *Barri*, UNAT held that “[a] mere request for assistance from the Ombudsman’s Office is not sufficient” for an implicit extension of the time limit to seek management evaluation.<sup>190</sup>

➤ *Res judicata*

*Res judicata* is the term for expressing that a matter has already been adjudicated and that it cannot be re-litigated. Accordingly, UNAT held that “final judgments by an appellate court can be set aside only on limited grounds and for the gravest of reasons.”<sup>191</sup>

➤ *Functus Officio doctrine*

The doctrine of *functus officio* holds that once an authority renders a decision regarding the issues submitted, it lacks any power to re-examine that decision. In *Auda*, UNAT held that “the [DT’s] decision to amend its own Judgment [...] went beyond clerical mistakes or errors arising from any accidental slips or omissions.”<sup>192</sup> “They were unexplained corrections that altered the main findings of the Judgment. As such, they were impermissible, irregular and in violation of the *functus officio* doctrine.”<sup>193</sup>

➤ *Memorandum of agreement*

With respect to cases resolved through mediation, UNAT held that “the legal consequences of a valid agreement are similar to those of a final judgment (*res judicata*).”<sup>194</sup> Similarly, UNAT held that “when a staff member signs a memorandum of understanding [...], it will normally be enforced.”<sup>195</sup>

➤ *Peremption*

“It is an established principle of international administrative law that an applicant’s right to review of a contested administrative decision can be preempted should she/he, by unequivocal conduct inconsistent with an intention to seek review, acquiesce in the decision.”<sup>196</sup> In *Salhi et al.*, it was not on whether in acquiescing in the decision the Applicants reserved their rights of review and the Respondent had not pleaded peremption. As a result, UNAT assumed that there was no peremption.<sup>197</sup>

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<sup>190</sup> *Barri* 2020-UNAT-1005, para. 13. See also, *Ngoga* 2018-UNAT-823, para. 36.

<sup>191</sup> *Shanks* 2010-UNAT-026bis, para. 4. See also, *Costa* 2010-UNAT-063, para. 4; *Beaudry* 2011-UNAT-129, paras. 16-17; *Masri* 2011-UNAT-163, para. 12; *Meron* 2012-UNAT-198, paras. 25-26; *Abbasi* 2013-UNAT-315, para. 14; *Ghahremani* 2013-UNAT-351, para. 10; *Gakumba* 2014-UNAT-492, para. 12; *Onana* 2015-UNAT-533, para. 43; *Dalgaard et Al.* 2016-UNAT-646, paras. 9-14; *Loeber* 2018-UNAT-844, paras. 26-28; *Sarwar* 2018-UNAT-868, para. 36.

<sup>192</sup> *Auda* 2017-UNAT-722, para. 39.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Pirraqu* 2015-UNAT-561, para. 14.

<sup>195</sup> *Jemai* 2011-UNAT-137, para. 1. See also, *Faust* 2017-UNAT-777, para. 29.

<sup>196</sup> *Salhi et al.* 2020-UNAT-1017, para. 27.

<sup>197</sup> *Ibid.*

## 2. Due Process Rights

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### A. In proceedings before DT

#### ➤ Main principles

Due process requires that both parties, the Applicant and the Administration, must be permitted to present their cases<sup>198</sup>, and that “a staff member must know the reasons for a decision so that he or she can act on it.”<sup>199</sup> In the same vein, due process and a fair hearing requires that parties are given an opportunity to present their views on the possible reliance of DT on a fact communicated to DT after closing submissions.<sup>200</sup>

In *Abu Hweidi et al.*, a non-selection case, UNAT concluded that the Applicants’ due process rights were not respected by UNRWA DT for three reasons. First, the Applicants’ request for the production of documents, regarding whether a set of standardised interview questions had been used by the Panel for all interviews, was not granted. Second, the question whether the Applicants’ answers in their interviews in Arabic had been translated for the non-Arabic speaking Panel members was not addressed. Third, UNRWA DT did not address whether keeping the results of the first round of interviews confidential had a negative impact on Applicants’ participation in the second round.<sup>201</sup> The case was remanded.

#### ➤ No difference principle

“[A] lack of a fair hearing or due process is no bar to fair or reasonable administrative action or disciplinary action provided it appears at a later stage that a hearing would have made no difference.”<sup>202</sup>

In *Allen*, the judgment of DT was reversed for an erroneous application of this “no difference principle”. In that case, the Applicant’s appointment was not renewed for poor performance although no performance review had been conducted. Based on certain emails between the Applicant and his supervisor, DT concluded that the review would have made no difference. UNAT held that “the comments [of the supervisor] in e-mails [to the Applicant] were informal advice or corrections that [did] not bear the hallmarks of formality or other performance assessment attributes.”<sup>203</sup>

#### ➤ Estoppel

In *Simmons*, with respect to one of the Applicant’s claims, the Respondent made a “passing reference” to the receivability of that claim before DT. “[T]his reference was made subsequent to the time [...] when the Respondent specifically sought a ruling on whether the Appellant’s

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<sup>198</sup> *Thweib and Al Hasanat* 2014-UNAT-449, paras. 23-24; *Bertucci* 2011-UNAT-121, paras. 52-54; *Khisa* 2014-UNAT-422, paras. 14-16.

<sup>199</sup> *Hepworth* 2011-UNAT-178, para. 32. See also, *Zamel* 2015-UNAT-602, para. 22.

<sup>200</sup> *Haroun* 2017-UNAT-720, paras. 25-27.

<sup>201</sup> *Abu Hweidi et al.* 2017-UNAT-779, paras. 29-36.

<sup>202</sup> *Kallon* 2017-UNAT-742, para. 54. This was also confirmed in *Michaud* 2017-UNAT-761, para. 60; *Nadasan* 2019-UNAT-918, para. 57; *Ladu* 2019-UNAT-956, para. 44.

<sup>203</sup> *Allen* 2019-UNAT-951, para. 38.

claims were receivable.”<sup>204</sup> Afterwards, during the appeal process, UNAT found that “the Respondent [...] [was] estopped from raising such issue on appeal [...] and [was] not satisfied to entertain its cross-appeal” and dismissed the cross-appeal.<sup>205</sup>

In *Nielsen*, the Applicant argued that she “didn’t dare” to include in the annexes filed with her application a correspondence – a letter – that was marked “strictly confidential”.<sup>206</sup> UNAT held that, “[i]rrespective of whether the UNDT would have allowed her to file the letter on an *ex parte* basis, she could at least have sought to do so, or alternatively, she could have simply alerted the [DT] to the fact of her receipt of such letter thereby allowing the [DT] to conduct such further enquiry with regard to the letter as it saw fit in the conduct of its case management functions.”<sup>207</sup> Consequently, UNAT concluded that the Applicant’s “opportunity to challenge the aforesaid findings has been forfeited by her failure to bring the [letter] to the attention of [DT].”<sup>208</sup>

➤ Oral hearings

“[T]he discretion to hold an oral hearing [is vested] in the judge, [and an oral hearing] should normally be held following an appeal against a decision imposing a disciplinary measure.”<sup>209</sup> “The same caution might well be observed in the more serious cases involving discontinuation of employment.”<sup>210</sup>

For example, in *Abu Hweidi et al.*, UNAT concluded that the “decision not to hold an oral hearing was a shortcoming of the procedure, since the parties had not agreed to the case being decided on the papers and the facts needed to be established by witnesses and/or further documentary evidence, [...] [an oral hearing] could have had an impact on the outcome of the case.”<sup>211</sup>

Similarly, in *Nadasan*, UNAT held that DT “erred in exercising its case management discretion when it refused the request for an oral hearing.”<sup>212</sup> In fact, in that case, the Respondent “brought to the Judge’s attention [the fact that the Applicant] was under the erroneous impression that he could call witnesses and reargue his case on appeal and specifically requested an oral hearing in order to discuss whether or not the case could be decided on the papers.”<sup>213</sup>

In some other examples, the decision not to hold an oral hearing was not a shortcoming in the process. In *Nadeau*, the Applicant’s request for an oral hearing was related to his desire to

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<sup>204</sup> *Simmons* 2012-UNAT-221, para. 60.

<sup>205</sup> *Ibid.*, para. 61. See also, *Kortes* 2019-UNAT-925, paras. 37-38.

<sup>206</sup> *Nielsen* 2016-UNAT-621, para. 35.

<sup>207</sup> *Ibid.*, para. 36.

<sup>208</sup> *Ibid.*, para. 38.

<sup>209</sup> *He* 2016-UNAT-686, para. 46. Also, Article 16(2) of UNDT Rules of Procedure provides that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. However, this article does not exist in the UNRWA DT’s Rules of Procedure.

<sup>210</sup> *He* 2016-UNAT-686, para. 46.

<sup>211</sup> *Abu Hweidi et al.* 2017-UNAT-779, para. 18.

<sup>212</sup> *Nadasan* 2019-UNAT-918, para. 36.

<sup>213</sup> *Ibid.*

present his arguments *viva voce* in French to the Judge; accordingly, the decision not to hold an oral hearing was not in error.<sup>214</sup>

UNAT held that the burden is on the Applicant to show that DT's decision not to hold an oral hearing affected the decision of the case.<sup>215</sup>

UNAT likewise held that "[i]t was [...] within the UNRWA DT's discretion to encourage an amicable solution rather than to order the Agency to give [the Applicant's] representative permission to absent himself from work in order to attend the hearing."<sup>216</sup>

In *Belsito*, UNAT considered that the decision not to hold an oral hearing was a shortcoming of the procedure and remanded the case to DT. In fact, "[DT] ignored that Mr. Belsito had stated [...] that, [...] his supervisor told him that [...] [it was] the ED [Executive Director] who had informed her that she, the ED, had decided not to select Mr. Belsito for the D-1 post because she preferred a woman for the position. In this situation, it was an error in procedure, such as to affect the decision of the case, not to hold an oral hearing and call both women into the witnesses stand."<sup>217</sup>

In *Mansour*, UNAT held that, "[a]lthough broad, [the] discretion [to hold a hearing in person] is not absolute or unfettered. Among other tests, it must be exercised in the interests of justice, not arbitrarily or perversely and it must take account of relevant considerations and not of irrelevant ones."<sup>218</sup> UNAT further added that, "UNRWA DT is a first instance tribunal before which the usual expectation is that there will be an in-person hearing, even if not of evidence, then at which a party or that party's representative has an opportunity to make submissions and answer questions from the Tribunal arising from their submissions."<sup>219</sup> Accordingly, UNAT concluded that UNRWA DT "erred in declining Ms. Mansour's clearly implicit request for a hearing in person, at least without having considered it and giving reasons why it should not occur."<sup>220</sup>

➤ Oral hearings in disciplinary cases

Article 16(2) of UNDT's Rules of Procedure provides that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.<sup>221</sup> In *Mbaigolmem*, UNAT held that UNDT "conducted a limited hearing at which neither the complainant (despite her availability to testify) nor any of the material witnesses were properly examined."<sup>222</sup> UNAT further held that an appeal against a disciplinary measure would "almost always require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or

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<sup>214</sup> *Nadeau* 2017-UNAT-733, para. 31.

<sup>215</sup> *Nimer* 2018-UNAT-879, para. 33.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Belsito* 2020-UNAT-1013, para. 49.

<sup>218</sup> *Mansour* 2020-UNAT-1036, para. 37.

<sup>219</sup> *Ibid.*, para. 41.

<sup>220</sup> *Ibid.*, para. 44.

<sup>221</sup> UNRWA DT's Rules of Procedure does not contain such a provision.

<sup>222</sup> *Mbaigolmem* 2018-UNAT-819, para. 25.

expertise to conduct a full and fair trial of the issues.”<sup>223</sup> However, UNAT added that there might be “cases where the record before the [DT] arising from the investigation is sufficient for it to render a decision without the need for a hearing.”<sup>224</sup> Yet, UNAT also underscored that “it often would be safer for the [DT] to determine the facts fully itself, which [might] require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation.”<sup>225</sup>

➤ *Videoconference & Seat of DT*

Conducting an audience through the videoconference is not a violation of due process rights of the staff member.<sup>226</sup> “The fact that a party may wish to participate via video-link has no impact on the seat of [DT] [and on the transparency of the public hearings], where the judges sit and where the public can attend.”<sup>227</sup> In *Mezoui*, UNAT held that “the assignment of venue is a matter of the court’s discretion.”<sup>228</sup>

➤ *Witnesses & experts*

“[T]he question of whether to call a certain person to testify [is] within the discretion of [DT] and [does] not merit a reversal except in clear cases of denial of due process of law affecting the right to produce evidence.”<sup>229</sup>

Due process may require that parties shall be permitted to call witnesses/experts to testify on the issue at stake.<sup>230</sup> For example, in *Hunt-Matthes*, DT’s refusal of the SG’s motion to call a witness violated the Respondent’s due process rights.<sup>231</sup> In *Kacan*, DT gave no explanation for declining to call the Applicant’s proposed witness and violated his due process rights.<sup>232</sup>

➤ *Further evidence*

In *He*, further evidence or information was necessary for the fair disposal of the case. Yet, DT “held on a limited factual foundation that the [Applicant] had not discharged her onus to prove retaliation.”<sup>233</sup> UNAT held that “[a]lthough it is correct that the Applicant bears the overall onus to prove improper motive, [...] [this] can only be decided once the facts have been properly established [,] [and that] [a] finding that an onus has not been discharged cannot rest on an assessment of mere submissions and allegations.”<sup>234</sup>

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<sup>223</sup> *Ibid.*, para. 27.

<sup>224</sup> *Ibid.*, para. 28.

<sup>225</sup> *Ibid.*, para. 29.

<sup>226</sup> *Oge* 2011-UNAT-186, para. 23.

<sup>227</sup> *Gehr* 2012-UNAT-236, para. 33.

<sup>228</sup> *Ibid.* See also, *Mezoui* 2011-UNAT-101, para. 12.

<sup>229</sup> *Wu* 2015-UNAT-597, para. 35.

<sup>230</sup> *Hepworth* 2011-UNAT-178, paras. 30-31; *Landgraf* 2014-UNAT-471, para. 30; *Flores* 2015-UNAT-525, para. 24. This was also confirmed in *Kacan* 2014-UNAT-426, para. 25. See also, Dissenting Opinion of Judge Weinberg de Roca in *Landgraf* 2014-UNAT-471.

<sup>231</sup> *Hunt-Matthes* 2014-UNAT-443.

<sup>232</sup> *Kacan* 2014-UNAT-426.

<sup>233</sup> *He* 2016-UNAT-686, para. 47.

<sup>234</sup> *Ibid.*

➤ Summary judgment

“[DT] can choose to proceed by way of summary judgment without taking any argument or evidence from the parties because [its] Statute prevents [it] from receiving a case which is not receivable.”<sup>235</sup>

➤ Judgment set aside following a clerical error

In *Xu*, a clerical error by the Registry made a huge difference. “When an e-mail is sent to two or more addresses, the addresses have to be separated by a comma. If this is not done, the e-mail only goes to the first address and not to the second. [And] this minor flaw led [one of the Applicants being] forever uninformed of the date of the hearing[.]”.<sup>236</sup> Consequently, the judgment was set aside so that the matter could be retried afresh.

➤ OSLA – Due process rights

In accordance with the due process rights of staff members, a counsel of the OSLA needs to disclose an alleged conflict of interest that may affect a staff member’s terms of appointment.<sup>237</sup> The fact that the Chief of OSLA was once employed by the Respondent is not sufficient to allege a conflict of interest.<sup>238</sup>

➤ Right to be heard - Audi alteram partem

The principle known as *Audi alteram partem*, indicates the other party’s right to be heard. In *Monarawila*, the Applicant’s right to be heard was violated.<sup>239</sup> However, this violation did not affect the decision of the case.<sup>240</sup>

➤ Nemo auditur propriam turpitudinem allegans

“It is a general principle of law that no one can be allowed to invoke his own turpitude.”<sup>241</sup>

➤ Ubi lex non distinguit, nec nos distinguere debemus

“[W]here the law does not distinguish, neither should we distinguish.”<sup>242</sup>

➤ Transcripts

In the absence of transcripts, summaries of evidence before the joint advisory bodies are merely hearsay and have little probative value.<sup>243</sup>

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<sup>235</sup> *Kazazi* 2015-UNAT-557, para. 42. This was also confirmed in *Faust* 2016-UNAT-695, paras. 23-24; *Auda* 2017-UNAT-740, paras. 18-19; *Lee* 2014-UNAT-481, para. 46; *Monarawila* 2016-UNAT-694, para. 29; *Palaco Caballero* 2016-UNAT-703, para. 18.

<sup>236</sup> *Xu* 2010-UNAT-053, para. 13.

<sup>237</sup> *Larkin* 2011-UNAT-135, paras. 19-21.

<sup>238</sup> *Larkin* 2011-UNAT-263, paras. 24-26.

<sup>239</sup> *Monarawila* 2016-UNAT-694, para. 26.

<sup>240</sup> *Ibid.*, para. 30.

<sup>241</sup> *Roig* UNDT/2012/146, para. 53. See also, *Coulibaly* UNDT/2009/091, para. 51. This was also confirmed in *Yakovlev* UNDT/2014/040, para. 28; *Krioutchkov* UNDT/2016/052, para. 79.

<sup>242</sup> *Benser* 2016-UNAT-696, para. 44. See also, *Faust* 2016-UNAT-695, para. 34.

<sup>243</sup> *Nyambuza* 2013-UNAT-364, para. 37.

➤ Oath

If an applicant is heard in an audience as witnesses and DT did “in fact take evidence from [him/her] and then relied on [that] evidence [,] [...] this procedure [would] qualif[y] [him/her] as witness [] and, as such, [he/she] [would be] required to [...] [take an oath].”<sup>244</sup>

➤ Translations

In *Nadeau*, the application was filed in French. The Respondent’s reply was not translated into English, and the Applicant submitted his observations on the Respondent’s reply in French. UNAT held that the Applicant’s “due process rights were not violated by the fact that the Respondent’s reply was not translated into English.”<sup>245</sup> Regarding the translation of certain annexes of his application into English, UNAT ruled that “it [was] irrelevant that they were not translated into English and Judge Hunter could not read and understand them[,] as [...] the (translated) application which the Judge could read and understand contain[ed] all the facts which [were] relevant and necessary for the case.”<sup>246</sup>

Despite this ruling, in *Abu Fardeh*, UNAT held that “[t]he fundamental right of the staff member to a full participation in the justice proceedings requires that he has an opportunity to receive a translation, not only of the Reply of the Respondent, but also of the Comments that, at a later stage of the proceedings, the Respondent could issue, especially if these comments contain rebuttal of the staff member’s allegations. There is no legal basis to decide [...] that the potential costs of translation could only be compensated for as material damages by the Judgment, in the event that the Applicant’s application was not dismissed.”<sup>247</sup> In *Al Ashhab*, regarding the Applicant’s allegation of a “violation of his right to receive a translation of all documents exchanged during the proceedings”, UNAT held that, as the Applicant “does not establish any damages and does not seek any relief on this issue[,] [w]e cannot grant the appeal on the basis of the alleged procedural failure.”<sup>248</sup>

**B. In Administration’s dealing with staff members**

Due process and procedural fairness require that a staff member “is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him.”<sup>249</sup> “[T]he staff member has a right to receive written notification of the formal allegations and to respond to them.”<sup>250</sup> However, “these due process entitlements do not exist during the investigation phase.”<sup>251</sup>

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<sup>244</sup> *Landgraf* 2014-UNAT-471, para. 26. See also, *Azzouni* 2010-UNAT-081, paras. 1-2.

<sup>245</sup> *Nadeau* 2017-UNAT-733, para. 32.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Abu Fardeh* 2020-UNAT-1011, para. 53.

<sup>248</sup> *Al Ashhab* 2020-UNAT-1046, para. 31.

<sup>249</sup> *Michaud* 2017-UNAT-761, para. 56.

<sup>250</sup> *Ibrahim* 2017-UNAT-776, para. 27.

<sup>251</sup> *Ibid.* This was also confirmed in *Benamar* 2017-UNAT-797, para. 54.

“[T]he Organization has an obligation to act fairly and in good faith with its staff and a duty of care concerning its employees.”<sup>252</sup> For example, in *Rahimi*, Ms. Rahimi accepted an offer of employment and, afterwards, transferred funds to a false entity. A few days after, Ms. Rahimi discovered that “the whole application process [...] was a fraud created for the sole purpose of deceiving her into transferring funds to a false entity and that none of the parties that Ms. Rahimi had dealt with at any stage during the application process were actual [UN] entities, staff members or representatives.”<sup>253</sup> Ms. Rahimi contended that “the Organization owed her a duty of care as a result of the actions of its representatives. However, there [was] no evidence of a link between the scam and the Organization.”<sup>254</sup>

In another example, in *Santos*, UNAT held that not informing the Applicant of “possible adverse consequences on his career within the Organization” due to agreed disciplinary measures is not a violation of good faith and fair dealing.<sup>255</sup>

➤ *Right to cross-examination*

“As a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established.”<sup>256</sup> That said, “[d]isciplinary cases are not criminal. Liberty is not at stake.”<sup>257</sup> Therefore, “due process does not always require that a staff member defending a disciplinary action for summary dismissal has the rights to confront and cross-examine his accusers.”<sup>258</sup> This is because “there are [...] cases in which it is impossible, or inadvisable, for such confrontation to occur”,<sup>259</sup> “[as] long as it is established to the Tribunal’s satisfaction that the Applicant was afforded fair and legitimate opportunities to defend his or her position.”<sup>260</sup>

➤ *Correcting an unlawful decision*

“[I]n situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation; but it must be timely done.”<sup>261</sup> However, UNAT clarified that, “timely doing it” cannot be interpreted as if there is a time limit. It held that “there is no law that puts a time limit on the right and duty of the Administration to correct an administrative error.”<sup>262</sup> “In considering the applicability of estoppel in *Cranfield*, [UNAT] took into account that no blame could be laid at the feet of Ms. Cranfield for the

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<sup>252</sup> *Kusuma* UNDT/2014/143, para. 33. See also, *McKay* 2013-UNAT-287, para. 33; *Hamayel* 2014-UNAT-459, para. 17. See also, *Pirnea* 2013-UNAT-311.

<sup>253</sup> *Rahimi* 2012-UNAT-217, para. 7.

<sup>254</sup> *Ibid.*, para. 23.

<sup>255</sup> *Santos* 2014-UNAT-415, para. 44.

<sup>256</sup> *Applicant* 2013-UNAT-302, para. 33.

<sup>257</sup> *Molari* 2011-UNAT-164, para. 30.

<sup>258</sup> *Applicant* 2013-UNAT-302, para. 33.

<sup>259</sup> *Ibid.*, para. 36.

<sup>260</sup> *Applicant* 2013-UNAT-302, para. 36, citing Former Administrative Tribunal Judgement No. 654, Hourani (1994), para. VI.

<sup>261</sup> *Das* 2014-UNAT-421, para. 15. See also, *Cranfield* 2013-UNAT-367, para. 36. This was also confirmed in *Husseini* 2016-UNAT-701, paras. 22-23; *Kule Kongba* 2018-UNAT-849, para. 30; *Kauf* 2019-UNAT-934, para. 22; *Colati* 2020-UNAT-980, para. 41.

<sup>262</sup> *Kortes* 2019-UNAT-925, para. 36.

Administration's mistake."<sup>263</sup> However, this was not the case in *Kortes*. Accordingly, UNAT held that "correction of a mistake made more than five years later [...], of itself, [would not be] sufficient to find that the Administration should be estopped from correcting its error."<sup>264</sup>

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<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*, para. 35.

### 3. Case management

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DT “is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties.”<sup>265</sup> “[UNAT] [does] not interfere lightly with the broad discretion of the [DT] in the management of cases.”<sup>266</sup> DT has the discretion to determine whether to conduct hearings or to accept the testimony of witnesses in writing.<sup>267</sup> “If interpretation is provided, there can be no error in conducting a hearing in either English or French.”<sup>268</sup>

➤ Confidentiality

“The names of litigants are routinely included in judgments [...] in the interests of transparency and, indeed, accountability.”<sup>269</sup> The Applicant must demonstrate “greater need than any other litigant for confidentiality” in order not to include his/her name in the judgment.<sup>270</sup> “It is for the party making [the] claim [of confidentiality] to establish the grounds upon which the claim is based.”<sup>271</sup>

“[W]hen the Administration relies on the right to confidentiality in order to oppose the disclosure of information”, DT verifies the claim of confidentiality.<sup>272</sup> If justified, DT “must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.”<sup>273</sup>

Exceptional circumstances are needed “to support an application for the [Applicant’s] name to be redacted from the Judgment.”<sup>274</sup> “A request for redaction can only be permissible and/or permitted where it is necessary to protect information of a confidential and sensitive nature.”<sup>275</sup> For example, in *Applicant*, given the fact that “the case concern[ed] an allegation of harassment and relie[d] on medical evidence supporting a claim for physical and moral harm”, UNAT redacted the Applicant’s name from the judgment, as did DT.<sup>276</sup>

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<sup>265</sup> *Bertucci* 2010-UNAT-062, para. 23. This was also confirmed in *Khambatta* 2012-UNAT-252, para. 15; *Pérez-Soto* 2013-UNAT-329, para. 20; *Gehr* 2013-UNAT-294, para. 20; *Leboeuf et al.* 2013-UNAT-354, para. 8; *Bastet* 2014-UNAT-423, para. 14; *Staedtler* 2015-UNAT-560, para. 30; *Namrouti* 2015-UNAT-593, para. 33; *James* 2016-UNAT-600, para. 19; *Mohanna* 2016-UNAT-687, para. 20; *Abu Malluh et al.* 2016-UNAT-690, para. 35; *Nadeau* 2017-UNAT-733, para. 32.

<sup>266</sup> *Ibid.*

<sup>267</sup> *Lauritzen* 2013-UNAT-282, paras. 23-27. See also, *Yapa* 2011-UNAT-168, para. 32.

<sup>268</sup> *Molari* 2011-UNAT-164, para. 33. This was also confirmed in *Comerford-Verzuu* 2012-UNAT-203, para. 37.

<sup>269</sup> *Lee* 2014-UNAT-481, para. 34 citing *Servas*, Order No. 127 (2013), para. 5. This principle was also confirmed in *Pirnea* 2014-UNAT-456, paras. 17-20; *Oh* 2014-UNAT-480, para. 21; *Kazazi* 2015-UNAT-557, para. 21; *Fedorchenko* 2015-UNAT-499, para. 29; *Buff* 2016-UNAT-639, para. 21.

<sup>270</sup> *Pirnea* 2014-UNAT-456, para. 20. This was also confirmed in *Charot* 2017-UNAT-715, paras. 37-38.

<sup>271</sup> *Bertucci* 2011-UNAT-121, para. 46, citing ILOAT Judgment No. 2315 (2004), para. 28.

<sup>272</sup> *Bertucci* 2011-UNAT-121, para. 50.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Utkina* 2015-UNAT-524, para. 17.

<sup>275</sup> *Ibid.*, para. 18.

<sup>276</sup> *Applicant* 2020-UNAT-1001, para. 47.

➤ Other matters

“[A] formal motion [needs] to be introduced when there is an attempt to file a late answer.”<sup>277</sup>

A request for an extension of time does not equate to the filing of an application.<sup>278</sup> In addition, DT “cannot convert *sua sponte* [a request for an extension of time] into an incomplete application [.]”<sup>279</sup>

“Judges must give judgment or rulings in a case promptly. Judgements should be given no later than three months from the end of hearing or the close of pleadings.”<sup>280</sup>

An Order to strike a case from the cases before DT does not mean that the application has been dismissed.<sup>281</sup>

➤ Legal representation

There is no right to be represented.<sup>282</sup> “The discretionary power of OSLA not to represent a person is not unfettered”.<sup>283</sup> The fact that the Chief of OSLA was once employed by the Respondent is not sufficient to allege a conflict of interest.<sup>284</sup>

Errors by counsel are “only relevant to the relationship between the client and his counsel, and does not affect the case before [DT].”<sup>285</sup> In *Pavicic*, a staff union made a clerical error and did not send the request of management evaluation of Mr. Pavicic, and therefore, his application was not receivable.<sup>286</sup>

In accordance with the due process rights of the staff members, a counsel of OSLA needs to disclose an alleged conflict of interest that may affect a staff member’s terms of appointment.<sup>287</sup>

➤ Consolidation

“Where separate applications have been filed and it appears to [DT] convenient to do so, it may on application of any party consolidate the applications whereupon the applications shall proceed as one application. The overriding consideration is convenience, expedience and judicial economy. [DT] may order consolidation if it is satisfied that such a course of action is

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<sup>277</sup> *Wishah* 2013-UNAT-289, paras. 27-29; This principle was also confirmed in *Abu Jarbou* 2013-UNAT-292.

<sup>278</sup> *Bharati* 2016-UNAT-633, para. 20. This was also confirmed in *Subramanian* 2016-UNAT-618, para. 20; *Taneja et al.* 2016-UNAT-628, para. 21; *Prasad et al.* 2016-UNAT-629, para. 20; *Bhatia et al.* 2016-UNAT-630, para. 20; *Thomas et al.* 2016-UNAT-631, para. 20; *Jaishankar* 2016-UNAT-632, para. 20.

<sup>279</sup> *Subramanian* 2016-UNAT-618, para. 18. This was also confirmed in *Prasad et al.* 2016-UNAT-629, para. 17; *Bhatia et al.* 2016-UNAT-630, para. 17; *Thomas et al.* 2016-UNAT-631, para. 17; *Jaishankar* 2016-UNAT-632, para. 17; *Bharati.* 2016-UNAT-633, para. 17.

<sup>280</sup> *Zama* 2018-UNAT-850, para. 44, citing Section 7(b) of the Code of Conduct for the Judges of UNDT and UNAT.

<sup>281</sup> *Hassan* 2019-UNAT-943, paras. 4-5 and 20-21.

<sup>282</sup> *Worsley* 2012-UNAT-199, para. 37; *Staedtler* 2015-UNAT-577, para. 31; *Gakumba* 2015-UNAT-591, para. 16.

<sup>283</sup> *Worsley* 2012-UNAT-199, para. 36; *Staedtler* 2015-UNAT-577, para. 31.

<sup>284</sup> *Larkin* 2011-UNAT-263, paras. 24-26.

<sup>285</sup> *McCluskey* 2013-UNAT-384, para. 20.

<sup>286</sup> *Pavicic* 2016-UNAT-619.

<sup>287</sup> *Larkin* 2011-UNAT-135, paras. 19-21.

favoured by the balance of convenience and that there is no possibility of substantial prejudice to any party.”<sup>288</sup> The Tribunal can also consolidate cases *sua sponte*.

➤ Rejoinder process

“There is no reference whatsoever in [its] Regulations to a ‘rejoinder’ process as referred to by the UNRWA DT by which an applicant who disagrees with assertions made by a respondent in the respondent’s reply filed [...], must or even may, file a ‘rejoinder’ challenging the reply.”<sup>289</sup> “In these circumstances, it was wrong of the UNRWA DT to have treated Ms. Mansour’s claims in this regard as having been abandoned or settled because she failed to file a pleading for which there is no regulatory provision or presumption in law of acceptance of the pleaded reply in the absence of a rejoinder.”<sup>290</sup>

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<sup>288</sup> *Abu Ata et al.* 2020-UNAT-1016, paras. 28-29.

<sup>289</sup> *Mansour* 2020-UNAT-1036, para. 61.

<sup>290</sup> *Ibid.*, para. 63.

## 4. Suspension of action

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### A. Procedural matters

“Articles 2(2) and 10(2) of the UNDT Statute<sup>[291]</sup> govern the suspension of the implementation of an administrative decision and must be read together”.<sup>292</sup> Pursuant to these provisions, appeals against decisions taken by the Judge during the proceedings before UNDT on requests for suspension of action are not receivable, “even where the judge of first instance has committed an error of law or fact relating to the application of the conditions to which the grant of a suspension of action is subject or a procedural error.”<sup>293</sup> However, “the prohibitions on appeals in Articles 2(2) and 10(2) of UNDT Statute cannot apply where UNDT issues orders that purport to be based on these articles but in fact exceed its authority.”<sup>294</sup> In other words, “an interlocutory appeal [against an order of the Tribunal] is only receivable in cases where UNDT has clearly exceeded its jurisdiction or competence.”<sup>295</sup>

“[T]he exclusion of the right to appeal a decision to suspend the execution of an administrative decision constitutes an exception to the general principle of the right to appeal and must therefore be narrowly interpreted.”<sup>296</sup>

For example, in *Bastet*, UNAT held that UNDT’s decision to transfer the Applicant’s case to Geneva was within its jurisdiction and competence. Thus, a decision with respect to a change of venue is not in excess of the competence or jurisdiction on the part of UNDT.<sup>297</sup> UNAT also held that a decision refusing a second hearing is not in excess of UNDT’s competence or jurisdiction.<sup>298</sup> In addition, UNDT may order a preliminary suspension for five days “where the implementation of an administrative decision is imminent.”<sup>299</sup>

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<sup>291</sup> The Statute of UNRWA DT only provides a suspension of action during the proceedings and not during the decision review process.

<sup>292</sup> *Igbinedion* 2011-UNAT-159, para. 20. This was also confirmed in *Benchebbak* 2012-UNAT-256, para. 31; *El-Komy* 2013-UNAT-324, para. 18.

<sup>293</sup> *Wamalala* 2013-UNAT-300, para. 17.

<sup>294</sup> *Tadonki* 2010-UNAT-005, para. 9. See also, *Onana* 2010-UNAT-008, para. 19; *Kasmani* 2010-UNAT-011.

<sup>295</sup> *Hassan* 2019-UNAT-943, para. 18. See also, *Tadonki* 2010-UNAT-005, paras. 8-9; *Khambatta* 2012-UNAT-252, para. 15; *Onana* 2010-UNAT-008, para. 19; *Kasmani* 2010-UNAT-011; *Hersh* 2012-UNAT-243, paras. 10-12; *Bali* 2012-UNAT-244, paras. 9-11; *Khambatta* 2012-UNAT-252, para. 12; *Benchebbak* 2012-UNAT-256, paras. 31-34; *Mpacko* 2013-UNAT-314, paras. 16-17; *Tiwathia* 2013-UNAT-327, para. 9; *Nwuke* 2013-UNAT-330, paras. 19-21; *Lee* 2014-UNAT-481, para. 42; *Harris* 2018-UNAT-816, paras. 37-41.

<sup>296</sup> *Onana* 2010-UNAT-008, para. 19. This was also confirmed in *Kasmani* 2010-UNAT-011, para. 8; *Igbinedion* 2011-UNAT-159, paras. 16-17; *Benchebbak* 2012-UNAT-256, para. 32; *Mpacko* 2013-UNAT-314, para. 16; *El-Komy* 2013-UNAT-324, para. 19.

<sup>297</sup> *Bastet* 2014-UNAT-423, para. 15.

<sup>298</sup> *Bastet* 2014-UNAT-423, para. 24. For another example where suspension, see, *Igunda* 2012-UNAT-255, paras. 26-28.

<sup>299</sup> *Villamorán* 2011-UNAT-160, para. 43. This principle was also reaffirmed in *Nwuke* 2012-UNAT-230 para. 34.

“[T]he Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction” because article 8(6) of UNAT’s Rules of Procedure<sup>300</sup> does not apply to interlocutory appeals.<sup>301</sup>

➤ Suspension - During the pendency of management evaluation (Art. 2.2)

UNDT cannot order a suspension of action beyond the 60-day time limit for the submission of a request for management evaluation.<sup>302</sup> For example, in *Tetova*, the Applicant was informed of the contested decision on 9 March 2011. Accordingly, he had until 8 May 2011 to request management evaluation. However, he only submitted his request on 23 June 2011; and on 27 June 2011, he filed an appeal to suspend the non-renewal of his contract.<sup>303</sup> “Since [he] exceeded the mandatory time limit for requesting management evaluation of the contested decision”, his application for suspension of action was time-barred.<sup>304</sup>

➤ Interim measures – During the proceedings (Art. 10.2)

“Article 10(2) of the Statute of DT provides that DT may adopt interim measures at any time during the proceedings, that is to say, once judicial proceedings have been initiated. Among those measures, it provides for the suspension of implementation of administrative decisions and prohibits the adoption of such suspension in cases of appointment, promotion, or termination.”<sup>305</sup> For example, in *Auda*, the Applicant was “separated from service solely because his appointment was not renewed.”<sup>306</sup> As a case of termination, the case fell “under the exclusionary provision of Article 10(2)”, despite the Applicant’s attempt to distinguish between the non-renewal of his appointment and his separation from service.<sup>307</sup>

➤ No suspension of action under art. 10.2 in case of APT<sup>308</sup>

A case of separation following non-renewal is a case of APT;<sup>309</sup> separation prior to the expiry of FTA is a case of APT;<sup>310</sup> retirement age is a term of appointment and therefore is not a case of APT;<sup>311</sup> conducting a recruitment exercise is not a case of APT;<sup>312</sup> and lateral assignment or transfer is not a case of APT.<sup>313</sup>

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<sup>300</sup> This article reads as follow: “The filing of an appeal shall suspend the execution of the judgement or order contested.”

<sup>301</sup> *Villamorán* 2011-UNAT-160, para. 48. This was also confirmed in *Benchebbak* 2012-UNAT-256, para. 37; *Igunda* 2012-UNAT-255, para. 31; *Igbinedion* 2014-UNAT-410, para. 30.

<sup>302</sup> *Igbinedion* 2011-UNAT-159, para. 2.

<sup>303</sup> *Tetova* 2012-UNAT-229, paras. 17-18.

<sup>304</sup> *Ibid.*, para. 18.

<sup>305</sup> *Siri* 2016-UNAT-609, para. 30.

<sup>306</sup> *Auda* 2016-UNAT-671, para. 29.

<sup>307</sup> *Ibid.*, para. 28. See also, *Tadonki* 2010-UNAT-005, para. 9; *Benchebbak* 2012-UNAT-256, para. 34; *El-Komy* 2013-UNAT-324, para. 18-19.

<sup>308</sup> For further examples of “appointment, promotion or termination (APT)” please refer to sub-section entitled “Compensation in lieu of rescission - Article 10(5)(a) of UNDT Statute”.

<sup>309</sup> *Benchebbak* 2012-UNAT-256, para. 34; *Siri* 2016-UNAT-609, para. 33.

<sup>310</sup> *Guzman* 2014-UNAT-455, paras. 28-30; *Siri* 2016-UNAT-609, para. 33.

<sup>311</sup> *Siri* 2016-UNAT-609, para. 35.

<sup>312</sup> *Ibid.*, para. 36.

<sup>313</sup> *Chemingui* 2016-UNAT-641, paras. 24-25.

## B. Substantive matters

UNDT can only suspend the implementation of an administrative decision that is the subject of an ongoing management evaluation.<sup>314</sup> UNDT cannot order a suspension of action in situations where there is no need to seek a management evaluation. Yet, it can order an interim measure according to Article 10(2).<sup>315</sup>

“If copies of the contested decision or the request for management evaluation have not been submitted”, “the UNDT is not in a position to rule on an application for suspension of action.”<sup>316</sup>

“[T]wo types of interim measures have to be clearly distinguished. Every application for interim measures has to be considered either under [Article 2.2, *i.e.* suspension of action], or under [Article 10.2, *i.e.*, interim measure]. It is not possible to apply both provisions simultaneously to a single application.”<sup>317</sup> A suspension of action “can only be released during the pendency of the management evaluation; whereas it is an indispensable prerequisite of an interim measure [...] that judicial proceedings have already been started, in other words that the case is already before [UNDT].”<sup>318</sup>

In the absence of an “administrative decision [that] has not been already taken, the application for suspension of action is premature” and cannot be ordered.<sup>319</sup>

A suspension of action can only be granted if the administrative decision has not been implemented.<sup>320</sup> To consider “a selection decision [as] implemented, an employment offer from the Organization and its unconditional acceptance by the selected candidate are, at least, required.”<sup>321</sup> A selection decision that has been notified but has not yet been implemented through the appointment of the selected candidate, can still be suspended.<sup>322</sup>

A decision imposing administrative leave on a staff member can be considered as fully implemented only upon its completion. Till then, DT may order a suspension of action.<sup>323</sup>

### ➤ Requirements

“[A]ll three of the requirements for suspension – *prima facie* unlawfulness, urgency, irreparable damage – have to be fulfilled in a cumulative way.”<sup>324</sup> Before deciding on a request

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<sup>314</sup> *Caldarone* UNDT/2009/035, para. 8; *Tiwathia* UNDT/2012/109, paras. 23-27.

<sup>315</sup> *Jahnsen Lecca* UNDT/2012/132, paras. 12-15. This was also confirmed in *Suri* UNDT/2012/145, paras. 20-22.

<sup>316</sup> *Vivarie* UNDT/2012/156, para. 12.

<sup>317</sup> *Corcoran* UNDT/2009/071, para. 34.

<sup>318</sup> *Ibid.*, para. 35. This was also confirmed in *Utkina* UNDT/2009/096, para. 31; *Igbinedion* UNDT/2011/110, paras. 22-24.

<sup>319</sup> *Agona* UNDT/2012/017, para. 11. See also, *Adlung* UNDT/2012/152; *Miseleni* UNDT/2012/155.

<sup>320</sup> *Mills-Aryee* UNDT/2011/051, paras. 17-18. See, *inter alia*, *Abdalla* Order No. 4 (GVA/2010); *Neault* Order No. 6 (GVA/2011).

<sup>321</sup> *Osmanli* UNDT/2011/190, para. 16.

<sup>322</sup> *Wang* UNDT/2012/080, paras. 16-17.

<sup>323</sup> *Kompass* Order No. 99 (GVA/2015), para. 18.

<sup>324</sup> *Hepworth* UNDT/2009/003, para. 8.

for suspension of action, “there is no requirement [...] for there to be a respondent’s reply.”<sup>325</sup> In case of a suspension of an action, “[t]he Respondent must present all evidence together with his reply” to the application.<sup>326</sup>

UNDT may not order a suspension of action extending beyond the management evaluation period.<sup>327</sup> In addition, UNDT may order a preliminary suspension for five days “where the implementation of an administrative decision is imminent.”<sup>328</sup> Nevertheless, UNDT may not order a preliminary suspension of action extending beyond the five working days.<sup>329</sup> Under Art. 2(2) of its Statute, UNDT may not order interim measures other than suspension of the contested administrative decision.<sup>330</sup>

➤ *Prima facie unlawfulness*

The requirement of *prima facie* unlawfulness is met if there are “serious and reasonable doubts about the lawfulness of the contested decision.”<sup>331</sup> A determination concerning *prima facie* unlawfulness does not constitute a matter *res judicata* for the purposes of a subsequent or a pending application.<sup>332</sup> Also, “the power to revoke decisions conferring rights should necessarily be exercised within the relevant time frame to respond to a request for management evaluation.”<sup>333</sup>

➤ *Particular urgency*

The urgency should not be self-created.<sup>334</sup> “It is the timeline of the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent.”<sup>335</sup>

➤ *Irreparable damage*

“[S]erious harm to professional reputation and career prospects or on health or unemployment after a very long time of service” may constitute irreparable damage.<sup>336</sup> “It is generally accepted that mere financial loss is not enough to satisfy the test of irreparable damage.”<sup>337</sup>

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<sup>325</sup> *Kananura* UNDT/2011/176, para. 6.

<sup>326</sup> *Ullah* UNDT/2012/140, para. 18.

<sup>327</sup> *Onana* 2010-UNAT-008, paras. 19-22.

<sup>328</sup> *Villamorán* 2011-UNAT-160, para. 43. This principle was also reaffirmed in *Nwuke* 2012-UNAT-230 para. 34.

<sup>329</sup> *Igunda* 2012-UNAT-255, paras. 23-29. This principle was also reaffirmed in *Nwuke* 2012-UNAT-230 para. 34; *Rawat* 2012-UNAT-223 para. 26.

<sup>330</sup> *Kamanou* UNDT/2012/050, para. 29.

<sup>331</sup> *Hepworth* UNDT/2009/003, para. 10. This was also confirmed inter alia in *Corcoran* UNDT/2009/071, para. 45; *Berger* UNDT/2011/134, para. 10; *Chattopadhyay* UNDT/2011/198, para. 31.

<sup>332</sup> *Bauza Mercere* UNDT/2013/011, paras. 24-25; *Zhao, Zhuang, Xie* UNDT/2014/036, para. 34.

<sup>333</sup> *Wand* UNDT/2012/157, para. 19; see also, *Cranfield* UNDT/2012/141.

<sup>334</sup> *Dougherty* UNDT/2011/133, para. 32; *Jitsamruay* UNDT/2011/206, paras. 25-26. This was also confirmed inter alia in *Villamorán* UNDT/2011/126, para. 26; *Maloka Mpacko* UNDT/2012/081, para. 22; *Ba* UNDT/2012/025, para. 50.

<sup>335</sup> *Onana* UNDT/2009/033, para. 29.

<sup>336</sup> *Corcoran* UNDT/2009/071, para. 44. This was also confirmed inter alia in *Osmanli* UNDT/2011/190, para. 28; *Villamorán* UNDT/2011/126, para. 39; *Chattopadhyay* UNDT/2011/198, para. 49.

<sup>337</sup> *Evangelista* UNDT/2011/212, para. 26. This was also confirmed inter alia in *Omer S* UNDT/2011/188, para. 33; *Villamorán* UNDT/2011/126, para. 39; *Chattopadhyay* UNDT/2011/198, para. 49; *Fradin de Bellabre* UNDT/2009/004; *Utkina* UNDT/2009/096.

“Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities.”<sup>338</sup> Finally, the irreparable damage must be to the Applicant, not to the Organization.<sup>339</sup>

*Newland* is an interesting example with respect to suspension of action.<sup>340</sup>

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<sup>338</sup> *Khambatta* UNDT/2012/058, para. 30. This was also confirmed inter alia in *Okongo* UNDT/2012/099, para. 28; *Ullah* UNDT/2012/140, para. 25.

<sup>339</sup> *Evangelista* UNDT/2011/212, para. 27.

<sup>340</sup> *Newland* 2018-UNAT-820, paras. 16-43.

## 5. Appeals before UNAT

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The function of UNAT is “not simply to re-try the case.”<sup>341</sup> It “is to determine if [DT] has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of UNAT’s Statute.”<sup>342</sup> Accordingly, “[a] party cannot merely repeat on appeal arguments that did not succeed before [DT]. Rather, he or she must demonstrate that [DT] has committed an error of fact or law warranting intervention by [UNAT].”<sup>343</sup>

An issue that was not “raised before [DT] [...] cannot be introduced for the first time on appeal for consideration by [UNAT].”<sup>344</sup> In other words, it is not possible for the parties to “change horses in midstream”.<sup>345</sup> Furthermore, UNAT held that “it is quite ‘unreasonable’ for [an applicant] to assert that the UNDT erred with respect to allegations which were not raised before the UNDT for its consideration.”<sup>346</sup> Accordingly, “new claims [cannot be allowed] to be raised on appeal when the circumstances giving rise to such claims were known to a party at the time and should have been presented to [DT].”<sup>347</sup>

“[A] party may not file an appeal against a judgment about a claim in which that party’s position has prevailed”.<sup>348</sup> “[T]he successful party is prevented from filing an appeal, which is an instrument to pursue a change of a judicial decision, in the form of modification, annulment or vacation, used as a way to repair a concrete grievance directly caused by the impugned judgment. The concrete and final decision adopted by a court must generate the harm that constitutes the *conditio sine qua non* of any appeal. It is not enough to claim that the grievance comes from the reasoning of the judgment, from all or part of its motivation or from the rejection of certain or all of the arguments submitted by a party. The right to appeal arises when the decision has a negative impact on the situation of the affected party. That means that a

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<sup>341</sup> *Ilic* 2010-UNAT-051, para. 29. This principle was also confirmed in *Tsoneva* 2010-UNAT-045; *Larkin* 2011-UNAT-134, para. 33; *Gehr* 2012-UNAT-234, para. 34; *Bofill* 2013-UNAT-383, para. 13; *Balinge* 2013-UNAT-377, para. 17; *Ruyooka* 2014-UNAT-487, para. 24; *Al-Moued* 2014-UNAT-458, para. 18; *Aliko* 2015-UNAT-540, para. 28; *Staedtler* 2015-UNAT-547, para. 30; *Ackhar* 2015-UNAT-579, para. 15; *Gebremariam* 2015-UNAT-584, para. 15; *El Saleh* 2015-UNAT-594, para. 30; *Saeed* 2016-UNAT-617, para. 7; *Aly et al.* 2016-UNAT-622, para. 27; *Neocleous* 2016-UNAT-635, para. 29; *Savado* 2016-UNAT-642, para. 56; *Haimour and Al Mohammad* 2016-UNAT-688, para. 36; *Krioutchkov* 2016-UNAT-691, para. 19.

<sup>342</sup> *Ibid.*

<sup>343</sup> *Crichlow* 2010-UNAT-035, para. 30. This principle was later confirmed in *Dannan* 2013-UNAT-340, para. 14; *Mahfouz* 2014-UNAT-414, para. 15; *Al-Moued* 2014-UNAT-458, para. 23; *Khasan* 2015-UNAT-502, para. 14; *Savado* 2016-UNAT-642, para. 56; *Mohanna* 2016-UNAT-687, para. 23; *Haimour and Al Mohammad* 2016-UNAT-688, para. 36; *Krioutchkov* 2017-UNAT-744, paras. 36-37.

<sup>344</sup> *Haimour and Al Mohammad* 2016-UNAT-688, para. 38. See also, *Simmons* 2012-UNAT-221, paras. 60-61; *Staedtler* 2015-UNAT-547, para. 25. This was also confirmed in *Planas* 2010-UNAT-049, para. 13; *Masri* 2016-UNAT-626, para. 25; *Krioutchkov* 2017-UNAT-744, para. 35; *Sarrouh* 2017-UNAT-783, para. 24

<sup>345</sup> *Rodriguez* 2020-UNAT-994, para. 27.

<sup>346</sup> *Porras* 2020-UNAT-1068, para. 29. See also, *Abu Salah* 2019-UNAT-974, para. 47.

<sup>347</sup> *Hasan* 2015-UNAT-541, para. 18. See also, *Shakir* 2010-UNAT-056, para. 12; *Abu Jarbou* 2013-UNAT-292, para. 31; This principle was later reaffirmed in *Azzouz* 2014-UNAT-432, para. 20; *Goodwin* 2014-UNAT-467, para. 46; *Kalil* 2015-UNAT-580, para. 51; *Vukasovic* 2016-UNAT-699, para. 15.

<sup>348</sup> *Saffir and Ginivan* 2014-UNAT-466, para. 13. See also, *Sefraoui* 2010-UNAT-048, para. 18; *Rasul* 2010-UNAT-077, para. 15; *Larkin* 2011-UNAT-134, para. 34. This principle was also confirmed in *Buff* 2016-UNAT-639; *Auda* 2017-UNAT-787, paras. 27- 29.

judgment can contain errors of law or fact, even with regard to the analysis of the tribunal’s own jurisdiction or competence and yet, it may still be not appealable.”<sup>349</sup> This rule is, however, not absolute.<sup>350</sup> For example, “[i]n *Ngoma-Mabiala*, the [SG] was allowed to appeal, because [DT] had erred in law and exceeded its jurisdiction in commenting on the merits of the case, although it had dismissed the application as not receivable.”<sup>351</sup> The situation in *Kozul-Wright* was also “similar because [DT] may have erred in law or exceeded its jurisdiction or competence by receiving the application when it might not have been receivable *ratione materiae*.”<sup>352</sup>

“[W]here [DT] renders separate judgments on receivability [...] and on the merits, an appeal should be filed only after the final judgment has been rendered.”<sup>353</sup>

In *Harrich*, the Applicant argued that “his appeal is timely because the 60-days deadline for filing an appeal runs from the date his second motion for correction of judgment was denied.”<sup>354</sup> UNAT dismissed the Applicant’s argument and held that “Article 7(1)(c) of the Statute does not allow for the limitations period to commence running from any date other than the date the judgment is received by the staff member.”<sup>355</sup>

“[A]ll evidence is to be submitted to [DT] and [...] [UNAT] will not admit evidence which was known to the party and could have, with due diligence, been presented to [DT].”<sup>356</sup>

UNAT would only accept additional pleadings based on the existence of exceptional circumstances.<sup>357</sup> In *Roberts*, “the President of [UNAT] granted the [SG’s] motion [to file additional pleadings] so that he could respond to the new facts and evidence, which had not been part of the UNDT record [and] which Mr. Roberts had proffered in his answer [to the SG’s appeal].”<sup>358</sup>

Even when a party requests proper leave, additional evidence before UNAT would only be admitted if that would assist UNAT in reaching “the efficient and expeditious resolution” of the appeal, or “exceptional circumstances” exist to receive these documents or that their admission into evidence is required in “the interest of justice”.<sup>359</sup> For example, the fact that the

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<sup>349</sup> *Bagot* 2017-UNAT-718, para. 29. See also, *Saffir and Ginivan* 2014-UNAT-466, para. 15. See also, *Buff* 2016-UNAT-639, para. 30; *Auda* 2017-UNAT-787, para. 27; *Ho* 2017-UNAT-791, para. 10; *Avramoski* 2020-UNAT-987, para. 37.

<sup>350</sup> *Kozul-Wright* 2018-UNAT-843, para. 43-45.

<sup>351</sup> *Ibid.*, para. 45. See also, *Ngoma-Mabiala* 2013-UNAT-361, paras. 17-23.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Fiala* 2015-UNAT-516, para. 32. This was also confirmed in *Rees* 2012-UNAT-266, paras. 52-54; *Hunt-Matthes* 2014-UNAT-444, paras. 21-24.

<sup>354</sup> *Harrich* 2015-UNAT-576, para. 22.

<sup>355</sup> *Ibid.*

<sup>356</sup> *Dube* 2016-UNAT-674, para. 62. This was also confirmed in *Zhang* 2010-UNAT-078, para. 24; *Dumornay* 2010-UNAT-097, para. 17; *Ihekbawa* 2010-UNAT-083, para. 16; *Shakir* 2010-UNAT-056, para. 12; *Seddik Ben Omar* 2012-UNAT-264, para. 27; *Ruger* 2016-UNAT-693, para. 15.

<sup>357</sup> *Crichlow* 2010-UNAT-035, para. 27. See also, *Solanki* 2010-UNAT-044; *Onifade* 2016-UNAT-668, para. 26; *Faust* 2016-UNAT-695, para. 20; *Thiombiano* 2020-UNAT-978, para. 23.

<sup>358</sup> *Roberts* 2016-UNAT-614, para. 5.

<sup>359</sup> *Charot* 2017-UNAT-715, paras. 39-41. See also in *Michaud* 2017-UNAT-761, paras. 43-47; *Symeonides* 2019-UNAT-977, para. 26.

Applicant was unaware that DT would undertake a merit's based review of his chances of selection and that he only realised the relevance of additional evidence after DT's judgment is not enough.<sup>360</sup> Also, the fact that the Applicant only discovered a report well after DT's judgment is not enough.<sup>361</sup> Regarding excessive submissions and motions, in *Nouinou*, UNAT "warned Ms. Nouinou that if she kept abusing the process [by submitting frivolous motions], it would have no choice but to award costs against her."<sup>362</sup> Later, UNAT imposed costs on her following her abusive behaviour and manifest abuse of the appeal process.<sup>363</sup>

In cases where the Appellant has failed to identify the grounds for his/her appeal, if DT's judgment "solely addresses the issue of receivability, the ground for appeal may reasonably be inferred."<sup>364</sup> "Not all procedural errors will justify interfering with a judgment of the UNDT. The error must be shown to have affected the decision of the case. In that sense, it must be material to the outcome."<sup>365</sup>

Where an applicant "expressly concede[s] that [a certain period] did not count in terms of the calculation of [his/her] participation in a health insurance plan", DT does not have the authority to find that it, in fact, counted.<sup>366</sup>

"[A] party may withdraw an appeal simply by giving notice and need not necessarily provide any further justification."<sup>367</sup>

➤ Interlocutory appeals

UNAT generally does not entertain interlocutory appeals.<sup>368</sup> The general principle underlying the right to appeal under Article 2(1) of UNAT's Statute is that "only appeals against final judgments will be receivable". Nevertheless, interlocutory appeals are receivable in cases where DT has clearly exceeded its jurisdiction or competence.<sup>369</sup> UNAT also held that "appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct."<sup>370</sup>

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<sup>360</sup> *Chhikara* 2017-UNAT-723, paras. 20-21.

<sup>361</sup> *Chhikara* 2017-UNAT-723, paras. 26-27. For another example, see *Mbok* 2018-UNAT-824, para. 37.

<sup>362</sup> *Nouinou* 2020-UNAT-981, para. 31.

<sup>363</sup> *Ibid.*, para. 34.

<sup>364</sup> *Abdel Rahman* 2016-UNAT-610, para. 20. This was also confirmed in *Achkar* 2012-UNAT-267, para. 20.

<sup>365</sup> *Monarawila* 2016-UNAT-694, para. 27. See also, *Nadeau* 2017-UNAT-733, para. 31.

<sup>366</sup> *Rodriguez* 2020-UNAT-994, para. 31.

<sup>367</sup> *von der Schulenburg* 2015-UNAT-515, para. 12. This was also confirmed in *Chowdhury* 2014-UNAT-441, para. 13; *Oummih* 2014-UNAT-413, para. 22; *Wilson* 2019-UNAT-940, para. 31.

<sup>368</sup> *Mezoui* 2011-UNAT-101, paras. 12-14; *Hassan* 2019-UNAT-943, paras. 17-18.

<sup>369</sup> *Bertucci* 2010-UNAT-062, para. 25; *Wamalala* 2013-UNAT-300, paras. 21-22. This was also confirmed in *Wasserstrom* 2010-UNAT-060, paras. 18-20; *Hersh* 2012-UNAT-243, paras. 10-12; *Bali* 2012-UNAT-244, paras. 9-11; *Khambatta* 2012-UNAT-252, para. 12; *El-Komy* 2013-UNAT-324, paras. 49-51; *Tiwathia* 2013-UNAT-327, para. 10; *Nwuke* 2013-UNAT-330, para. 20; *Al-Badri* 2014-UNAT-461, para. 15; *Lee* 2014-UNAT-481, para. 43; *Staedtler* 2015-UNAT-560, para. 25.

<sup>370</sup> *Villamorán* 2011-UNAT-160, para. 36. See also, *Bertucci* 2010-UNAT-062; *Kasmani* 2010-UNAT-011; *Onana* 2010-UNAT-008; *Tadonki* 2010-UNAT-005; *Reilly* 2019-UNAT-975, paras. 27 to 29; *Nadeau* 2020-UNAT-1058, para. 26.

➤ Cross-appeal

A party may withdraw a cross-appeal simply by giving notice and without any further justification.<sup>371</sup> There is “nothing in the language of article 9 of the [UNAT’s Rules of Procedure] prevent[ing] the prevailing party from filing a so-called ‘conditional cross-appeal’, whose fate depends entirely on the initial appeal [...]”<sup>372</sup>

In *Ghahremani*, the cross-appeal was not receivable because the Applicant was the prevailing party before DT, and “he [did] not claim to broaden the order of [DT], but just to maintain it by means of an additional argument that had already been rejected by the UNDT.”<sup>373</sup>

In *Tosi*, the cross-appeal was not receivable because the Applicant “has already had the opportunity to file his own independent appeal”.<sup>374</sup> Instead, *via* his cross-appeal, the Applicant was aiming “to complement his appeal, by adding new arguments, reiterating and introducing claims, as well as requesting the production of new evidence. However, a party is not entitled to appeal the same judgment twice. If [the Applicant] found it was necessary to complement his appeal, he should have requested leave to submit additional pleadings with the appropriate justification for doing so.”<sup>375</sup>

In *Hamdan*, as DT’s decision dismissed the Applicant’s application and the Administration “[was] not adversely affected by its Judgment”, UNAT concluded that the SG’s cross-appeal was not receivable with respect to “[DT’s] findings on the unlawfulness of the SLWFP decision.”<sup>376</sup>

➤ Appeals of case management orders (execution)

According to Article 11(3) of DT Statute, DT’s orders are subject to appeal to UNAT and are “executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal”. However, “[c]ase management orders or directives shall be executable immediately.”<sup>377</sup>

➤ Application for revision

“[A]n applicant must show or identify the decisive facts that, at the time of the Appeals Tribunal’s judgment, were unknown to both the Appeals Tribunal and the party applying for revision; that such ignorance was not due to the negligence of the applicant; and that the facts identified would have been decisive in reaching the decision.”<sup>378</sup> In this sense, “an application for revision is not a substitute for appeal, and no party may seek revision of a judgment merely

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<sup>371</sup> *Wilson* 2019-UNAT-940, para. 31.

<sup>372</sup> *Bagot* 2017-UNAT-718, para. 36.

<sup>373</sup> *Ghahremani* 2013-UNAT-351, para. 32.

<sup>374</sup> *Tosi* 2019-UNAT-946, para. 34.

<sup>375</sup> *Ibid.*

<sup>376</sup> *Hamdan* 2020-UNAT-1050, para. 36.

<sup>377</sup> Article 11(3) of UNDT Statute. See also, *Nadeau* 2020-UNAT-1072, paras. 32-35.

<sup>378</sup> *Ghahremani* 2013-UNAT-351, para. 9. This was also confirmed in *Macharia* 2011-UNAT-128, para. 7; *Saeed* 2017-UNAT-719, para. 11.

because the party is dissatisfied with the judgment and ‘wants to have a second round of litigation’.<sup>379</sup>

An interesting case about revision is *Nikolarakis*. In this case, on 22 September 2017, the SG filed an application for revision of judgment before DT. However, the appeal was filed on 24 October 2017, thus preventing DT from proceeding with adjudicating the application for revision.<sup>380</sup> Consequently, the application for revision remained pending before DT. UNAT held that “[t]he outcome of the application for revision [...] [was] likely to have an impact on the appeal” and therefore remanded the case to DT for a decision on the application for revision.<sup>381</sup>

➤ Application for execution

In *Ocokoru*, UNAT held that the SG’s appeal was filed out of time and was not receivable. Later, the Applicant applied to DT for an order for execution. However, UNAT had simply decided that the SG’s appeal was not receivable. UNAT’s Judgment was, therefore, not an executable judgment. Accordingly, it was necessary for the Applicant to request the execution of DT’s Judgment, which remained in force.<sup>382</sup>

In *Warren*, UNAT held that its “judgments shall be executed within 60 days of the date the judgment is issued to the parties.”<sup>383</sup> In some other judgments, UNAT did not provide for a time period for the execution of its judgments. In such cases, a party can seek the execution of a judgment after 60 days<sup>384</sup> and/or after a reasonable time period has elapsed since the issuance of a judgment.<sup>385</sup>

In *Belkhabbaz*, UNAT ordered the ASG/OHRM to proceed in accordance with the provisions of Section 5.18(c) of ST/SGB/2008/5.<sup>386</sup> Later, the Applicant submitted an application for execution of judgment following the Organization’s decision to only take managerial action. UNAT held that “the reasonableness of the administrative decision to take managerial action [was] not a matter for consideration in this application for execution” and that the judgment has been executed.<sup>387</sup> Furthermore, UNAT added that “an Application for an Execution of Judgment [was] not an appropriate vehicle to request additional remedies.”<sup>388</sup>

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<sup>379</sup> *Maghari* 2013-UNAT-392, para. 19 quoting *Muthuswami* 2011-UNAT-102, para. 11. This was also confirmed in *Eid* 2011-UNAT-145, para. 2; *Massah* 2013-UNAT-356, para. 15; *Saeed* 2017-UNAT-719, para. 10.

<sup>380</sup> See, Article 12(1) of UNDT Statute.

<sup>381</sup> *Nikolarakis* 2018-UNAT-832, para. 28.

<sup>382</sup> *Ocokoru* 2018-UNAT-826, paras. 8-12.

<sup>383</sup> *Warren* 2010-UNAT-059, para. 17.

<sup>384</sup> *Fiala* 2016-UNAT-645, para. 16.

<sup>385</sup> *Dibs* 2020-UNAT-1020, para. 17.

<sup>386</sup> *Belkhabbaz* 2018-UNAT-873, para. 92.

<sup>387</sup> *Belkhabbaz* 2020-UNAT-1027, para. 15.

<sup>388</sup> *Ibid.*, para. 16.

➤ Appealing a judgment on interpretation

“The exercise of interpretation under Article 30 of [DT’s] Rules of Procedure is not an avenue for review or the basis for a fresh judgment. Any dissatisfaction with the meaning of a judgment by [DT] may be raised in an appeal against the substantive judgment.”<sup>389</sup>

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<sup>389</sup> *Gehr* 2013-UNAT-333, para. 13. See also, *Tadonki* 2010-UNAT-010, para. 7; *ElShanti* 2020-UNAT-1022, paras. 60-61.

## 6. Appeals from other International Organizations

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### A. Appeals against the decisions of the UNJSPB

#### ➤ Receivability

With respect to judicial review of the decisions of the UNJSPB, in general, “the person who is entitled to submit an application against such a decision, shall, as a first preliminary step, request review of this decision to the Staff Pension Committee. This review is similar to the request for management evaluation, that is to say that this is a mandatory first step in the appeal process.”<sup>390</sup>

Later, “[w]hen the outcome of this review does not satisfy the person’s interests, he or she can ordinarily appeal against the Staff Pension Committee’s decision to the Standing Committee acting on behalf of the Pension Board, which will then play a role similar to that of the UNDT, as first instance to the case. Finally, the decision of the Standing Committee is the only one against which an appeal to the Appeal Tribunal can be filed.”<sup>391</sup>

For example, in *Richards*, UNAT dismissed as non-receivable an appeal against “a decision from the Pension Board, which has not been subject to review or appeal, neither by the Staff Pension Committee nor by the Standing Committee, acting on behalf of the Pension Board.”<sup>392</sup>

#### ➤ A staff member of the Fund’s election to the UN Staff Pension Committee (UNSPC)

There is no provision preventing a staff member of the Fund from being elected to the UNSPC once he/she meets “the requisite requirements of an eligible candidate.”<sup>393</sup> “[A]s a direct consequence of [his/her] election to the UNSPC, the same rights and privileges, which are bestowed upon an elected member, are conferred upon [the concerned staff member]. There is no provision in law which empowers the Standing Committee to remove, restrict or interfere with, any of these rights and privileges.”<sup>394</sup>

#### ➤ The Fund’s discretion in terms of benefits

“The Fund has no discretion to vary benefits on a discretionary basis. [...] [D]iscretionary, *ad hoc* adjustments to benefits would constitute an arbitrary variance of the formula established by the Fund’s Regulations, which would not be in the interests of the Fund and its members because it would inconsistently alter the carefully formulated design of a defined benefit pension fund, with possible unforeseen actuarial complications and unpredictability in funding requirements.”<sup>395</sup>

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<sup>390</sup> *Richards* 2020-UNAT-1010, para. 16. This was also confirmed in *Faye* 2016-UNAT-654, para. 31; *Gehr* 2013-UNAT-293, para. 27.

<sup>391</sup> *Richards* 2020-UNAT-1010, para. 17.

<sup>392</sup> *Ibid.*, para. 20.

<sup>393</sup> *Faye* 2017-UNAT-801, para. 27.

<sup>394</sup> *Ibid.*, para. 28. See also, *Rockcliffe* 2017-UNAT-807, paras. 31-32; *Rockcliffe* 2019-UNAT-908.

<sup>395</sup> *Pise* 2020-UNAT-1007, paras. 29; *Fox* 2018-UNAT-834, para. 42.

➤ The Fund's duty of good faith

In *Schepens*, UNAT held that “[W]hile the duty of good faith requires the Fund to respond appropriately to a participant’s legitimate requests for information, it cannot be expected of the Fund to provide information in relation to every conceivable contingency or possibility that might or might not eventuate in the future... In the absence of a direct, pertinent enquiry for information [...], there [is] no duty on the Fund to keep [its participants] abreast of the changes and developments.”<sup>396</sup>

➤ Change in the records of the Fund

In *Sidell*, Mr. and Ms. Sidell were married and Ms. Sidell asked for a survivor’s benefits after the passing of Mr. Sidell. However, Mr. Sidell failed to report his marriage with Ms. Sidell before his separation as required. The Fund refused the payment as no change can be made to the Fund’s records after Mr. Sidell’s separation. UNAT clarified that “no change” rule is only about the date of birth of the participant and his or her prospective beneficiaries, and nothing else. In addition, Mr. Sidell informed the Fund about his marriage after his separation. The appeal was granted.<sup>397</sup>

➤ Payment of a widow’s benefit (Article 34 of the UNJSPF Regulations)

In *Pise*, the Applicant requested to be granted a widow’s benefit. A widow’s benefit is paid to a spouse of a participant who was entitled to a deferred retirement benefit, if the spouse was married to the participant at the date of separation and remained married to him/her until his/her death (Article 34 of the Fund’s Regulations). This is not possible if the participant had commuted a deferred retirement benefit into a lump sum payment.<sup>398</sup> UNAT held that this rule would be applicable whether or not there had been “commutation of the full or a portion of the benefit.”<sup>399</sup>

In *Larriera*, following a Brazilian judicial decision declaring that Mr. M and Ms. Larriera were in a stable union at the time of the death of Mr. M, Ms. Larriera requested to be granted a survivor’s benefits. UNAT noted that Mr. M had never reported Ms. Larriera as his wife. In addition, even Ms. Larriera, who was a participant in the Fund, had never reported Mr. M as her spouse. UNAT held that, as Mr. M’s marriage to Ms. M was concluded under French law, and accordingly, his marriage was governed by French law.<sup>400</sup> Thus, Mr. M could not “unilaterally change his marital status under Brazilian law, the law of his nationality, ignoring the place and procedures of his marriage.”<sup>401</sup>

In *Williams*, UNAT held that, as Mr. Williams was separated from service on 12 October 2008 and married Ms. Williams after his separation from service, Ms. Williams was not entitled to

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<sup>396</sup> *Schepens* 2018-UNAT-830, para. 34.

<sup>397</sup> *Sidell* 2013-UNAT-348, paras. 19-29. See also, *Larriera* 2020-UNAT-1004, para. 39.

<sup>398</sup> *Pise* 2020-UNAT-1007, paras. 25-26.

<sup>399</sup> *Ibid.*, para. 26.

<sup>400</sup> *Larriera* 2020-UNAT-1004, para. 43.

<sup>401</sup> *Ibid.* For another interesting case, see *Ansa-Emmim* 2011-UNAT-155.

be paid survivor's benefits.<sup>402</sup> UNAT further recalled that, in case of a withdrawal settlement, all rights extinguishes, including survivor's benefits.<sup>403</sup>

➤ Validity of a marriage

“In accordance with general principles of private international law, the validity of a marriage must be assessed and determined in accordance with the *lex loci celebrationis*.”<sup>404</sup> In addition, in the context of validity or marriages, UNAT also referred to the following principle: “[A] juridical act may be void for one purpose and valid for another, or it may be void against one person but valid against another.”<sup>405</sup>

➤ Withdrawal settlement & deferred retirement benefit

In *Fox*, Ms. Fox paid her contributions and employer's contributions to the Fund for almost two years during her special leave without pay to complete 5 years of service. At the end, instead of deferred retirement benefits, she opted for withdrawal settlement. With this option, she did not get the employer's contribution, even though she was the one who paid it for two years. UNAT said that Ms. Fox should be given the option to return the withdrawal settlement and be afforded the option of deferred retirement benefits.<sup>406</sup>

In *Maher*, UNAT held that “Article 24(a) of the UNJSPF Regulations confers the right to restore prior contributory service only to participants who upon separation had elected to receive a withdrawal settlement, or, who before 1 April 2007 had elected, or were deemed to have elected, to receive a deferred retirement benefit under Article 30 of the Fund's Regulations that was not yet in payment at the time of the election to restore”.<sup>407</sup> In addition, UNAT held that the Fund has no discretion to make an exception under Article 24(a).<sup>408</sup>

➤ Withdrawal settlement & Restoration (Article 24 and 31)

“[T]he contractual right to restore prior contributory service is available only to participants who had previously left the Pension Fund with a withdrawal benefit consisting of their own contributions by reason of having less than five years' service.”<sup>409</sup> *Zakharov* provides an example in this regard.<sup>410</sup>

➤ Reduction for child support (Article 45)

In *Domzalski*, UNAT recalled the two requirements for an order of deduction: a legal obligation on the part of a participant evidenced by a final and executable order of a court. Accordingly, UNAT held that the provision “is clear in that it does not bestow discretion on the Fund to exceptionally make deductions if these criteria are not fulfilled.”<sup>411</sup> UNAT further held that “a

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<sup>402</sup> *Williams* 2017-UNAT-736, para. 30.

<sup>403</sup> *Ibid.*

<sup>404</sup> *Clemente* 2019-UNAT-912, para. 25. See also, *Larriera* 2020-UNAT-1004, para. 50.

<sup>405</sup> *Ibid.*, para. 38. See also, *Larriera* 2020-UNAT-1004, para. 51.

<sup>406</sup> *Fox* 2018-UNAT-834, para. 57.

<sup>407</sup> *Maher* 2016-UNAT-656, para. 25. See also, *Schepens* 2018-UNAT-830, para. 27.

<sup>408</sup> *Neville* 2010-UNAT-004, para. 14; *Schepens* 2018-UNAT-830, para. 28.

<sup>409</sup> *Zakharov* 2017-UNAT-729, para. 34.

<sup>410</sup> *Zakharov* 2017-UNAT-729.

<sup>411</sup> *Domzalski* 2017-UNAT-728, para. 29.

retroactive payment could eventually occur, if and when the court order becomes final or in case of an agreement incorporated into a divorce or other court order or if the parties reach an agreement on the amount due for the period in question.”<sup>412</sup>

➤ Second participation to the Fund

In case of an early retirement, the participant’s benefits are reduced by 6 percent for each year before the age of retirement. Once the participant chooses this option and starts receiving his/her benefits, this first participation is closed. If, before the age of retirement, he/she participates again in the Fund, the calculation of the first pension benefits will not be re-opened. Rather, an independent second pension process will be initiated (Article 40(c)). Accordingly, the reductions of 6 percent of the first pension benefits cannot be changed as this would mean a double consideration of the second employment.<sup>413</sup> In addition, retirement benefits of the first pension are suspended during the second employment (Article 40(a)). These suspended pension benefits cannot be retroactively paid to a participant after the end of the second employment.<sup>414</sup>

➤ Reference to national law

In this regard, UNAT consistently held that “the reference to the law of the staff member’s nationality in the area of marital status allowed the United Nations to respect the various cultural and religious sensibilities existing in the world, as no general solution is imposed by the Organization, which simply tolerates and respects national choices. Reference to national law is the only method whereby the sovereignty of all States can be respected.”<sup>415</sup> In addition, UNAT considered that “the principle of determining personal status by reference to the law of the staff member’s nationality could only apply to a staff member who concluded a marriage or entered into another partnership recognized under his or her national law, and not to a staff member who chose to enter into a marriage or partnership under a law other than that of his or her nationality.”<sup>416</sup>

**B. Appeals against the Opinions of ICAO’s Advisory Joint Appeals Board**

➤ Receivability

In accordance with Article 2(10) of the its Statute, “[UNAT is] competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations [...] where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal[.] [...] Such special agreement may only be

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<sup>412</sup> *Domzalski* 2017-UNAT-728, para. 34.

<sup>413</sup> *Witold* 2017-UNAT-734, para. 26.

<sup>414</sup> *Ibid.*, para. 27.

<sup>415</sup> *El-Zaim* 2010-UNAT-007, para. 22; *Al Abani* 2016-UNAT-663, para. 30; *Larriera* 2020-UNAT-1004, para. 41.

<sup>416</sup> *Larriera* 2020-UNAT-1004, para. 42.

concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law.”<sup>417</sup>

In the case of ICAO, even though the ICAO’s Advisory Joint Appeals Board’s (ICAO AJAB) opinion is detailed and contains “reasons, facts and law”, UNAT said that “it cannot be said to be a decision resulting from a ‘neutral first instance process’” as the final contested decision is made by the ICAO Secretary General upon the ICAO AJAB’s advisory opinion.<sup>418</sup> Accordingly, UNAT remanded the case to the ICAO AJAB for a “decision” in accordance with Article 2(10) of UNAT’s Statute.<sup>419</sup> In fact, another similar appeal was also remanded back to the ICAO AJAB for the same reason.<sup>420</sup>

Since its creation, UNAT has dealt with the “appeals” against the ICAO Secretary General’s decision taken upon the ICAO AJAB’s advisory opinion. Nevertheless, following UNAT’s judgment in *Spinardi*<sup>421</sup> with respect to a case about International Maritime Organization, UNAT reversed its standing and started to remand cases from ICAO to ICAO AJAB.<sup>422</sup>

Keeping this change of the jurisprudence in mind, the below paragraphs will still address earlier and relevant UNAT judgments with respect to the cases from ICAO.

In terms of receivability, UNAT held that decisions made by the governing body of the ICAO are not justiciable by UNAT, as they are not administrative decisions.<sup>423</sup>

In terms of administrative review, UNAT held that “administrative review by ICAO is the equivalent of management evaluation under Article 7(3) of the Appeals Tribunal Statute, and Article 7(3) must be interpreted in the same manner as Article 8(3) of the UNDT Statute.”<sup>424</sup>

In terms of the merits of the ICAO cases before UNAT, please refer to the rest of this compendium.

### **C. Appeals against the International Maritime Organization’s Staff Appeals Board**

#### **➤ Receivability**

Similar to the aforementioned case of ICAO’s AJAB, UNAT also held that International Maritime Organization’s (IMO) Staff Appeals Board (SAB) was not a “neutral first instance process” and remanded cases to the IMO’s SAB for a “decision” in accordance with Article 2(10) of UNAT’s Statute.<sup>425</sup>

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<sup>417</sup> *El Sehemawi* 2020-UNAT-1034, para. 16.

<sup>418</sup> *Hefberger* 2020-UNAT-1012, para. 14.

<sup>419</sup> *Ibid.*, para. 15.

<sup>420</sup> See, *El Sehemawi* 2020-UNAT-1034.

<sup>421</sup> *Spinardi* 2019-UNAT-957.

<sup>422</sup> For the time being, *Hefberger* 2020-UNAT-1012 and *El Sehemawi* 2020-UNAT-1034 was remanded in that respect. For earlier UNAT Judgments about the cases from the ICAO AJAB and the neutrality of a first-instance procedure, see *Ortiz* 2012-UNAT-231, paras. 32-33; *Williams* 2013-UNAT-376, paras. 23-27; *Mosupukwa* 2016-UNAT-625, paras. 31-37.

<sup>423</sup> *Cherif* 2011-UNAT-165, para. 23.

<sup>424</sup> *Williams* 2013-UNAT-376, para. 32. See also, *Gorelova* 2017-UNAT-805, para. 32; *Clemente* 2018-UNAT-857, para. 44.

<sup>425</sup> *Dispert & Hoe* 2019-UNAT-958; *Spinardi* 2019-UNAT-957; *Sheffer* 2019-UNAT-949.

#### D. Appeals against the World Meteorological Organization’s Joint Appeals Board

➤ Receivability

Similarly, UNAT also held that World Meteorological Organization’s (WMO) Joint Appeals Board (JAB) was not a “neutral first instance process” and remanded cases to the WMO’s JAB for a “decision” in accordance with Article 2(10) of UNAT’s Statute.<sup>426</sup> In the case of WMO, an agreement was signed between the UN and the WMO, effective 20 January 2020, stipulating that the UNDT has the jurisdiction to hear cases from WMO as the first instance tribunal.<sup>427</sup>

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<sup>426</sup> *Rolli* 2019-UNAT-952; *Abrate et al.* 2020-UNAT-1031; *Rixen* 2020-UNAT-1038.

<sup>427</sup> *Lynn* 2020-UNAT-1039, paras. 30-32.

## 7. Judicial review

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### A. Standard of review

DT is “not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision.”<sup>428</sup> For example, “unfairness, unreasonableness, illegality, irrationality,<sup>[429]</sup> procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds to interfere with the exercise of administrative discretion.”<sup>430</sup>

In terms of grounds of unreasonableness, “mutual trust and confidence between the employer and the employee is implied in every contract of employment. And both parties must act reasonably, fairly and in good faith.”<sup>431</sup> “Reasonableness is an open-ended review ground, subsuming within it elements of rationality and proportionality, as well as [...] [the fact] that administrative action is reviewable if it is so unreasonable that no reasonable decision-maker could have taken it”.<sup>432</sup> “What is reasonable in a particular case depends on the circumstances and various factors relevant to the inquiry, such as: the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on those affected by it.”<sup>433</sup>

“Rationality as a review ground requires only that a decision be rationally connected to the purpose for which it was taken and be supported by the evidence. The decision must also further the purpose for which the legislative power was given to the administrator. Though variable, substantive reasonableness is typically a higher standard calling for a more intensive scrutiny of the administrative action, touching in some instances on the merits of the decision. A rational basis test is deferential because it calls for rationality and justification rather than the substitution of the court’s opinion for that of the functionary on the basis that it finds the decision substantively incorrect. It seeks a condition of rationality in the relationship between the method and outcome of decision-making. By similar token, the principal aim of proportionality review is to avoid an imbalance between the adverse and beneficial effects of an action or measure by balancing the necessity for the action with the suitability of the means deployed to achieve the purpose.”<sup>434</sup>

A discretionary administrative decision “can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive. The staff member has the burden of proving

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<sup>428</sup> *Sanwidi* 2010-UNAT-084, para. 42.

<sup>429</sup> For an example of irrationality, see *El Shaer* 2019-UNAT-942, paras. 29-34.

<sup>430</sup> *Sanwidi* 2010-UNAT-084, para. 38. This was also confirmed in *Ahmed* 2011-UNAT-153, para. 44; *Hersh* 2014-UNAT-433, para. 18; *Matadi et Al.* 2015-UNAT-592, para. 18.

<sup>431</sup> *Kallon* 2017-UNAT-742, para. 18.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.*

<sup>434</sup> *Kallon* 2017-UNAT-742, para. 19, emphasis added.

that such factors played a role in the administrative decision.”<sup>435</sup> “When judging the validity [...] [of the discretionary powers], [DT] determines if the decision is legal, rational, procedurally correct, and proportionate. [...] It is not the role of [DT] to consider the correctness of the choice made by [the Administration] amongst the various courses of action open to him, [n]or [...] to substitute its own decision for that of [the Administration].”<sup>436</sup>

“[A] justification is given by the Administration for the exercise of its discretion it must be supported by the facts.”<sup>437</sup> “[T]here is a threefold purpose for providing reasons for decisions, which is intelligibility (enabling both implementation and acceptance), accountability and reviewability.”<sup>438</sup>

DT cannot “undertake an exercise to classify or reclassify posts in an organization’s structure”; but can only review procedural irregularities in such an exercise.<sup>439</sup>

“The judicial review of decisions regarding dishonesty and the non-disclosure of material information dictates that due deference be given to the duty of the [SG] to hold staff members to the highest standards of integrity [...]. However, due deference does not eradicate the role of [DT] in reviewing decisions of the Administration relating to misconduct [...] [and] does not mean that [DT] cannot review whether the Administration has met its evidential burden to prove misconduct [...]”<sup>440</sup>

## **B. Presumption of regularity & discretion**

“There is always a presumption that official acts have been regularly performed”. [...] But this presumption is a rebuttable one.”<sup>441</sup> “[T]he standard of proof required to rebut the presumption of regularity [is not] one of preponderance of evidence. [...] [Rather], once the presumption arises, the rebuttal of it should occur only where clear and convincing evidence establishes that an irregularity was highly probable.”<sup>442</sup>

“Managerial decisions should be sustained provided that they are free from invidious or improper motivations and are based upon the exercise of reason and proper judgment.”<sup>443</sup>

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<sup>435</sup> *Kule Kongba* 2018-UNAT-849, para. 26. See also, *Pirnea* 2013-UNAT-311, para. 32; *Obdeijn* 2012-UNAT-201; *Ahmed* 2011-UNAT-153; *Orabi* 2018-UNAT-884, para. 20; *Ozturk* 2018-UNAT-892, para. 18.

<sup>436</sup> *Kule Kongba* 2018-UNAT-849, para. 27. See also, *Sanwidi* 2010-UNAT-084, para. 40. This principle was also confirmed in *Schook* 2012-UNAT-216, para. 34; *Lauritzen* 2013-UNAT-282, para. 39; *Jibara* 2013-UNAT-326, para. 31; *Pérez-Soto* 2013-UNAT-329, para. 32; *Egglesfield* 2014-UNAT-399, para. 23; *Benchebbak* 2014-UNAT-438, para. 19; *Balan* 2014-UNAT-462, para. 25; *Cobarrubias* 2015-UNAT-510, para. 19; *Karseboom* 2015-UNAT-601, para. 43.

<sup>437</sup> *Islam* 2011-UNAT-115, paras. 28-29. See also, *Nugroho* 2020-UNAT-1042, para. 40; *Collins* 2020-UNAT-1021, footnote 28.

<sup>438</sup> *Nugroho* 2020-UNAT-1042, para. 40.

<sup>439</sup> ILOAT Judgment No. 2807, 4 February 2009, Consideration 5. See also, *Fuentes* 2011-UNAT-105, para. 26. This was also confirmed in *Al Rifai* 2016-UNAT-653, para. 16.

<sup>440</sup> *Rajan* 2017-UNAT-781, para. 36.

<sup>441</sup> *Rolland* 2011-UNAT-122, para. 26. This principle was also confirmed in *Ibekwe* 2011-UNAT-179, para. 30; *Landgraf* 2014-UNAT-471, para. 28; *Dhanjee* 2015-UNAT-527, para. 30; *Zhuang, Zhao & Zie* 2015-UNAT-536, para. 48; *Staedtler* 2015-UNAT-547, para. 27; *Survo* 2015-UNAT-595, para. 68; *Niedermayr* 2015-UNAT-603, para. 23; *Ngokeng* 2017-UNAT-747, para. 33.

<sup>442</sup> *Ngokeng* 2017-UNAT-747, para. 34. See also, *Lemonnier* 2017-UNAT-762, paras. 37-39.

<sup>443</sup> *El-Awar* 2019-UNAT-931, para. 34.

“[T]he Administration’s discretionary authority is not unfettered.”<sup>444</sup> “The Secretary-General must act in good faith and comply with the applicable law. His decisions must not be taken on erroneous, inconsistent or fallacious grounds. If a decision is contested, it is for the Tribunal exercising its control to reconcile the judicial authority vested in it in the interests of justice of the United Nations with the discretionary power vested in the Secretary-General.”<sup>445</sup>

### C. Evidence

DT “has discretionary authority in case management and the production of evidence in the interest of justice.”<sup>446</sup> “[S]ome degree of deference should be given to the factual findings by [DT] [...], particularly where oral evidence is heard.”<sup>447</sup>

“There is [...] [a] test for admissibility of additional evidence, and indeed of any evidence at any stage in any proceeding. Such evidence must be relevant to the issue or issues to be decided. It is perhaps so fundamental that it does not need to be, and has not been, expressed in the tests for the admission of additional evidence after the parties’ submissions have been filed. The requirement of relevance is, nevertheless, always essential.”<sup>448</sup>

In terms of oral evidence, in *Stoykov*, UNAT held that “in a case with oral evidence, we cannot review the UNDT’s findings unless we have a transcript of that testimony. In a case that turns on disputed facts, we would have no choice, in the absence of a written transcript, but to remand to the trial court for a new and recorded hearing.”<sup>449</sup>

In cases where the Administration refuses to provide requested documents by DT, “[t]he Tribunal is [...] entitled to draw appropriate conclusions from the refusal [...] and it could, depending on the circumstances, go so far as to find that, by virtue of its refusal, the Administration, whatever the scope of its discretionary power, must be regarded as having accepted the allegations made by the other party regarding the facts.”<sup>450</sup>

DT has a broad discretion in determining “[t]he weight to be attached to the evidence” before it.<sup>451</sup> “In order to overturn a finding of fact by [DT], [UNAT] must be satisfied that the finding

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<sup>444</sup> *Asaad* 2010-UNAT-021, para. 11. This was also confirmed in *Bertucci* 2011-UNAT-121, para. 37; *Pérez-Soto* 2013-UNAT-329, paras. 28-29; *Lauritzen* 2013-UNAT-282, para. 28; *Hamayel* 2014-UNAT-459, para. 17; *Abdullah* 2014-UNAT-482, para. 60.

<sup>445</sup> *Bertucci* 2011-UNAT-121, para. 37. See also, *Pérez-Soto* 2013-UNAT-329, paras. 28-29; *Lauritzen* 2013-UNAT-282, para. 28; *Hamayel* 2014-UNAT-459, para. 17; *Abdullah* 2014-UNAT-482, para. 60.

<sup>446</sup> *Calvani* 2010-UNAT-032, paras. 8-9; *Bertucci* 2011-UNAT-121, para. 39. This was also confirmed in *Wu* 2015-UNAT-597, paras. 34-35; *Uwais* 2016-UNAT-675, para. 27.

<sup>447</sup> *Abbassi* 2011-UNAT-110, para. 26. This was also confirmed in *Messinger* 2011-UNAT-123, para. 36; *Muratore* 2012-UNAT-245, para. 30; *Xu* 2012-UNAT-251, para. 17; *Badawi* 2012-UNAT-261, para. 37; *Oh* 2014-UNAT-480, para. 53; *Eissa* 2014-UNAT-469, para. 35.

<sup>448</sup> *Barud* 2020-UNAT-998, para. 24.

<sup>449</sup> *Stoykov* 2014-UNAT-440, para. 21. This was also confirmed in *Koda* 2011-UNAT-130, para. 32; *Finniss* 2012-UNAT-210, para. 40; *He* 2016-UNAT-686, para. 35.

<sup>450</sup> *Bertucci* 2011-UNAT-121, para. 51.

<sup>451</sup> *Messinger* 2011-UNAT-123, para. 33. This was also confirmed in *Dannan* 2013-UNAT-340, para. 14; *Larkin* 2011-UNAT-134, para. 38; *Gehr* 2012-UNAT-236, para. 36; *Charles* 2013-UNAT-286, para. 24; *Pacheco* 2013-UNAT-281, para. 24; *Mahfouz* 2014-UNAT-414, para. 15; *Wang* 2014-UNAT-454, para. 36; *Al-Moued* 2014-UNAT-458, para. 19; *Staedtler* 2015-UNAT-547, para. 17; *Kacan* 2015-UNAT-582, para. 25.

is not supported by the evidence or that it is unreasonable.”<sup>452</sup> For example, in *Krioutchkov*, UNAT remanded the case to DT where a factual determination of DT was not supported by evidence.<sup>453</sup> “In order to establish that the Judge erred [in not admitting evidence], it is necessary to establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case.”<sup>454</sup>

UNAT also clarified that argument is not evidence.<sup>455</sup>

In *Hassanin*, UNAT held that “[in certain] unusual circumstances, [...] it would [be] inappropriate for the [DT] to refuse to admit evidence of events after the issuance of the [contested decision]”.<sup>456</sup>

Evidence might be submitted after the parties’ closing arguments if this evidence was only available at that time.<sup>457</sup> Also, “selected extracts of a report” may not be enough to establish certain facts. In such a situation, DT is expected to make further enquires in order to obtain the whole report.<sup>458</sup>

In *Bagula*, the Applicant produced two impostors as witnesses. UNAT concluded that “the contemptuous conduct of the [Applicant] [could] lead to only one conclusion that the [Applicant] was guilty of the charge of soliciting and accepting bribes.”<sup>459</sup>

In *Thiombiano*, UNAT also held that it is incumbent on the Applicant to submit any supporting documentation, and that “it is not for the Tribunal to presume that the party is waiting for an order before submitting any supporting documentation or evidence.”<sup>460</sup>

➤ Secret recordings

“Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness.”<sup>461</sup>

➤ Hearsay

“Hearsay evidence before [DT] can and should be admissible in the interests of justice. [DT], before admitting such evidence, however, should have regard to: i) the making or absence of

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<sup>452</sup> *Abbassi* 2011-UNAT-110, para. 26. This was also confirmed in *Messinger* 2011-UNAT-123, para. 36; *Larkin* 2011-UNAT-134, para. 33; *Xu* 2012-UNAT-251, para. 17; *Eissa* 2014-UNAT-469, para. 35.

<sup>453</sup> *Krioutchkov* 2019-UNAT-924, paras. 23-25.

<sup>454</sup> *Abbassi* 2011-UNAT-110, para. 20. This principle was also confirmed in *Pacheco* 2013-UNAT-281, para. 25; *Kaddoura* 2011-UNAT-151, para. 34; *Larkin* 2012-UNAT-263, para. 23; *Riano* 2015-UNAT-529, para. 32; *Survo* 2015-UNAT-595, para. 54.

<sup>455</sup> *Balinge* 2013-UNAT-377, paras. 15-16. This principle was later confirmed in *Hushiyeh* 2014-UNAT-435, para. 34; *Hepworth* 2015-UNAT-503, para. 43.

<sup>456</sup> *Hassanin* 2017-UNAT-759, para. 43.

<sup>457</sup> *Wilson* 2019-UNAT-940, paras. 12-14 & 33-35.

<sup>458</sup> *Ibid.*, para. 36.

<sup>459</sup> *Bagula* 2012-UNAT-237, paras. 25-26.

<sup>460</sup> *Thiombiano* 2020-UNAT-978, paras. 39-40.

<sup>461</sup> *Asghar* 2020-UNAT-982, para. 43.

any objection to the evidence by any one of the parties; ii) the nature of the evidence; iii) the purpose for which the evidence is tendered; iv) the probative value of the evidence; v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; vi) any prejudice to a party which the admission of the evidence may entail; and vii) any other relevant factor.”<sup>462</sup>

➤ Children as witnesses

In *Suleiman*, UNAT held that the statements of pupils can be accepted as corroborating evidence and that, especially in a case involving physical abuse, reliance can be given to children as witnesses.<sup>463</sup>

**D. Jurisdiction of DT**

The jurisdiction of DT is limited by its Statute<sup>464</sup> and DT has no jurisdiction regarding the access to UN premises.<sup>465</sup> Also, DT’s *raison d’être* is to pass judgment on existing disputes, but not to give interpretations of the law where there is no case before it.<sup>466</sup>

Article 36 of DT’s Rules of Procedure<sup>467</sup> does not allow DT to extend its jurisdiction in violation of Article 2 of DT Statute.<sup>468</sup> DT would exceed its competence and jurisdiction if it decides the merits after having decided that the application was not receivable.<sup>469</sup>

“When Article 8(4) of the [DT’s] Statute<sup>470</sup> applies – and bars the filing of an application – [...] [DT] [would] act [] *ultra vires* [if it were to] consider [] whether the Applicant has established exceptional circumstances for waiving the deadline under Article 8(3).”<sup>471</sup>

“When UNAT determines that DT had improperly received an application and reverses or vacates a judgment on receivability, any judgment on the merits is null and void *ab initio*.”<sup>472</sup>

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<sup>462</sup> *Asghar* 2020-UNAT-982, paras. 44-45.

<sup>463</sup> *Suleiman* 2020-UNAT-1006, para. 12.

<sup>464</sup> *Ndjadi* 2012-UNAT-197, para. 2.

<sup>465</sup> *Sims* 2011-UNAT-154, para. 14.

<sup>466</sup> *Rawat* 2012-UNAT-223, para. 28; *Warintarawat* 2012-UNAT-208, para. 10. This was also confirmed in *Finniss* 2016-UNAT-708, para. 23; *Wilson* 2016-UNAT-709, para. 25; *Crotty* 2017-UNAT-763, para. 16.

<sup>467</sup> Article 36 reads as follows: “1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute. 2. The Dispute Tribunal may issue practice directions related to the implementation of the rules of procedure.”

<sup>468</sup> *Chocobar* 2014-UNAT-488, paras. 16-18. See also, *Charles* 2014-UNAT-437.

<sup>469</sup> *Servas* 2013-UNAT-349, paras. 23-24. This was also confirmed in *Khan* 2017-UNAT-727, paras. 28-30.

<sup>470</sup> Paragraphs 3 and 4 of Article 8 reads as follows: “3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation. 4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant’s receipt of the contested administrative decision.”

<sup>471</sup> *Khan* 2017-UNAT-727, para. 24.

<sup>472</sup> *Cooke* 2013-UNAT-380, para. 11.

Also, where an applicant “expressly concede[s] that [a certain period] did not count in terms of the calculation of [his/her] participation in a health insurance plan”, DT does not have the authority to find that it, in fact, counted.<sup>473</sup>

➤ Stare Decisis

“[T]he jurisprudence of [UNAT] [...] set[s] precedent, to be followed in like cases by [DT].”<sup>474</sup> Thus, the principle of *stare decisis* applies. However, “the jurisprudence of the former [Administrative] Tribunal, though of persuasive value, cannot be binding precedent for [DT and UNAT] to follow.”<sup>475</sup>

➤ Compétence de la compétence

“[DT] is competent to review its own competence or jurisdiction in accordance with Article 2(6) of its Statute”, even *proprio motu*.<sup>476</sup>

➤ Obiter dictum

“Language not necessary or relevant to the actual decision of [DT] may be disregarded as *obiter dictum* or surplusage.”<sup>477</sup> If an application is withdrawn, DT, in accepting the withdrawal, should refrain from commenting on the merits.<sup>478</sup>

➤ Inherent powers

Identification of claim: In terms of the identification of the claim, it is part of the duties and the inherent powers of a Judge “to adequately interpret and comprehend the application submitted by the moving party”, and to identify what is in fact being contested.<sup>479</sup>

Contempt power: “The ability to promote and protect the court, and to regulate proceedings before it, is an inherent judicial power. [...] [I]t is essential to, *inter alia*, a tribunal’s case management and ability to conduct hearings.”<sup>480</sup>

Witness protection: “There is no doubt that the Dispute Tribunal has the inherent power to issue orders to protect witnesses who testify before it from retaliation by a party.”<sup>481</sup>

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<sup>473</sup> Rodriguez 2020-UNAT-994, para. 31.

<sup>474</sup> Igbinedion 2014-UNAT-410, para. 24. This was also confirmed in *Hepworth* 2015-UNAT-503, para. 40; *Gehr* 2016-UNAT-613, para. 14.

<sup>475</sup> Sanwidi 2010-UNAT-084, para. 37. This was also confirmed in *Leal* 2013-UNAT-337, para. 18; *Baracungana* 2017-UNAT-725, para. 27; *Muwambi* 2017-UNAT-780, para. 61.

<sup>476</sup> Christensen 2013-UNAT-355, para. 20. See also, *Chahrour* 2014-UNAT-406, para. 28; *Tintukasiri* 2015-UNAT-526, para. 32.

<sup>477</sup> Abboud 2011-UNAT-103, para. 10. See also, *Achkar* 2012-UNAT-267, para. 26; See also, *Basenko* 2013-UNAT-316, para. 9; *Wang* 2014-UNAT-454, para. 48.

<sup>478</sup> Wilson 2012-UNAT-235, para. 13. See also, *Ngoma-Mabiala* 2013-UNAT-361, paras. 21-25, for some observations of UNDT; and *Kauf* 2019-UNAT-934, paras. 28-29, for irrelevant and unnecessary findings by UNDT.

<sup>479</sup> Hassanin 2017-UNAT-759, para. 41. See also, *Massabni* 2012-UNAT-238, paras. 25-26; *Gakumba* 2015-UNAT-591, para. 21; *Chaaban* 2016-UNAT-611, para. 16; *Monarawila* 2016-UNAT-694, para. 32; *Fasanella* 2017-UNAT-765, para. 19; *Cardwell* 2018-UNAT-876, para. 23.

<sup>480</sup> Igbinedion 2014-UNAT-410, paras. 31-33.

<sup>481</sup> Nartey 2015-UNAT-544, paras. 62-63. See also, *Kasmani* 2013-UNAT-305, para. 41.

➤ Compliance with the DT's orders

UNAT held that “a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body’s jurisdiction, because it is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.”<sup>482</sup>

Also, in *Igbinedion*, UNAT emphasised that “[i]t is unacceptable that a party before the Dispute Tribunal would refuse to obey its binding decision in this manner, regardless of the fact that [...] the Order was ultimately vacated by the Appeals Tribunal. To rule otherwise would undermine legal certainty and the internal justice system at its core, and would incite dissatisfied parties to consider UNDT Orders as mere guidance or suggestions, with which compliance is voluntary.”<sup>483</sup>

E. Other issues

➤ Duty to provide reason

“The duty to give reasons for a decision [...] is essential for the Tribunals to exercise their judicial review of administrative decisions, assessing whether they were arbitrary, capricious, or unlawful”.<sup>484</sup> “Although this obligation might not stem from any Staff Regulation or Rule, it derives from the public law principle which confers upon the Tribunals the inherent power to review the validity of such administrative decisions, the functioning of the system of administration of justice and the principle of accountability of managers.”<sup>485</sup>

“[A]ll proceedings [...] must be conducted in a reviewable manner, by observing the principles of natural justice. The affected party must get a proper hearing, and the order detailing a decision must contain sound reasons which can be judicially scrutinized upon appeal.”<sup>486</sup> Similarly, UNAT held that “Article 11(1) of the UNDT Statute requires that the UNDT must set forth the reasons, facts and law on which its Judgment is based.”<sup>487</sup> Also, “[t]he mere disagreement by the [Applicant] with the UNDT’s statement of its reasons or the facts and law supporting its Judgment is not a basis for overturning the Judgment.”<sup>488</sup>

“It is not necessary for any court [...] to address each and every claim made by a litigant, especially when a claim has no merit.”<sup>489</sup> However, in *Mansour*, UNAT underlined that

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<sup>482</sup> *Igunda* 2012-UNAT-255, para. 32; *Dalgaard et al.* 2015-UNAT-532, Dissent by Judge Simon and Judge Faherty, para. 4.

<sup>483</sup> *Igbinedion* 2014-UNAT-410, para. 29; *Dalgaard et al.* 2015-UNAT-532, Dissent by Judge Simon and Judge Faherty, para. 5.

<sup>484</sup> *Nugroho* 2020-UNAT-1042, para. 39. See also, *Collins* 2020-UNAT-1021, para. 42, citing *Obdeijn* 2012-UNAT-201, paras. 35 and 36.

<sup>485</sup> *Nugroho* 2020-UNAT-1042, para. 39. See also, *Obdeijn* 2012-UNAT-201, para. 36.

<sup>486</sup> *Ansa-Emmim* 2011-UNAT-155, para. 31. This was also confirmed in *Larghi* 2013-UNAT-343, para. 40; *Pio* 2013-UNAT-344, para. 49; *Pio* 2015-UNAT-569, para. 29; *Teklu* 2015-UNAT-608, para. 53.

<sup>487</sup> *Staedtler* 2015-UNAT-577, para. 45. See also, *Rahman* 2012-UNAT-260, paras. 25-26; *Asariotis* 2013-UNAT-309, para. 26.

<sup>488</sup> *Staedtler* 2015-UNAT-577, para. 45. This was also confirmed in *Tiwathia* 2016-UNAT-616, para. 25.

<sup>489</sup> *Abu Jarbou* 2013-UNAT-292, para. 47. This principle was also confirmed in *Mizyed* 2015-UNAT-550, para. 35; *Abdullah* 2016-UNAT-623, para. 24; *Negussie* 2016-UNAT-700, para. 19; *Al-Ashi* 2018-UNAT-838, para. 26; *Beidas* 2016-UNAT-685, para. 20; *Hepworth* 2015-UNAT-503, para. 38.

“serious, substantive claims advanced by counsel for a party should not generally be ignored completely. Nor should this be an *ex post facto* excuse for a refusal or a failure to address a claim that should have been dealt with, even briefly. We do not think those claims the UNRWA DT elected or failed to address in this case fall into the class of patently rejectable submissions covered by these authorities. A failure to address a matter in issue may amount to a reviewable failure to exercise jurisdiction.”<sup>490</sup>

➤ Revision / Interpretation / Correction of Judgments

A judgment on receivability is susceptible to revision under article 12(1) of DT’s Statute.<sup>491</sup> For example, in *Masri*, UNAT concluded that “the ‘new’ information [...] [did] not constitute circumstances which warrant a revision, because none of the information would result in the exclusion of the main reasons stated by [UNAT] in vacating the UNDT’s Judgment and affirming the administrative decision of summary dismissal”.<sup>492</sup>

In *Sims*, new evidence regarding the merits of the case was irrelevant for a revision of a case which had been declared not receivable.<sup>493</sup> In *Abbasi*, a case involving a contested selection decision, the purportedly new fact that a lower-ranked candidate had cheated is not enough for a revision of the case, as it would not have affected the outcome.<sup>494</sup>

In *Applicant*, it was held that new case law “does not constitute a ‘new fact’ [...] to support a revision under the [...] statutory regulations. It constitutes law and no possibility for a revision based on law is provided for in [the statutory regulations].”<sup>495</sup> “An allegation of an error in law” is not enough to obtain a revision of a final judgment of UNAT.<sup>496</sup>

An application seeking review of a final judgment can only succeed “if it fulfils the strict and exceptional criteria established [...] [under the relevant rules of the Statute]”.<sup>497</sup>

An application for interpretation of judgment is receivable if the operative part of the judgment gives rise to uncertainty or ambiguity about its meaning.<sup>498</sup> In *Kasmani* and *Shanks*, requests for interpretation of judgment were denied on grounds that the ambiguities were not properly identified.<sup>499</sup> In *Shkurtaj*, a request for interpretation of judgment regarding the date from which interest was to accrue was denied as the judgment was not ambiguous on this point.<sup>500</sup>

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<sup>490</sup> *Mansour* 2020-UNAT-1036, para. 45.

<sup>491</sup> *Abbasa* 2014-UNAT-484, paras. 26-29.

<sup>492</sup> *Masri* 2011-UNAT-163, para. 15.

<sup>493</sup> *Sims* 2013-UNAT-323, paras. 11-12.

<sup>494</sup> *Abbasi* 2013-UNAT-315, para. 17.

<sup>495</sup> *Applicant* 2013-UNAT-393, para. 16.

<sup>496</sup> *Costa* 2010-UNAT-063, para. 4.

<sup>497</sup> *Beaudry* 2011-UNAT-129, para. 16. This principle was also confirmed in *Fedorchenko* 2015-UNAT-567, para. 13; *El Khatib* 2013-UNAT-317, para. 10; *Chaaban* 2015-UNAT-497, para. 19; *Al-Mulla* 2013-UNAT-394, para. 14; *Dalgaard et al.* 2016-UNAT-646, para. 9.

<sup>498</sup> *Shanks* 2010-UNAT-065, para. 4. See also, *Dzuberovic* 2014-UNAT-490, para. 10; *Ruyooka* 2014-UNAT-487, para. 15; *Karseboom* 2016-UNAT-681.

<sup>499</sup> *Kasmani* 2010-UNAT-064; *Shanks* 2010-UNAT-065.

<sup>500</sup> *Shkurtaj* 2013-UNAT-322, para. 14. See also, *James* 2016-UNAT-680.

In *Porter*, UNAT held that the judgment was clear and thus vacated DT's judgment on interpretation.<sup>501</sup> In *Awe and Wilson*, the matter was about an application for correction of judgment.<sup>502</sup>

➤ *Remand of a case to the Administration*

“Generally, when the Administration’s decision is unlawful because the Administration, in making the decision, failed to properly exercise its discretion and to consider all requisite factors or criteria, the appropriate remedy would be to remand the matter to the Administration to consider anew all factors or criteria; it is not for the Tribunals to exercise the discretion accorded to the Administration.”<sup>503</sup>

“In terms of Article 10(4) of the UNDT Statute,<sup>[504]</sup> the UNDT may only remand a case for correction of the required procedure if it has not reached the merits of a case.”<sup>505</sup>

“[A]n order [...] for the remand of a case to the Administration for institution or correction of the required procedure, not observed at all or found flawed by the UNDT, can be made only with the concurrence of the [SG].”<sup>506</sup>

➤ *Referral for accountability*

“Article 10(8) of the UNDT Statute<sup>[507]</sup> provides the UNDT with the discretionary power” to refer staff members for accountability to the SG.<sup>508</sup> “The exercise of the power of referral for accountability [...] must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.”<sup>509</sup> In *Hersh*, the actions of the Chief of Radio was referred for accountability for “blatant and reckless abuse of power”.<sup>510</sup> In *Chhikara*, even though “there was no evidence that the decision-maker(s) had acted in bad faith, there was clear evidence ‘that someone intended to manipulate the test results and therefore also the selection process’, with regard to the lack of anonymity of candidates when grading the test responses.”<sup>511</sup> UNAT

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<sup>501</sup> *Porter* 2017-UNAT-796, paras. 20-24.

<sup>502</sup> *Awe* 2018-UNAT-845; *Wilson* 2020-UNAT-999.

<sup>503</sup> *Eggesfield* 2014-UNAT-399, para. 27. This was also confirmed in *O’Hanlon* 2013-UNAT-303, para. 23; *Branche* 2013-UNAT-372, para. 35.

<sup>504</sup> This paragraph reads as follows: Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the SG of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months’ net base salary.

<sup>505</sup> *Mbaigolmem* 2018-UNAT-819, para. 30.

<sup>506</sup> *Baracungana* 2017-UNAT-725, para. 31.

<sup>507</sup> Article 10(8) of UNDT Statute reads as follows: “The Dispute Tribunal may refer appropriate cases to the SG of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.”

<sup>508</sup> *Tadonki* 2014-UNAT-400, para. 65.

<sup>509</sup> *Cohen* 2017-UNAT-716, para. 46. This principle was also confirmed in *Igbinedion* 2014-UNAT-410, paras. 37-39; *Gorelova* 2017-UNAT-805, paras. 50-51.

<sup>510</sup> *Hersh* 2014-UNAT-433, para. 38. For other examples, see *Finniss* 2014-UNAT-397, paras. 37-39; *Koduru* 2019-UNAT-907, para. 22.

<sup>511</sup> *Chhikara* 2020-UNAT-1014, para. 38.

held that “[n]egligence, to say the least, appears to have occurred in the manipulation of the selection exercise and this alone may warrant some sort of accountability.”<sup>512</sup>

➤ *Amicus Curia Brief*

“There is no statutory provision or other law which gives the UNDT jurisdiction to entertain an application by a staff representative on behalf of staff members. The only recognition given to a staff association in the UNDT Statute is contained in Article 2(3), which provides: ‘The Dispute Tribunal shall be competent to permit or deny leave to an application to file a friend-of-the-court brief by a staff association’. As a matter of law, a friend-of-the-court (amicus curiae) must be someone who is not a party to the case.”<sup>513</sup>

“If the issues in a case raise very specific or particular questions of law which are not generally within the expertise of counsel or the Judges, an application to file a friend-of-the-court brief may be granted.”<sup>514</sup> In *Ross*, as the circumstances of the case did not warrant an intervention “to establish general and collective guidelines for the future”, the UNHCR Staff Council’s application to file a friend-of-the-court brief was denied.<sup>515</sup>

➤ *Conflict of interest/Recusal of judges*

“It is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds.”<sup>516</sup> The same Judge simultaneously handling cases of a staff member with harassment allegations and the alleged harasser does not constitute a conflict of interest “where the two cases were independent of each other.”<sup>517</sup> “The test for determining whether or not a judge is biased is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge is biased.”<sup>518</sup> UNAT also held that “cast[ing] aspersions on a Judge just because the judgment does not satisfy a party’s interest is an impropriety.”<sup>519</sup>

The fact that the direct supervisor of the Applicant was a member of the Interview Panel for the Applicant’s selection process “does not, of itself, constitute a conflict of interest.”<sup>520</sup>

➤ *Principles of interpretation*

“When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without

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<sup>512</sup> *Ibid.*

<sup>513</sup> *Faye* 2016-UNAT-657, paras. 35-36.

<sup>514</sup> *Masri* 2010-UNAT-098, para. 27. See also, *Terragnolo* 2014-UNAT-445, paras. 15ss; *Terragnolo* 2014-UNAT-448, paras. 16ss.

<sup>515</sup> *Ross* 2020-UNAT-1000, para. 47.

<sup>516</sup> ILOAT judgment in *Varnet v. UNESCO*, Judgment No. 179. See also, *Finnis* 2014-UNAT-397, para. 22; *Savadogo* 2016-UNAT-642, para. 48.

<sup>517</sup> *Squassoni* 2012-UNAT-213, para. 36.

<sup>518</sup> *Masri* 2016-UNAT-626, para. 21.

<sup>519</sup> *Thiombiano* 2020-UNAT-978, para. 29.

<sup>520</sup> *Faust* 2017-UNAT-778, para. 32.

further investigation.”<sup>521</sup> “The interpretation of a rule is made within the context of the hierarchy in which the rule appears.”<sup>522</sup> “[T]he language of a legal instrument should be construed so as to be consistent, so far as possible, with every other unrepealed legal instrument made by the same lawmaking body.”<sup>523</sup> “Just as a Staff Rule may not conflict with the Staff Regulation under which it is made, an administrative issuance may not conflict with the applicable Staff Regulation or Rule which it implements.”<sup>524</sup>

“[I]n interpreting the terms of a staff member’s appointment, [DT] may also draw upon general principles of law insofar as they apply to the international civil service.”<sup>525</sup>

“[W]hen doubts remain as to the meaning of a term in a document, an interpretation against the party who supplied it is to be preferred.”<sup>526</sup>

“[S]tatutory instruments must be read together and the later one may be construed as repealing the provisions of the earlier one but only where that intention is explicit or alteration is a necessary inference from the terms of the later statutory instrument [*lex posterior priori derogate*].”<sup>527</sup>

In *Collins*, UNAT provided an example where it was necessary to interpret the law in a teleological manner, beyond its literal meaning. It held that “[s]ometimes the word may must be read in context, in order to determine if it means an act which is either optional or mandatory, for it may be an imperative.”<sup>528</sup>

➤ *Delay in issuing judgments*

Regarding the Applicant’s contention about DT’s delay in issuing its judgment, UNAT held that “[h]owever regrettable [such] delay might be for a party who seeks justice, [it] does not have the effect of entitling [the Applicant] to any compensation for moral damage [...]. To the extent that the delay in issuing the Judgment occurred, it did not stem from any act of the Secretary-General [...]. Thus, the delay in question is beyond the scope of [the] initial application.”<sup>529</sup>

➤ *Staff members as persona non grata*

“[I]t is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds themselves following their expulsion from the host country. That obligation arises because of the unilateral and unquestionable nature of a *persona non grata* declaration

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<sup>521</sup> *Scott* 2012-UNAT-225, para. 28. This was also confirmed in *De Aguirre* 2016-UNAT-705, paras. 43-45.

<sup>522</sup> *De Aguirre* 2016-UNAT-705, para. 44.

<sup>523</sup> *Husseini* 2016-UNAT-701, para. 18.

<sup>524</sup> *De Aguirre* 2016-UNAT-705, para. 44.

<sup>525</sup> *De Aguirre* 2016-UNAT-705, para. 44. See also, *Hunt-Matthes* 2014-UNAT-444, para. 26; *Assale* 2015-UNAT-534, para. 34.

<sup>526</sup> *Al Hallaj* 2018-UNAT-810, para. 44.

<sup>527</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 81.

<sup>528</sup> *Collins* 2020-UNAT-1021, para. 43. Please refer to paras. 44 & 45.

<sup>529</sup> *Thiombiano* 2020-UNAT-978, para. 41.

including that it may be made irrespective of fault or misconduct by the individual so declared and because of the inability of that individual to challenge and reverse its effect.”<sup>530</sup>

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<sup>530</sup> *Porras* 2020-UNAT-1068, para. 34.

## 8. Applicable law

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### ➤ Terms and conditions of the employment

“[A]n employment contract of a staff member subject to the internal laws of the [UN] is not the same as a contract between private parties.”<sup>531</sup> “The terms and conditions of the employment contract of a staff member are set forth in the letter of appointment and its express incorporation by reference of the Organization’s Regulations and Rules and all pertinent administrative issuances.”<sup>532</sup>

“The issuance of a letter of appointment [...] is more than a mere formality.”<sup>533</sup> “However, this does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization [...] and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization.”<sup>534</sup> Accordingly, a quasi-contract is considered to be formed between the parties and this is not without rights or remedies.<sup>535</sup> “[This] quasi-contract [...] creates obligations for the Organization which include behaving in keeping with the principle of good faith [...] and acting fairly, justly and transparently in its dealings with the person.”<sup>536</sup>

“Staff Regulations [and Rules] embody the conditions of service and the basic rights and duties and obligations of [UN] staff members. They are supplemented by the administrative issuances in application of, and consistent with, the said Regulations and Rules.”<sup>537</sup> “The Organization [] [...] is governed by its internal rules and regulations and not the national laws of its Member States, unless the Organization adopts such national laws as part of its internal law.”<sup>538</sup>

### ➤ Normative hierarchy

“[T]he Charter, the Universal Declaration of Human Rights and the General Assembly’s resolutions and decisions takes precedence over the Organization’s regulations, rules and

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<sup>531</sup> *Gabaldon* 2011-UNAT-120, para. 22. See also, *James* 2010-UNAT-009, para. 45; *Sprauten* 2011-UNAT-111, para. 23; *Slades* 2014-UNAT-463, para. 26.

<sup>532</sup> *Slade* 2014-UNAT-463, para. 26. See also, *Abboud* 2010-UNAT-100, para. 32; *Muwambi* 2017-UNAT-780, para. 25.

<sup>533</sup> *Badawi* 2012-UNAT-261, para. 28. See also, *El-Khatib* 2010-UNAT-029, para. 16; *Sprauten* 2011-UNAT-111, para. 23; *Gabaldon* 2011-UNAT-120, para. 22; *Muwambi* 2017-UNAT-780, para. 46.

<sup>534</sup> *Gabaldon* 2011-UNAT-120, para. 23.

<sup>535</sup> *Gabaldon* 2011-UNAT-120, paras. 28-30. See also, *Sprauten* 2011-UNAT-111, paras. 23-25; *Al Hallaj* 2018-UNAT-810, paras. 37-39; *Latimer* 2019-UNAT-901, para. 47; *Ross* 2020-UNAT-1000, para. 74; *Murad* 2020-UNAT-1025, para. 35.

<sup>536</sup> *Ross* 2020-UNAT-1000, para. 74. See also, *Sprauten* 2011-UNAT-111, paras. 23-25; *Al Hallaj* 2018-UNAT-810, paras. 37-39; *Latimer* 2019-UNAT-901, para. 47; *Murad* 2020-UNAT-1025, para. 35.

<sup>537</sup> *Valimaki-Erk* 2012-UNAT-276, para. 42. See also, *Egglesfield* 2014-UNAT-399, para. 20; *Slade* 2014-UNAT-463, paras. 27-28.

<sup>538</sup> *Wang* 2014-UNAT-454, para. 32. See also, *Ernst* 2012-UNAT-227, para. 31; *El Rush* 2016-UNAT-627, para. 14; *B. Kosbeh et al.* 2018-UNAT-894, para. 27.

administrative issuances.”<sup>539</sup> “[I]n the event of any ambiguity or contradiction between the UNDT Statute and the Staff Rules (or for that matter, Staff Regulations or the UNDT Rules of Procedure), the former must prevail over the latter.”<sup>540</sup> “[T]he [SG’s] reports and memoranda lack the legal authority vested in properly promulgated administrative issuances.”<sup>541</sup> Also, “[a]dministrative issuances regulate matters of general application and directly concern the rights and obligations of staff and the Organization. Rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances.”<sup>542</sup> “[W]here there is a conflict between guidelines and manuals and a properly promulgated administrative issuance”, administrative issuances have greater legal authority over manuals.<sup>543</sup> Also, hiring manuals do not have binding authority.<sup>544</sup>

➤ Retroactivity

Laws cannot be applied retroactively.<sup>545</sup> For example, in *Nogueira*, UNAT held that “since the incidents in question occurred before ST/SGB/2008/5 was promulgated it is not applicable in this case.”<sup>546</sup>

➤ Human Rights

“Everyone, without any discrimination, has the right to equal pay for equal work.”<sup>547</sup> “[T]he principle ‘equal pay for work of equal value’ forbids discrimination; but it does not prohibit every form of different treatment of staff members.”<sup>548</sup> Also, “principles of equality are not affected by reasonable differences in agencies’ policies”.<sup>549</sup>

➤ Delegation of authority

“In matters of delegation of authority, the legal instrument delegating authority must be read carefully and restrictively.”<sup>550</sup> “Any adequate mechanism can be used for the purpose of delegation, provided that it contains a clear transmission of authority to the grantee concerning the matter being delegated.”<sup>551</sup> “[I]n the absence of any specific provision governing the process for holding staff members with designation accountable, the UNDT would rely on the basic principles of administrative law and judicial review [...]. [A]ny administrative action in relation to the withdrawal of a designation should be lawful, reasonable and procedurally

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<sup>539</sup> *Al Abani* 2016-UNAT-663, Dissenting Opinion of Judge Chapman, para. 7.

<sup>540</sup> *Gehr* 2013-UNAT-293, para. 32. See also, *Dalgaard et al.* 2016-UNAT-646, para. 13.

<sup>541</sup> *Charles* 2013-UNAT-286, para. 23.

<sup>542</sup> *Ibid.*

<sup>543</sup> *Mashhour* 2014-UNAT-483, paras. 22-23. See also, *Villamorán* 2011-UNAT-160.

<sup>544</sup> *Pinto* 2018-UNAT-878, para. 23. For examples of manuals lacking legal binding force, see *Asariotis* 2015-UNAT-496, paras. 20-22; *Krioutchkov* 2017-UNAT-744, para. 38.

<sup>545</sup> *Nogueira* 2014-UNAT-409, paras. 14-15; *Hunt-Matthes* 2014-UNAT-444, para. 25; *Assale* 2015-UNAT-534, para. 34; *Al Abani* 2016-UNAT-663, paras. 24-26.

<sup>546</sup> *Nogueira* 2014-UNAT-409, para. 14.

<sup>547</sup> Article 23(2) of the UDHR. See also, *Tabari* 2010-UNAT-030, para. 17; *Chen* 2011-UNAT-107, para. 15; *Elmi* 2016-UNAT-704, para. 32.

<sup>548</sup> *Elmi* 2016-UNAT-704, para. 33.

<sup>549</sup> *Charot* 2017-UNAT-715, para. 51.

<sup>550</sup> *Malmström* 2013-UNAT-357, para. 52.

<sup>551</sup> *Bastet* 2015-UNAT-511, para. 49. See also, *Ademagic et al.* UNDT/2012/131, paras. 49-69.

fair.”<sup>552</sup> In *Ishaish*, UNRWA DT found that “[as] there is no delegation of authority, [...] the decision to terminate the Applicant was taken by an unauthorized individual and that on that ground it is unlawful and must be rescinded.”<sup>553</sup>

➤ *Break in service*

“In the UN context, a break in service is, in essence, a certain period following the end of a contract, during which a person cannot be employed by the United Nations. [...] A break in service also has the effect of interrupting continuous appointment.”<sup>554</sup>

➤ *Applicability of the UN’s administrative issuances to the UN’s funds and programmes*

“UNFPA is a separately administered fund of the [UN] and has promulgated its own separation policy.”<sup>555</sup> “[A]dministrative issuances do not apply to UNFPA, unless their applicability is expressly provided for in the administrative issuance or expressly accepted by UNFPA being a separately administered fund.”<sup>556</sup>

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<sup>552</sup> *Kallon* 2017-UNAT-742, para. 22. For an example where UNDT made an error in fact with respect to delegated authority, see *Elobaid* 2018-UNAT-822, paras. 32-34.

<sup>553</sup> *Ishaish* UNRWA/DT/2014/033, para. 27.

<sup>554</sup> *Rockcliffe* UNDT/2012/033, para. 37. See also, *Castelli* 2010-UNAT-037 and other applicable administrative issuances.

<sup>555</sup> *Weerasooriya* 2015-UNAT-571, para. 19.

<sup>556</sup> *Ibid.*, para. 20. For other similar cases, see *Charot* 2017-UNAT-715, para. 49. See also, *Mashour* 2014-UNAT-483.

## **PART II: Substantive Matters**

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## 9. Non-selection

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### A. Receivability

The deadline for challenging a selection decision runs from the time that a staff member has been informed that she/he had not been selected, not from the time of appointment of the selected staff member.<sup>557</sup> Similarly, a staff member cannot argue that she/he is, in fact, contesting the decision to appoint another candidate, as this decision is the consequence of the non-selection decision.<sup>558</sup>

It is also expected from a staff member to challenge a specific selection process for her/his application to be receivable. Complaints of general discrimination are not sufficient.<sup>559</sup>

It is also important to note that “[a] selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT.”<sup>560</sup> For example, not shortlisting an applicant is “an internal step within the selection process, it is not an administrative decision. [Accordingly,] [t]he only appealable decision [in a non-shortlisting situation would be] the decision not to select [the concerned applicant] for the position in question.”<sup>561</sup> “Such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration in a non-selection case that has direct legal consequences.”<sup>562</sup>

In *Hussein*, the Applicant “was the only candidate recommended for the position. Later, the recruitment process was cancelled and the post was re-advertised. Hussein again applied for the post. She challenged the first recruitment while being a candidate for the second recruitment, and wanted the first recruitment to be kept in abeyance.”<sup>563</sup> However, UNAT held that it is not possible to keep in abeyance a challenge to the first recruitment exercise while being a candidate for the second.<sup>564</sup>

UNAT also underlined that a candidate who has no chance of selection, for example a non-shortlisted candidate, “lacks standing [...] to challenge the qualifications of the selected candidate, in support of his own interest in the position”.<sup>565</sup>

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<sup>557</sup> *Roig* 2013-UNAT-368, paras. 18-19.

<sup>558</sup> *Ivanov* 2013-UNAT-378, paras. 17-18.

<sup>559</sup> *Planas* 2010-UNAT-049, paras. 20-22; *Ibekwe* 2011-UNAT-179, para. 29; *Reid* 2014-UNAT-419, para. 20; *Aliko* 2015-UNAT-540, para. 38.

<sup>560</sup> *Ishak* 2011-UNAT-152, para. 29.

<sup>561</sup> *Abdellaoui* 2019-UNAT-928, para. 17.

<sup>562</sup> *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 33. See also, *Birya* 2015-UNAT-562, para. 44; *Auda* 2017-UNAT-786, paras. 26 and 30.

<sup>563</sup> *Hussein* 2010-UNAT-006, para. 1.

<sup>564</sup> *Ibid.*, para. 11.

<sup>565</sup> *Verma* 2018-UNAT-829, para. 31.

## A. Judicial Review

Judicial review of non-selection decisions represents some particularities. As a general principle, “every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; [...] (2) whether the staff member was given fair and adequate consideration”,<sup>566</sup> and (3), “whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner”.<sup>567</sup>

In addition, the Administration “has broad discretion in matters of staff selection”.<sup>568</sup> And DT’s role “is not to substitute [its] decision for that of the Administration”.<sup>569</sup> “[I]t is not the function of [DT] to take on the substantive role with which an interview panel is charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in [DT] is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy they deem appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.”<sup>570</sup> DT’s role is limited to a judicial review of “whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner”.<sup>571</sup>

In *Lemonnier*, DT “improperly replaced the Administration in the selection process. [DT] redefined the ‘headquarters experience’ requirement; it applied its own definition of the ‘headquarters experience’ requirement to *both* Mr. Lemonnier and the *selected* candidate; and it *compared* the qualifications of the *selected* candidate to Mr. Lemonnier’s qualifications, based on evidence *outside* the administrative record.”<sup>572</sup> Similarly, in *Sarrouh*, UNAT held that DT erred by substituting its own views with respect to a candidate’s performance in a previous post as part of the candidate’s evaluation in view of the “pertinent criteria for the post in question”.<sup>573</sup>

## B. Burden of Proof/Presumption of regularity

“[I]n non-selection cases [,] all official acts are presumed to have been regularly performed.<sup>[574]</sup> This is a rebuttable presumption. The presumption stands satisfied if the Administration is able to minimally show that full and fair consideration was given to the candidate. The burden

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<sup>566</sup> *Luvai* 2014-UNAT-471, para. 31. See also, *Abbassi* 2011-UNAT-110, paras. 23-24.

<sup>567</sup> *Savado* 2016-UNAT-642, para. 40.

<sup>568</sup> *Ljungdell* 2012-UNAT-265, para. 30.

<sup>569</sup> *Ibid.*

<sup>570</sup> *Fröhler* 2011-UNAT-141, para. 32.

<sup>571</sup> *Ljungdell* 2012-UNAT-265, para. 30. For other examples where these principles were affirmed, see *Majbri* 2012-UNAT-200, para. 35; *Charles* 2013-UNAT-285, para. 39; *Bofill* 2013-UNAT-383, para. 21; *Luvai* 2014-UNAT-417, paras. 31-32; *Hersh* 2014-UNAT-433, para. 29; *Terragnolo* 2014-UNAT-445, para. 22; *Bali* 2014-UNAT-450, para. 29; *Dhanjee* 2015-UNAT-527, para. 24; *Staedtler* 2015-UNAT-547, para. 27; *Scheepers et al.* 2015-UNAT-556, paras. 39-40; *Survo* 2015-UNAT-595, para. 67; *Niedermayr* 2015-UNAT-603, paras. 21ss; *Tiwathia* 2016-UNAT-616, para. 30; *Savado* 2016-UNAT-642, para. 40; *Nikolarakis* 2016-UNAT-652, para. 30-31; *Loeber* 2018-UNAT-836, para. 14.

<sup>572</sup> *Lemonnier* 2017-UNAT-762, paras. 34-36, emphasis in original.

<sup>573</sup> *Sarrouh* 2017-UNAT-784, para. 38.

<sup>574</sup> This is known as the ‘presumption of regularity’.

of proof then shifts to the staff member to show, through clear and convincing evidence, that she was denied a fair chance of [selection or] promotion.”<sup>575</sup> Accordingly, a candidate challenging a non-selection decision must prove through clear and convincing evidence any of the following grounds: 1) the procedures were violated; 2) the members of the panel were biased; 3) the panel discriminated against an interviewee; 4) relevant material was ignored or irrelevant material was considered; or 5) potentially other grounds depending on the facts of the case.<sup>576</sup>

Despite UNAT’s Judgment in *Rolland*, in *Majbri*, UNAT held that it was expected from a candidate challenging a non-selection decision to prove his arguments through a preponderance of the evidence, instead of clear and convincing evidence.<sup>577</sup> As a result, there was some ambiguity regarding the exact standard of proof in weighing evidence in non-selection cases. For example, in *Luvai*, UNAT applied the standard of “clear and convincing evidence”, but still referred to *Majbri*.<sup>578</sup> In subsequent cases, UNAT referred to *Rolland*. With the Judgment in *Lemonnier*, UNAT clarified that the standard of proof in weighing evidence in non-selection cases is clear and convincing evidence.<sup>579</sup> UNAT held that “it [is] the staff member’s burden to prove by clear and convincing evidence that the Administration did not give his candidacy full and fair consideration [...]. The ‘balance of evidence’ [*i.e.*, the preponderance standard] is a lesser standard of proof than clear and convincing evidence.”<sup>580</sup>

As noted above, “a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives such as bias or discrimination. A candidate, however, does not have a right to a promotion”.<sup>581</sup> In *Hersh*, “the Administration manipulated the job description and posting and failed to apply the relevant Regulations and Rules and guidelines in a fair and transparent manner”.<sup>582</sup>

UNAT also held that “[a] decision may be set aside if there is a reasonable apprehension of bias. In other words, there is no need to prove actual bias but only a reasonable apprehension. The test is objective and an inference of a reasonable apprehension of bias must be consistent with the proved facts and a plausible and probable inference.”<sup>583</sup>

For example, in *Noberasco*, the Applicant was eliminated from the selection process for belatedly submitting her written assessment.<sup>584</sup> However, the delay was due to a technical

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<sup>575</sup> *Ibekwe* 2011-UNAT-179, para. 1. See also, *Rolland* 2011-UNAT-122, para. 26; *Luvai* 2014-UNAT-417, para. 40; *Simmons* 2014-UNAT-425, para. 23; *Landgraf* 2014-UNAT-471, para. 28; *Dhanjee* 2015-UNAT-527, para. 30; *Zhuang, Zhao & Zie* 2015-UNAT-536, para. 48; *Staedtler* 2015-UNAT-547, para. 27; *Survo* 2015-UNAT-595, para. 68; *Niedermayr* 2015-UNAT-603, para. 23.

<sup>576</sup> *Rolland* 2011-UNAT-122, para. 26; *Majbri* 2012-UNAT-200, para. 30.

<sup>577</sup> *Majbri* 2012-UNAT-200, para. 30.

<sup>578</sup> *Luvai* 2014-UNAT-417.

<sup>579</sup> *Lemonnier* 2017-UNAT-762, paras. 34-36.

<sup>580</sup> *Ibid.*, paras. 35-36.

<sup>581</sup> *Ross* 2019-UNAT-944, para. 23 quoting *Ross* UNDT/2019/005, para. 46. See also, *Andrysek* 2010-UNAT-070, para. 17; *Charles* 2013-UNAT-286, para. 27; *Hersh* 2014-UNAT-433, para. 30; *Wang* 2014-UNAT-454, para. 41; *Luvai* 2014-UNAT-417, para. 32.

<sup>582</sup> *Hersh* 2014-UNAT-433, para. 30.

<sup>583</sup> *Mahmoud* 2019-UNAT-964, para. 30, emphasis added.

<sup>584</sup> *Noberasco* 2020-UNAT-1063.

problem and the Applicant was not at fault. This was discovered after recommendations had been made to the Central Review Panel (CRP) for approval, and the Applicant's test was only graded after that. Accordingly, UNAT held that the Applicant "faced the additional burden of persuading the assessment panel to move from the recommendation in the transmittal memo".<sup>585</sup> Thus, UNAT concluded that "[w]here a panel assesses one test on a different basis to others, a reasonable perception may arise that the test was not graded with the necessary degree of impartiality. A reasonable apprehension of partiality is normally sufficient to vitiate a decision. There is no need for an applicant to show ulterior motive, bad faith or actual bias."<sup>586</sup>

Also, in terms of conflict of interest, "[t]he core question for consideration and determination is [...] whether there is any *actual, possible or perceived* conflict of interest".<sup>587</sup>

In *Ross*, UNAT also held that "whether a non-selected candidate can meet his burden to show that he did not receive full and fair consideration for a job opening depends for the most part on the evidence the Administration reviewed in making the selection decision; not evidence outside the record of which the Administration was not aware. And certainly not evidence outside the record relating to the qualifications of the selected candidate."<sup>588</sup>

In *Krioutchkov*, the Applicant ticked the wrong option in Inspira while submitting his application for a job opening, resulting in his automatic elimination from the recruitment process, as his error showed that he did not possess a first-level university degree. UNAT held that "[the Applicant] had to provide correct information to be deemed eligible for the position, as the provision of incomplete or inaccurate application would render him ineligible for the position and he had access to the relevant Manual at the material moment."<sup>589</sup>

### C. Administration's selection policies

DT is not endowed with "the authority to amend any regulation or rule of the Organization. At best, [it] may point out what it considers to be a deficiency in a regulation or rule and recommend a reform or revision".<sup>590</sup> Accordingly, a promotion policy itself "cannot be the basis for [DT] to rescind an otherwise regular promotion session".<sup>591</sup> Yet, its wrongful implementation can be reviewed by DT.<sup>592</sup> In the same vein, "it is up to the [Administration] [...] to determine the relative importance of the criteria used to select the staff members who will be promoted".<sup>593</sup> As it has been consistently held by UNAT, "the [Administration] has a broad discretion in matters of promotion, and it is not the function of [DT] in the absence of

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<sup>585</sup> *Ibid.*, para. 47.

<sup>586</sup> *Ibid.*, para. 48.

<sup>587</sup> *Wilson* 2019-UNAT-961, para. 20, emphasis in original.

<sup>588</sup> *Ross* 2020-UNAT-1054, para. 29. For a distinction, see also, *Lemonnier* 2017-UNAT-762, para. 38.

<sup>589</sup> *Krioutchkov* 2019-UNAT-1066, para. 28.

<sup>590</sup> *Mebtouche* 2010-UNAT-033, para. 11. See also, *Mashhour* 2014-UNAT-483, para. 28; *Bezziccheri* 2015-UNAT-538, para. 37; *Elmi* 2016-UNAT-704, para. 35.

<sup>591</sup> *Ilic* 2010-UNAT-051, para. 35. See also, *Vangelova* 2010-UNAT-046, para. 23; *Mebtouche* 2010-UNAT-033, para. 11.

<sup>592</sup> *Ilic* 2010-UNAT-051, para. 35.

<sup>593</sup> *Bofill* 2013-UNAT-383, para. 20, quoting UNDT's judgment *Bofill* UNDT/2012/165.

evidence of bias, discriminatory practices or *mala fides* to substitute its judgment for that of the competent decision-maker”.<sup>594</sup>

#### D. Selection procedure

Regarding the eligibility criteria for job openings, the Administration may lawfully “set minimum experience eligibility criteria for vacancy announcements absent any promulgated issuance on the subject”.<sup>595</sup> Similarly, the SG has a “wide inherent discretion to determine eligibility criteria for temporary appointments”.<sup>596</sup>

In *Mohamed*, UNAT held that, given the “literal terms of the job opening”, it was acceptable to have a first level university degree in any field as long as it was combined with “extensive experience” in a related field to be accepted in lieu of the advanced university degree.<sup>597</sup> UNAT also added that the Administration “has a broad discretion to assess whether and to what extent the ‘experience in a related field’ of the selected candidate is sufficiently extensive”.<sup>598</sup>

“[T]he discretion to introduce criteria in the interests of operational requirements or efficiency is not unfettered and must be exercised lawfully, reasonably and fairly. The choice of eligibility criteria and their application must be reasonable, or at least rationally based, not arbitrary, capricious, improperly motivated or based on irrelevant considerations.”<sup>599</sup>

For example, selection procedures might include priority consideration for certain candidates. However, “priority consideration cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.”<sup>600</sup> An illustrative example of priority consideration is the situation of staff members with permanent appointments. A staff member with a permanent appointment occupying an abolished post does not have “an absolute right to be given preference in the selection to another post”.<sup>601</sup>

In *Charles*, UNAT held that “[t]here [was] no requirement [...] to first review all non-rostered candidates.”<sup>602</sup> In the same vein, UNAT held that “the selection of a candidate from the roster, shortly after the job opening had been formally advertised, was lawful.”<sup>603</sup> Also, “[t]he mere fact of being on the roster does not guarantee a promotion.”<sup>604</sup>

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<sup>594</sup> *Bofill* 2013-UNAT-383, para. 21.

<sup>595</sup> *Scheepers* 2015-UNAT-556, para. 52. See also, *Charles* 2013-UNAT-284.

<sup>596</sup> *Smith* 2017-UNAT-785, paras. 29-30. See also, *Krioutchkov* 2019-UNAT-966, para. 19.

<sup>597</sup> *Mohamed* 2020-UNAT-985, paras. 31-32.

<sup>598</sup> *Ibid.*, paras. 28-32.

<sup>599</sup> *Smith* 2017-UNAT-785, para. 30. See also, *Dhanjee* 2015-UNAT-527, paras. 29-31; *Scheepers et al.* 2015-UNAT-556, para. 55; *Nikolarakis* 2016-UNAT-652, para. 30.

<sup>600</sup> *Megerditchian* 2010-UNAT-088, paras. 27-28. See also, *Charles* 2012-UNAT-242, paras. 32-33; *Charles* 2013-UNAT-286, para. 26; *Onana* 2015-UNAT-533, para. 46; *Verma* 2018-UNAT-829, paras. 23-24.

<sup>601</sup> *Messinger* 2011-UNAT-123, para. 46.

<sup>602</sup> *Charles* 2014-UNAT-416, para. 28. See also, *Skourikhine* 2014-UNAT-468, para. 33; *Krioutchkov* 2016-UNAT-707, paras. 28-30.

<sup>603</sup> *Nouinou* 2020-UNAT-981, para. 71.

<sup>604</sup> *Krioutchkov* 2016-UNAT-707, para. 29.

In addition, “a staff member on a roster for a generic job opening for a position [...] may not necessarily possess the qualifications or requirements for the position as listed in the specific job opening [...]”.<sup>605</sup> This is due to the fact that “[g]enerally, a ‘job opening ... reflect[s] the functions and the location of the position and include[s] the qualifications, skills and competencies required’. This means that qualifications or requirements for a position may change over time, depending upon an unlimited number of factors which reflect the realities of the position at the time the job is open.”<sup>606</sup>

“The notion of transparency of, and access to, information, is very important in any Organization. It allows for openness, accountability and good governance, which indeed are the overarching principles of this Organization.”<sup>607</sup> Accordingly, “it is important in instances where there is a vacancy notice which targets a specific pool of candidates from a roster that the vacancy notice make specific mention to the effect that consideration will only be given to rostered candidates to fill the position”.<sup>608</sup>

“[T]he Administration is not under an obligation to pursue a recruitment procedure once begun, by filling the post which has become vacant. This falls within the discretionary authority of the Administration to terminate a recruitment procedure and/or to initiate a new one. The rule is nonetheless that, in filling the post, the Administration must proceed with the appointment of successful candidates in accordance with the recruitment results. However, it can deviate from that rule for sound reasons, justifying its decision clearly and fully, i.e. on account of irregularities occurred in the recruitment process or for reasons connected with the interests of the service, while providing an adequate statement of the reasons therefor which are subject to the above mentioned jurisprudential principles of judicial review as to their correctness and veracity.”<sup>609</sup>

UNAT also held that “two steps must be distinguished in the selection process: firstly, the Agency examines all applications with the purpose to create a long-list, including all the candidates who meet the requirements as described in the announcement; and secondly, the Agency short-lists a limited number of candidates who proceed to the next step in the selection process. Especially for the shaping of a short-list, the discretion of the Administration is broad even if [...] not unfettered.”<sup>610</sup>

#### E. **Rescission**

As a general principle, “[a]n irregularity in promotion procedures will only result in the rescission of the decision not to promote a [staff member] when he or she would have had a significant chance for promotion.”<sup>611</sup> “Where the irregularity has no impact on the status of a

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<sup>605</sup> *Lemonnier* 2017-UNAT-762, para. 29.

<sup>606</sup> *Ibid.*, para. 28.

<sup>607</sup> *Utkina* 2015-UNAT-524, para. 18. See also, *Krioutchkov* 2020-UNAT-1067, para. 38.

<sup>608</sup> *Krioutchkov* 2019-UNAT-920, para. 26. See also, *Krioutchkov* 2020-UNAT-1067, para. 38.

<sup>609</sup> *Kinyanjui* 2019-UNAT-932, paras. 21-24.

<sup>610</sup> *El-Madhoun* 2019-UNAT-947, paras. 13-14.

<sup>611</sup> *Bofill* 2011-UNAT-174, para. 1. See also, *Vagelova* 2011-UNAT-172, para. 19; *Dualeh* 2011-UNAT-175, para. 19; *Onana* 2015-UNAT-533, para. 48; *Pinto* 2018-UNAT-878, para. 24.

staff member, because he or she had no foreseeable chance for promotion, he/she is not entitled to rescission or compensation.”<sup>612</sup>

For example, in *Vangelova*, for 42 available promotion slots, there were 192 staff members above the Applicant on the list.<sup>613</sup> Therefore, the Applicant did not have a significant chance for promotion.<sup>614</sup> In *Akyeampong*, UNAT held that “had the two reprimands [of the Applicant] been considered in the correct perspective, as corrective measures”, the Applicant would have had a significant chance for promotion as one of the 10 candidates recommended.<sup>615</sup>

In *Ross*, UNAT explained further its jurisprudence established in *Bofill* about the rescission of non-selection decisions. Accordingly, UNAT held that “the principle in *Bofill* is, in any event, not restricted to procedural irregularities. It holds more broadly that any irregularity (procedural or substantive) in promotion cases will only give rise to an entitlement to rescission or compensation if the staff member has a significant or foreseeable chance for promotion. The irregularity must be of such a nature that, had it not occurred, the staff member would have had a foreseeable and significant chance for promotion.”<sup>616</sup>

UNAT further added that “even where there is a foreseeable and significant chance of promotion, rescission [,] [in other words, the actual cancellation of the recruitment or promotion exercise,] may not always be the appropriate remedy.”<sup>617</sup>

Lastly, UNAT held that the irregular composition of the interview panel, of itself, “is of such significance as it could well have affected the outcome of the selection process”.<sup>618</sup> However, “the mere fact that the interview panel did not take into consideration [a candidate’s] e-PAS reports, which were available to them, while relying on their own assessment of his competencies during the competency-based interview, does not render the selection process unreasonable or unfair”.<sup>619</sup>

In *Chhikara*, DT decided not to rescind an illegal selection process as it “found that a rescission would not be feasible due to the time which had elapsed between the contested administrative decision and the date of the Judgment (around four years)”.<sup>620</sup> However, UNAT held that “the lapse of time [...] was insufficient to justify the UNDT’s decision not to rescind the contested decision”.<sup>621</sup> UNAT added that the rescission “is mandatory and cannot be avoided on the basis

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<sup>612</sup> *Bofill* 2011-UNAT-174, para. 28. See also, *Vagelova* 2011-UNAT-172, para. 19; *Dualeh* 2011-UNAT-175, para. 19; *Onana* 2015-UNAT-533, para. 48; *Pinto* 2018-UNAT-878, para. 24.

<sup>613</sup> *Vangelova* 2011-UNAT-172

<sup>614</sup> For similar examples where the staff members did not have a significant chance for promotion, see *Mebtouche* 2010-UNAT-033; *Andrysek* 2010-UNAT-070; *Antaki* 2010-UNAT-096, para 23; *Bofill* 2011-UNAT-174; *Dualeh* 2011-UNAT-175; *Charles* 2013-UNAT-283; *Pinto* 2018-UNAT-878, para. 24.

<sup>615</sup> *Akyeampong* 2012-UNAT-192, para. 29.

<sup>616</sup> *Ross* 2019-UNAT-926, paras. 47-48.

<sup>617</sup> *Ibid.*, para. 49.

<sup>618</sup> *Elayyan* 2018-UNAT-887, para. 39, quoting UNRWA DT’s judgment *Elayyan* UNRWA/DT/2018/025, para. 29.

<sup>619</sup> *Riecan* 2017-UNAT-802, para. 21.

<sup>620</sup> *Chhikara* 2020-UNAT-1014, para. 23.

<sup>621</sup> *Ibid.*, para. 26.

of the excessive length of time between the filing of the application and the issuance of the first instance decision”.<sup>622</sup>

#### F. Compensation

“[I]n determining compensation [in lieu of rescission], [DT] should bear in mind two considerations. The first is the nature of the irregularity, that led to the rescission of the contested administrative decision. The second is an assessment of the staff member’s genuine prospects for promotion if the procedure had been regular.”<sup>623</sup> With respect to the calculation of the amount of compensation, UNAT held that compensation in lieu of rescission for non-selection might be calculated based on “the probability of the candidate being selected”.<sup>624</sup> Yet, this is not the only method, and Judges are entitled to determine the appropriate amount of compensation.<sup>625</sup>

Where a loss of chance becomes speculative and complicated, DT “must assess the matter and arrive at a figure that is [...] fair and equitable, having regard to the number of imponderables that present in [the] case”.<sup>626</sup> UNAT “will generally defer to [DT’s] discretion in the award of damages as there is no set way [] to set damages for loss of chance or promotion”.<sup>627</sup>

One of the points underlined by UNAT in fixing the compensation in non-selection cases is as follows: “[c]ompensation for loss of a ‘chance’ of promotion may sometimes be made on a percentage basis, but where the chance is less than ten per cent, damages become too speculative. The trial court is in the best position to assess those damages. Except in very unusual circumstances, damages should not exceed the percentage of the difference in pay and benefits for two years.”<sup>628</sup>

For example, in *Chhikara*, UNAT held that the candidate’s “chances of being rostered or selected for the post can be fairly stated as one in five, bearing in mind that he was one of five short-listed candidates”.<sup>629</sup> The Applicant claimed that “the post in question involved a three-year contract” [...], whereas he [was] currently on a year to year contract. Since the post in question [was] at the same level as his current position, [UNAT] [found] that it [was] appropriate to calculate compensation based on the difference between the amount earned on a one-year contract and the amount he would have earned on a three-year contract.”<sup>630</sup> However, UNAT added that “we must take into account the many possibilities that [the Applicant] may not have served out the full three-year contract (such as abolition of post, illness, resignation,

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<sup>622</sup> *Ibid.*

<sup>623</sup> *Ardisson* 2010-UNAT-052, para. 24. See also, *Fröhler* 2011-UNAT-141, para. 33; *Fradin De Bellabre* 2012-UNAT-214, para. 28; *Appleton* 2013-UNAT-347, para. 22.

<sup>624</sup> *Appleton* 2013-UNAT-347, para. 23. See also, *Hasting* 2011-UNAT-109, para. 18; *Mezoui* 2012-UNAT-220, paras. 43-45.

<sup>625</sup> *Lutta* 2011-UNAT-117, para. 14.

<sup>626</sup> *Niedermayr* 2015-UNAT-603, para. 40.

<sup>627</sup> *Muratore* 2012-UNAT-245, para. 5. See also, *Lutta* 2011-UNAT-117; *Sprauten* 2012-UNAT-219, para. 22.

<sup>628</sup> *Hastings* 2011-UNAT-109, para. 2. See also, *Krioutchkov* 2016-UNAT-691, para. 30; *Krioutchkov* 2017-UNAT-712, para. 18; *Pinto* 2018-UNAT-878, para. 24.

<sup>629</sup> *Chhikara* 2017-UNAT-723, para. 54.

<sup>630</sup> *Ibid.*, para. 55.

private business, etc.).”<sup>631</sup> Consequently, the alternative compensation was set at “an amount equal to one-fifth of the net base salary [the Applicant] would have received for one year had he been appointed to the post”.<sup>632</sup>

In another example with respect to a candidate who was unlawfully eliminated at the written assessment stage, UNAT took into account the Applicant’s “experience, skills and qualifications”, the fact that she “not only met all the requirements for the post but also all other desirable criteria”, the fact that “[h]er ability to perform higher functions at the [post’s] level was recognized in unequivocal terms in her [...] ePAS”, and the fact that one of the four recommended candidates “did not meet the language requirement”.<sup>633</sup> UNAT considered that the Applicant “had a 20-25 per cent prospect of success” and that “the sum of USD10,000 constitute[d] an adequate remedy for [her] loss of chance”.<sup>634</sup>

In *Krioutchkov*, UNAT found that the Applicant’s removal from the roster was unlawful. Given the fact that “the position [the Applicant] had applied for was at the same level as his current one, [...] [so,] no effect on his remuneration. Next, having weighed the impact on his mobility requirements and, as a consequence, on his potential career development within the Organization, [UNAT] [found] it adequate to set the amount for compensation in lieu at the equivalent of two months’ net base salary.”<sup>635</sup>

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<sup>631</sup> *Ibid.*

<sup>632</sup> *Ibid.*, para. 56.

<sup>633</sup> *Noberasco* 2020-UNAT-1063, para. 53.

<sup>634</sup> *Ibid.*, paras. 53-54.

<sup>635</sup> *Krioutchkov* 2020-UNAT-1067, para. 41.

## 10. Non-renewal

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As part of its judicial review in determining the lawfulness of a non-renewal decision, DT must assess whether 1) the Administration abused its discretion; 2) the decision was based on discriminatory or other improper considerations; or 3) the Administration made an express promise creating an expectancy for the renewal.<sup>636</sup> UNAT has clearly established that “where the applicable Staff Regulations and Rules provide that [a fixed-term appointment (FTA)] does not carry an expectancy of renewal and is *ipso facto* extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal”.<sup>637</sup>

### A. Substantial matters

When a non-renewal decision was based on a performance evaluation that was subsequently upgraded after the rebuttal proceedings, there would be a denial of due process rights, and the concerned Applicant would be, in principle, entitled to “compensation for moral damages caused by the denial of his due process rights”.<sup>638</sup>

FTAs and temporary appointments (TA) do not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment.<sup>639</sup> The same principle is also valid for appointments of limited duration, such as LDCs.<sup>640</sup>

“[T]he Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunal’s ability to judicially review the validity of the Administration’s decision.”<sup>641</sup> However, “[a]n administrative decision not to renew an FTA must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal.”<sup>642</sup> Regarding the reasons provided by the Administration, UNAT clarified that “the harmful administrative decision must be fully and adequately motivated. The reasoning must be sufficiently clear, precise, and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful.”<sup>643</sup>

A non-renewal decision would be lawful when a staff member partially meets performance expectations, as “a staff member who has received two consecutive ratings of ‘[p]artially meets performance expectations’[,] [he/she] has no legitimate expectation of renewal of contract at

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<sup>636</sup> *Ahmed* 2011-UNAT-153, para. 47; *Abdalla* 2011-UNAT-138, para. 23-24 and *Appellee* 2013-UNAT-341, para. 15; *Muwambi* 2017-UNAT-780, para. 27.

<sup>637</sup> *Obdeijn* 2012-UNAT-201, para. 31; *Schook* 2012-UNAT-216, para. 27.

<sup>638</sup> *Dzintars* 2011-UNAT-176, para. 31. With respect to the entitlement to the compensation, it is important to note that this judgment was issued before the modification of the Tribunals’ statutes.

<sup>639</sup> UN Staff Rules 4.12 and 4.13. See also, *inter alia*, *Syed* 2010-UNAT-061, para. 13; *Badawi* 2012-UNAT-261, para. 33; *Appellee* 2013-UNAT-341, para. 16; *Hepworth* 2015-UNAT-503, para. 42; *Munir* 2015-UNAT-522, para. 24; *Nouinou* 2020-UNAT-981, paras. 65-66.

<sup>640</sup> *Nouinou* 2019-UNAT-902, para. 44.

<sup>641</sup> *Pirnea* 2013-UNAT-311, para. 33. See also, *Obdeijn* 2012-UNAT-201, para. 36; *Muwambi* 2017-UNAT-780, para. 29; *He* 2018-UNAT-825, para. 46; *Nouinou* 2019-UNAT-902, para. 50; *Agha* 2019-UNAT-916, para. 20; *Abdeljalil* 2019-UNAT-960, para. 24.

<sup>642</sup> *Obdeijn* 2012-UNAT-201, para. 32.

<sup>643</sup> *Jafari* 2019-UNAT-927, paras. 36.

the end of the contract period”.<sup>644</sup> In *Sarwar*, UNAT clarified the standard of review in poor performance cases as follows: “It is incumbent on the [Administration] to provide sufficient proof of incompetence, usually on the basis of a procedurally fair assessment or appraisal establishing the staff member’s shortcomings and the reasons for them.”<sup>645</sup> “The reason for termination must rest on a reasonable basis and sufficient proof, as a matter of objective fact, that the staff member’s performance falls short” and the deficiency must be “sufficiently serious to render the continuation of the employment relationship untenable.”<sup>646</sup>

In that sense, in reviewing a poor performance case, it is expected from the Administration to verify “whether: i) the staff member was aware, or could reasonably be expected to have been aware, of the required standard; ii) the staff member was given a fair opportunity to meet the required standard; and iii) termination of appointment is an appropriate action for not meeting the standard in the circumstances”.<sup>647</sup>

For example, “to justify a decision [(non-renewal/reassignment)] based on poor performance, it is not sufficient to give informal feedback to the staff member. The Administration should usually follow [the appropriate] procedure and produce an e-PAS.”<sup>648</sup> Similarly, a non-renewal based on under-performance is unlawful if “the Administration failed to comply with the requirements set out in the Administrative Instruction [...], causing the appraisal to be invalid or the need to upgrade it to ‘fully meets performance expectations’.”<sup>649</sup>

In any case, “[a]n administrative decision not to renew a fixed-term appointment -- even one not to renew based on poor performance -- can be challenged on the grounds the decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation”.<sup>650</sup>

“The onus of proving that the grounds for non-renewal were unlawful lies with the staff member contesting the [non-renewal] decision”.<sup>651</sup> However, the Administration’s “refusal to disclose the reasons for the contested decision [would] shift [] the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives”.<sup>652</sup>

Regarding minor procedural errors, UNAT held that “not every irregularity in itself will necessarily lead to vacating an administrative decision”.<sup>653</sup> UNAT has also consistently held

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<sup>644</sup> *Dzintars* 2011-UNAT-176, para. 31. See also, *Jennings* 2011-UNAT-184, para. 24; *Said* 2015-UNAT-500, paras. 34-41; *Assale* 2015-UNAT-534, para. 30; *El Sadek* 2019-UNAT-900, para. 52.

<sup>645</sup> *Sarwar* 2017-UNAT-757, para. 71.

<sup>646</sup> *Ibid.*, para. 72.

<sup>647</sup> *Ibid.*, para. 73.

<sup>648</sup> *Ncube* 2017-UNAT-721, para. 18. See also, *Rees* 2012-UNAT-266, para. 65.

<sup>649</sup> *Tadonki* 2014-UNAT-400, paras. 51.

<sup>650</sup> *Morsy* 2013-UNAT-298, para. 23. See also, *Assad* 2010-UNAT-021; *Said* 2015-UNAT-500, para. 34; *Assale* 2015-UNAT-534, para. 30; *Muwambi* 2017-UNAT-780, para. 27.

<sup>651</sup> *Jennings* 2011-UNAT-184; para. 25. See also, *Assad* 2010-UNAT-021, para.20; *Obdeijn* 2012-UNAT-201 para. 38; *Nwuke* 2015-UNAT-506 para. 49; *Hepworth* 2015-UNAT-503 paras. 43-44; *Muwambi* 2017-UNAT-780, para. 27; *Nouinou* 2019-UNAT-902, paras. 64 and 65.

<sup>652</sup> *Obdeijn* 2012-UNAT-201, paras. 38.

<sup>653</sup> *Mansour* 2018-UNAT-881, para. 24. See also, *Ncube* 2017-UNAT-721, paras. 20-22.

that “only substantial procedural irregularities can render an administrative decision unlawful”.<sup>654</sup> In that sense, the Administration cannot be “forced to renew the appointment of an unqualified staff member merely because there are procedural errors in the evaluation process, provided that the procedural errors are not so serious and substantial as to render the evaluation process unlawful or unreasonable or as to violate the due process rights of the staff member in question”.<sup>655</sup> In *Sarwar*, UNAT developed its jurisprudence and explained that the seriousness of the error must be examined on a case by case basis.<sup>656</sup>

In *Allen*, DT had erroneously interpreted UNAT’s jurisprudence in *Sarwar*. UNAT reiterated that once poor performance is invoked for non-renewal, “relevant policy requires the presentation of a performance-related justification for non-renewal”.<sup>657</sup>

“[C]hronic absenteeism may be a lawful basis for a decision not to renew a fixed-term contract.”<sup>658</sup> Likewise, concerns about the staff member’s performance related to a few competencies might be enough to terminate the staff member’s service for unsatisfactory performance.<sup>659</sup>

In *Pirnea*, UNAT held that DT’s finding about the existence of “hidden or tacit reasons for the [impugned] decision” were based solely on speculation “stemming from unproven allegations”.<sup>660</sup> In *Gehr*, the Applicant contended that “the decision to extend his appointment for only 11 months [...] was motivated by retaliation for his having filed two applications with [DT] and reported misconduct [...]”.<sup>661</sup> The Applicant’s claim was rejected, as he “had failed to show that [his case] was motivated by improper motives and unfairness compared to other staff members who had also received [11-month extensions]”.<sup>662</sup> In *Kacan*, UNAT confirmed that the Applicant “failed to establish that the decision not to renew his appointment was tainted by improper motives and was discriminatory. Rather, [the impugned decision] was a legitimate exercise of the Administration’s discretion, based on the operational realities faced by the Field Office, [...] [in view of its temporary closure] [...]”.<sup>663</sup>

“[T]he lack of the minimum educational requirement [...] constitute[s] a valid reason proffered by the Administration for not renewing [an staff member’s] contract.”<sup>664</sup>

➤ *Onus of proof – jurisprudential change!*

In *Loose*, UNAT introduced an important nuance and amendment to the aforementioned jurisprudence with respect to the onus of proof in non-renewal decisions. To begin with, UNAT held that “[t]o require as an absolute onus the staff member to establish his or her case entirely

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<sup>654</sup> *Thiombiano* 2020-UNAT-978, para. 34. See also, *Muindi* 2017-UNAT-782, para. 48.

<sup>655</sup> *Ncube* 2017-UNAT-721, para. 19. See also, *Mansour* 2018-UNAT-881, para. 24.

<sup>656</sup> *Sarwar* 2017-UNAT-757, paras. 82-88.

<sup>657</sup> *Allen* 2019-UNAT-951, para. 35.

<sup>658</sup> *Agha* 2019-UNAT-916, para. 24. See also, *Abdallah* 2010-UNAT-091.

<sup>659</sup> *El Sadek* 2019-UNAT-900, para. 55.

<sup>660</sup> *Pirnea* 2013-UNAT-311, para. 37.

<sup>661</sup> *Gehr* 2012-UNAT-234, para. 42.

<sup>662</sup> *Ibid.*, para. 43.

<sup>663</sup> *Kacan* 2015-UNAT-582, para. 27.

<sup>664</sup> *Diop* 2019-UNAT-950, para. 28

while allowing the Administration to withhold (and even potentially oppose production of) information relevant to that decision has the potential to cause injustice. While this is established jurisprudence that we should follow, it is neither forever immutable nor of absolute application in any particular case.”<sup>665</sup> UNAT noted that “a blanket onus of proof” cannot be put on the staff members in certain circumstances and that a “more nuanced application of a shifting onus of proof [might be] appropriate for [certain] cases”.<sup>666</sup> Accordingly, UNAT concluded that “there is an initial [*prima facie*<sup>667</sup>] onus on a staff member [...] to establish a sufficient or apparent case of adequacy of resources to support a renewal or extension or other relevant grounds for not discontinuing the employment. When that initial onus <sup>[668]</sup> has been discharged by the staff member, the onus of justifying in law the decision not to renew where that is justiciable (such as in cases of legitimate expectation of renewal) moves to the Administration. It will then be able (and indeed in practice be required) to adduce the evidence that only it has to support its decision whichever of not to extend or renew an FTA or convert it to a continuing engagement in circumstances in which that would otherwise be expected to occur.”<sup>669</sup>

Also, in *Icha*, the Applicant’s post was abolished and she was terminated. The DT found that “the Secretary-General met the minimal standard of proof that the abolition of Ms. Icha’s post and her non-placement on another suitable post had been done in accordance with the Regulations and Rules [...] [and that] the burden of proof had shifted to Ms. Icha to show by clear and convincing evidence a violation of her employment rights”.<sup>670</sup> However, during the appeals proceedings, “the Secretary-General conceded that another [...] staff [...] was reassigned to a newly created position [...] [and that] [t]here was no vacancy announcement for this post”.<sup>671</sup> Accordingly, UNAT held that as “ Ms. Icha was not given the opportunity to apply for the newly created position [...][,] the Administration did not demonstrate that all reasonable efforts had been made to consider Ms. Icha for available suitable posts”.<sup>672</sup>

Furthermore, in *Loose*, UNAT endorsed UNDT’s conclusion that “the reason constituting the ground of the administrative decision should persist till the end of the contract, thus continuously supporting the reasons for the Administration’s choice” and that “the

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<sup>665</sup> *Loose* 2020-UNAT-1043, para. 39.

<sup>666</sup> *Ibid.*, para. 41.

<sup>667</sup> *Ibid.*, para. 37. UNAT in fact stated the following about the requirement of *prima facie*: “It is not unreasonable [...] to expect the employer to justify in law his decision when challenged to do so and when an applicant has made out an apparent (*prima facie*) case of absence of lawful justification”.

<sup>668</sup> *Pirnea* 2013-UNAT-311, para. 32; *Agha* 2019-UNAT-916, para. 24; *Porrás* 2020-UNAT-1068, para. 24.

<sup>669</sup> *Pirnea* 2013-UNAT-311, para. 41.

<sup>670</sup> *Icha* 2020-UNAT-1077, para. 1.

<sup>671</sup> *Ibid.*, para. 49.

<sup>672</sup> *Ibid.*, para. 52. Also, see especially, Concurring Opinion of Judge Colgan arguing for a complete change of jurisprudence as follows in para. 2: “This case provides a good example of where this jurisprudence has proven problematic and has delayed the expeditious and just disposition of the case. The principles at issue include the ‘presumption of regularity’ of administrative decisions; the imposition of an onus of proof resting on an affected staff member of establishing irregularity or other unlawfulness once the Organisation has met a very low threshold of regularity; and then that the burden of that proof carried by the staff member is to the high standard of a ‘clear and convincing’ case, the same standard of evidential proof as the Organisation is expected to show in its investigation of allegations of serious misconduct against staff members that may result in their summary dismissal from service.

Administration [is] under an obligation to verify whether the financial constraints precluding the renewal of [a staff member's] appointment continued to exist [after the notification of the contested decision]".<sup>673</sup>

## **B. Promise/Legitimate expectancy**

Regarding the legitimate expectancy of renewal, "unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended", there is no legitimate expectancy.<sup>674</sup> In addition, "the jurisprudence requires this promise at least to be in writing".<sup>675</sup>

UNAT also held that, to be sustained, a legitimate expectancy "must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case".<sup>676</sup> For example, "past renewals of an appointment [are not] a basis for an expectancy of renewal".<sup>677</sup> Going through a recruitment process does not confer any legitimate expectations.<sup>678</sup> "[G]eneral statements made at a Town Hall meeting" is not enough for an expectancy of renewal.<sup>679</sup>

The staff member's performance plays a key role regarding renewals. For example, a staff member with partial satisfactory performance has no legitimate expectation of renewal.<sup>680</sup> Similarly, not giving an applicant the lowest rating on performance appraisals does not show a commitment by the Administration to a renewal of appointment.<sup>681</sup>

### ➤ Jurisprudential change!

In *Loose*, while affirming the aforementioned established jurisprudence, UNAT added a significant nuance about the legitimate expectancy for renewals. It added that "while a fixed term creates no expectation of renewal, such is possible and, as the undisputed facts of this case and many others illustrate, is a relatively common occurrence".<sup>682</sup> In the context of the case, UNAT held that "[t]o [the Applicant's] knowledge, the financial impediments [...] had apparently been resolved. That appeared to be confirmed by the passing of budgets, including the [budget meetings] relating to her particular work. Likewise, there had, to her knowledge, been budgetary provision made for a P3 role in her unit, the same as she had held. In the absence of the financial and organisational information [...] to rely on [...], it cannot be said to have

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<sup>673</sup> *Ibid.*, para. 53, citing *Loose* UNDT/2020/38, paras. 42, 47 and 54.

<sup>674</sup> *Muwambi* 2017-UNAT-780, para. 25. See also, *Igbinedion* 2014-UNAT-411, para. 26.

<sup>675</sup> *Muwambi* 2017-UNAT-780, para. 25.

<sup>676</sup> *Munir* 2015-UNAT-522; para. 24. See also, *Abdalla* 2011-UNAT-138, para. 24; *Ahmed* 2011-UNAT-153.

<sup>677</sup> *Kacan* 2015-UNAT-582, para. 19. See also, *Igbinedion* 2014-UNAT-411, para. 26; *Hepworth* 2015-UNAT-503, para. 42; *Abdeljalil* 2019-UNAT-960, para. 41.

<sup>678</sup> *Neocleous* 2016-UNAT-635, para. 30; *Cicek* 2016-UNAT-636 para. 31.

<sup>679</sup> *Toure* 2016-UNAT-660, para. 26.

<sup>680</sup> *Dzintars* 2011-UNAT-176, para. 31; *Said* 2015-UNAT-500, para. 41. See also, *Jennings* 2011-UNAT-184 para. 24.

<sup>681</sup> *Charot* 2017-UNAT-715, para. 46.

<sup>682</sup> *Loose* 2020-UNAT-1043, para. 59.

erred in concluding that she had a legitimate expectation of continued employment, despite the previous notice of non-renewal.”<sup>683</sup>

### C. **Compensation**

In *Porras*, the Applicant was declared *persona non grata* by the Sudanese Government. The Applicant was reassigned to another post outside Sudan for more than two years. However, following a resolution of the GA, the post to which he was reassigned was re-deployed back to Sudan. As a result, the Administration decided not to renew the Applicant’s appointment. UNAT held that “there was no indication that the Organization made any efforts to review the status [of the Applicant] with the Sudanese Government before the non-renewal. Nor was there a specific explanation provided as to why these efforts could not be made.”<sup>684</sup> Accordingly, UNAT found that non-renewal was unlawful and, given the fact that “there was no guarantee the [Applicant] would have had a visa issued to him before the non-renewal”, awarded to the Applicant four months’ net base salary as compensation.<sup>685</sup>

### D. **Separation following non-renewal**

A case of separation following non-renewal constitutes a case of appointment in the sense of Art. 10(2) and 10(5)(a) of DT Statute.<sup>686</sup>

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<sup>683</sup> *Ibid.*, para. 60.

<sup>684</sup> *Porras* 2020-UNAT-1068, para. 40.

<sup>685</sup> *Ibid.*, para. 44.

<sup>686</sup> *Benchebbak* 2012-UNAT-256, para. 34; *El-Komy* 2013-UNAT-324, paras. 19-20; *Siri* 2016-UNAT-609, para. 33.

## 11. Separation from service

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### A. Abolishment of post

“[T]ermination [is] a ‘separation initiated by the [Administration]’, and [...] one basis for termination may be ‘the abolition of posts or reduction of staff’.”<sup>687</sup> The general principle in this respect is that the Administration “has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”.<sup>688</sup>

In the context of a downsizing entity, placing staff members on SLWFP until the end of their FTAs, instead of terminating their contract, “cannot be regarded as a disguised termination”.<sup>689</sup>

In several examples, UNAT concluded that the allegations of arbitrariness and unlawfulness with respect to the abolishment of posts were unfounded.<sup>690</sup> For example, in *Diallo*, UNAT underlined that “the abolition of a post [is] always a traumatic experience for the incumbent, and therefore greater objectivity, care, good faith and transparency [is] required”.<sup>691</sup>

If a staff member holding a permanent appointment is subject to termination following the abolition of a post or reduction of the staff, reasonable efforts need to be made by the Administration to find the staff member a suitable post.<sup>692</sup> However, this “does not confer on a staff member occupying an abolished post an absolute right to be given preference in applying for another post”.<sup>693</sup>

The question whether the jurisprudence of the former Administrative Tribunal, which held that a good faith effort be made by the Organization to find alternate posts for permanent staff members whose posts were to be abolished, has been left opened in the jurisprudence of UNAT. Many references have been made by DT to the idea of a “good faith effort”; however, UNAT has not mentioned anything about a good faith effort and is content to say that reasonable efforts are to be made by the Administration.

Nevertheless, in *El-Kholy*, UNAT held that the Administration has an obligation “to demonstrate that all reasonable and good faith efforts had been made to consider the staff member concerned for available and suitable posts [...] under Staff Rule 9.6(g), before taking the decision to terminate her permanent appointment”.<sup>694</sup> “It is for the Administration to prove

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<sup>687</sup> *Guzman* 2014-UNAT-455, para. 28.

<sup>688</sup> *Gehr* 2012-UNAT-236, para. 25; *Pacheco* 2013-UNAT-281, para. 22. See also, *Simmons* 2014-UNAT-425, para. 31; *Hersh* 2014-UNAT-433, para. 16; *Bali* 2014-UNAT-450, para. 21; *Matadi et al.* 2015-UNAT-592, para. 16; *Simmons* 2016-UNAT-624, para. 12.

<sup>689</sup> *Hamdan* 2020-UNAT-1050, para. 30.

<sup>690</sup> *Messinger* 2011-UNAT-123, para. 38; *Dumornay* 2010-UNAT-097, para. 21; *Gehr* 2012-UNAT-236, para. 37; *Liverakos* 2012-UNAT-206, para. 14; *Ruyooka* 2014-UNAT-487, paras. 20-22.

<sup>691</sup> *Diallo* 2014-UNAT-430, paras. 31. This was also confirmed in *De Aguirre* 2016-UNAT-705, para. 31; *Khalaf* 2016-UNAT-678, para. 38; *Matadi et al.* 2015-UNAT-592, para. 16; *Loeber* 2018-UNAT-844, para. 18; *Nouinou* 2019-UNAT-902, paras. 34-35.

<sup>692</sup> *Dumornay* 2010-UNAT-097, para. 21.

<sup>693</sup> *Messinger* 2011-UNAT-123, para. 46.

<sup>694</sup> *El-Kholy* 2017-UNAT-730, para. 25.

that the staff member holding a permanent appointment was afforded due and fair consideration, as required by Staff Rules 9.6(e), 9.6(g) and 13.1(d).”<sup>695</sup> UNAT also stated that “the failure on the part of [the Applicant] to participate in the Job Fairs [organised for the staff members affected by a restructuring exercise] does not shift the Administration’s obligation to find a vacant and suitable post onto [the Applicant’s] shoulders. Neither does the fact that [the Applicant] accepted a temporary assignment [...] or that she was informed that she was affected by the structural change and about the risk of separation from service due to the abolition of her post.”<sup>696</sup>

Moreover, given the fact that “the Administration revealed that several posts [...] were filled outside the scope of the Job Fairs by way of lateral moves or the placement of an unassigned staff member holding a permanent appointment”,<sup>697</sup> UNAT asked why the Applicant was not accorded “the same treatment [...] [but] was instead required to apply for those posts, which she could only have known about from public announcements?”<sup>698</sup> UNAT further held that “to consider that [the Applicant] was supposed to apply for suitable and advertised posts, concurring with the same conditions as external candidates, would render moot her right of preference deriving from Staff Rules 9.6(e), 9.6(g) and 13.1(d)”.<sup>699</sup>

In *Haimour and Al Mohammad*, in a case involving UNRWA’s regulatory framework, UNAT held that “while efforts to find a suitable post for the displaced staff member cannot be unduly prolonged, the person concerned is required to cooperate fully in these efforts”.<sup>700</sup> In other words, the affected permanent staff members must “fully cooperate in the process and make a good faith effort in order for their applications [for other positions] to succeed”.<sup>701</sup> “This includes a duty to apply within the deadlines and to respect the formal requirements.”<sup>702</sup> In that sense, “[i]f a permanent staff member refuses to apply to positions despite a direct call from his superior, there is no sufficient cooperation and the Administration has no duties under Staff Rules 9.6 and 13.1 to consider that staff member for available positions.”<sup>703</sup> Furthermore, “in order for the staff member to be retained in the service, [it is not enough] to have a relative competence for the new suitable post and the staff member is [...] required to be fully competent for the alternative post where he/she is to be retained”.<sup>704</sup>

Another important issue involves the significance of “suitable posts” in Staff Rule 9.6(e) and (f). First of all, the “suitable posts [must] be available within the[] parent organization at [the staff member’s] duty station and belong in the same category to that encumbered by the

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<sup>695</sup> *Ibid.*, para. 31.

<sup>696</sup> *Ibid.*, para. 29.

<sup>697</sup> *Ibid.*, para. 32.

<sup>698</sup> *Ibid.*

<sup>699</sup> *Ibid.*, para. 33.

<sup>700</sup> *Haimour and Al Mohammad* 2016-UNAT-688, para. 25.

<sup>701</sup> *Hassanin* 2017-UNAT-759, para. 49.

<sup>702</sup> *Smith* 2017-UNAT-768, para. 30. See also, *Hassanin* 2017-UNAT-759, para. 49; *Timothy* 2018-UNAT-847, para. 45; *Collins* 2020-UNAT-1021, para. 37.

<sup>703</sup> *Smith* 2017-UNAT-768, para. 32.

<sup>704</sup> *Timothy* 2018-UNAT-847, para. 39.

redundant staff member”.<sup>705</sup> However, “nothing in the language of Staff Rule 9.6(e) and (f) indicates that the (right and at the same time) obligation of the Administration to consider the redundant staff member for suitable posts, vacant or likely to be vacant in the future, is limited to the staff member’s grade level”.<sup>706</sup> Rather, “the Administration is under an obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest”.<sup>707</sup> However, UNAT held that “[DT’s] finding that [the Applicant] should have also been considered for available suitable posts covering the entire parent organization, including but not limited to her duty station [...], because she had passed the exam for the Professional level, [was] erroneous since the abolished post she [had been] encumbering at the critical time fell into the General Services category [...] and not into the Professional category.”<sup>708</sup>

Lastly, in *Hassanin*, UNAT clarified that the decision to terminate a permanent staff member cannot be unlawful because the concerned staff member did not receive proper consideration as a staff representative.<sup>709</sup> UNAT held that “an elected high-level official [...] of the Staff Union [...] do[es] not enjoy special protection from termination or enjoy higher priority for retention than other staff members”.<sup>710</sup>

In *Collins*, UNAT underlined that “whether or not there was an actual cost saving resulting from the abolition of the post when compared with the termination indemnity, is inconsequential for the purposes of assessing the legality of the decision. Conceivably poor managerial decisions are not sufficient grounds to justify judicial recourse by a staff member.”<sup>711</sup> UNAT also added that the “sole allegation that [the abolished] post was the only one in [the Applicant’s] division singled out to be abolished without reassignment cannot be construed as tantamount to discrimination against [the Applicant]”.<sup>712</sup>

In *Nugroho*, UNAT concurred with UNDT that the Administration’s reliance on budgetary constraints for abolishing the Applicant’s post and terminating his continuing appointment were contradicted by evidence. Accordingly, UNAT affirmed the unlawfulness of the Applicant’s termination and the compensation of two years’ net base salary.<sup>713</sup>

## **B. Unsatisfactory Performance**

While evaluating performance, “two consecutive reporting cycles should involve the most recent PERs, to protect the staff against arbitrary selection of reporting cycles by their reporting officers”.<sup>714</sup> However, “it [is] unreasonable to require the Administration to restart the

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<sup>705</sup> *Ibid.*, para. 57.

<sup>706</sup> *Ibid.*

<sup>707</sup> *Ibid.*

<sup>708</sup> *Ibid.*, para. 58.

<sup>709</sup> *Hassanin* 2017-UNAT-759.

<sup>710</sup> *Ibid.*, para. 54.

<sup>711</sup> *Collins* 2020-UNAT-1021, para. 29.

<sup>712</sup> *Ibid.*, para. 30.

<sup>713</sup> *Nugroho* 2020-UNAT-1042, paras. 48-49.

<sup>714</sup> *Das* 2014-UNAT-421, para. 37.

termination process if a new performance appraisal is completed before a final termination decision is taken. Otherwise, it would potentially place the Administration in an endless cycle whereby it could never be in a position to terminate the appointment of a staff member.”<sup>715</sup>

Regarding the management of unsatisfactory performance, “[m]anagers are required to record unsatisfactory performance and bring it to the attention of the staff member in a timely manner, in order to offer the staff member an opportunity to improve his or her performance.”<sup>716</sup> “[P]ast professional experience is not relevant to the requirement of satisfactory performance during the probationary period.”<sup>717</sup>

### **C. Constructive Dismissal**

There is constructive dismissal if “a reasonable person would believe that the employer was ‘marching them to the door’.”<sup>718</sup> It is a case where “the treatment is sufficiently bad to the extent that it usually creates a hostile working environment such that the resignation of the employee is not considered to be voluntary.”<sup>719</sup>

In *Fosse*, the Applicant left the Organization after having filed her application to DT. Accordingly, while her application was pending, she wanted to modify her request for remedies from specific performance, *i.e.*, returning her back to her post, to monetary compensation for constructive dismissal. DT dismissed the Applicant’s requests as not receivable because she did not raise these issues at the time of her request for management evaluation. UNAT affirmed, only by majority, with Judge Colgan dissenting.<sup>720</sup>

### **D. Termination during probationary period**

While the Administration has broad discretion to terminate appointments during the probationary period, it “must act in good faith and respect procedural rules [;] [i]ts decision must not be arbitrary or motivated by factors inconsistent with proper administration [...] [or] must not be based on erroneous, fallacious or improper motivation.”<sup>721</sup>

In *Musleh*, the Applicant had a three-year fixed-term appointment with 12 months of a probationary period. The probationary period was then extended for an additional six months; however, he was terminated at the end, due to unsatisfactory performance. The termination decision was affirmed by UNAT.<sup>722</sup>

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<sup>715</sup> *Weerasooriya* 2015-UNAT-571, para. 31.

<sup>716</sup> *Das* 2014-UNAT-421, para. 37.

<sup>717</sup> *Al-Ashi* 2018-UNAT-838, para. 20.

<sup>718</sup> *Kalil* 2015-UNAT-580, para. 65. See also, *Balestrieri* 2010-UNAT-041, para. 24; *Koda* 2011-UNAT-130, para. 36.

<sup>719</sup> *Ibid.* See also, *Balestrieri* 2010-UNAT-041, para. 24; *Koda* 2011-UNAT-130, para. 36.

<sup>720</sup> *Fosse* 2020-UNAT-1008.

<sup>721</sup> *Assaad* 2010-UNAT-021, para. 11.

<sup>722</sup> *Musleh* 2015-UNAT-596.

### **E. Abandonment of post**

In *Nimer*, the decision to separate the staff member from service for abandonment of post was found to be unreasonable and unlawful.<sup>723</sup> The Applicant was informed by letter dated 11 January 2017, that “unless he returned to duty no later than 31 January 2017 and/or submitted an acceptable written explanation for his absence, he would be separated from the Agency’s services on the ground of abandonment of post”.<sup>724</sup> UNAT held that “[the Applicant] rendered such a written explanation in his 29 January 2017 request for decision review” and added that “it would be too formalistic not to accept the 29 January 2017 letter as a written explanation [...] in response to the 11 January 2017 letter.”<sup>725</sup>

The decision to separate a staff member from service for abandonment of post “will apply most often when the whereabouts of the absent staff member are unknown. The exceptional and draconian nature of the rule, however, requires that it be construed restrictively and purposively and applied strictly in accordance with the stipulated conditions precedent.”<sup>726</sup> Within the regulatory framework of UNRWA, UNAT held that Area Staff Rule 109.4 would be applicable “only where five conditions precedent have been met, namely: i) the staff member has voluntarily absented himself from duty; ii) the absence from duty was for three or more consecutive working days; iii) the absence was unauthorized; iv) the Commissioner-General sent the staff member a letter informing him that if he did not report for duty or provide a written explanation for his absence within a specified time he shall be deemed to have been separated from service; and v) the staff member thereafter failed to report for duty or provide a written explanation within the specified time. Should any of these conditions precedent be absent the provision will not apply.”<sup>727</sup>

### **F. Withdrawal of resignation**

When “[a staff member’s] appointment [is] terminated by his voluntary action”, the decision to accept the withdrawal is solely within the discretion of the administration.<sup>728</sup>

### **G. Termination in the interest of the Agency**

“[A] decision to terminate any staff member’s appointment ‘in the interest of the Agency’ under Area Staff Regulation 9.1 is a very serious decision, since it is the ultimate manifestation of the Administration’s prerogative to do so where appropriate, and is permanent in nature.”<sup>729</sup> In *Uwais*, “the letter [...] [that informed the Applicant] that her services were terminated[,] [erroneously] indicated that the decision was ‘a disciplinary measure’.”<sup>730</sup> UNAT held, in this respect, that a termination decision “has far-reaching consequences for the staff member and

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<sup>723</sup> *Nimer* 2018-UNAT-879, para. 43.

<sup>724</sup> *Ibid.*, para. 40.

<sup>725</sup> *Ibid.*, paras. 40 & 41. See also, *Harris* 2019-UNAT-897.

<sup>726</sup> *El Shaer* 2019-UNAT-942, para. 30.

<sup>727</sup> *Ibid.*, para. 29.

<sup>728</sup> *Maghari* 2010-UNAT-037, para. 22, quoting UNAdT’s Judgment No. 991, Shamsi (2001), para. IV. See also, *Darwish* 2013-UNAT-369 para. 28.

<sup>729</sup> *Uwais* 2016-UNAT-675, para. 30.

<sup>730</sup> *Ibid.*, para. 29.

requires careful consideration and deliberation before implementation. It is therefore expected that a letter or notice which informs a staff member of the termination of his or her service will be transparent and written in such a way as to properly and adequately communicate, characterize and explain the reason for the decision.”<sup>731</sup> Therefore, UNAT found that the termination decision was unlawful.<sup>732</sup>

In *Al Ashhab*, in the context of UNRWA, “no performance evaluation process was legally required for the termination” of staff members employed under LDC modality.<sup>733</sup> In this regard, UNAT held that “[e]ven when the staff member is appointed to an LDC, there is an expectation that proper procedure before termination should be followed, namely, the staff member should be formally and clearly advised of his poor performance, what he needs to do to rectify it, and the consequences of not rectifying it. In the case at hand, the contract was terminated without prior notification of the poor performance and adequate notice of the consequences of it. The Agency failed to indicate that the contract would be terminated before its expiration date if the staff member did not improve his performance. Although the Staff Regulations and Rules do not provide for a performance evaluation process, the lack of fair warning renders the decision to terminate unlawful.”<sup>734</sup>

#### H. **Voluntary retirement before termination**

A voluntary retirement request submitted before the date of separation upon termination supersedes a termination decision, making “no termination decision capable of review”.<sup>735</sup>

#### I. **Termination following misconduct**

“[W]here a termination of service is connected to any type of investigation of a staff member’s possible misconduct, it must be reviewed as a disciplinary measure.”<sup>736</sup> Therefore, please refer to the section about disciplinary measures for the details about termination issues following misconduct.

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<sup>731</sup> *Ibid.*

<sup>732</sup> *Ibid.*, paras. 30-32.

<sup>733</sup> *Al Ashhab* 2020-UNAT-1046, para. 39.

<sup>734</sup> *Ibid.*, para. 43.

<sup>735</sup> *Al-Sayyed* 2012-UNAT-193, para. 44.

<sup>736</sup> *Haniya* 2010-UNAT-024, para. 30.

## 12. Other substantive matters

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### A. Transfer – Reassignment

“[T]he reassignment of staff members’ functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.”<sup>737</sup> However, this discretion is not unfettered “if [the decision] is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law”.<sup>738</sup>

“An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member’s grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member’s competence and skills; and, whether he or she had substantial experience in the field.”<sup>739</sup> It is also important to verify “whether the authority to reassign [an applicant] was properly delegated and whether the decision was in the best interests of the Organization”.<sup>740</sup>

In addition, “the funding source of a temporary post to which a staff member is being assigned is part of the legitimate considerations by which it is possible to evaluate the lawfulness of a reassignment decision”.<sup>741</sup> If, for example, there is “no post for the staff member to be assigned to, [but] just a name of a position yet to be established [,] the decision to reassign a staff member under these circumstances [would be considered to be made] hastily and without proper planning”.<sup>742</sup>

As usual, “the burden of proving discrimination or improper motivation rests with the party making the allegation”.<sup>743</sup> For example, in *Khalaf*, the Applicant “failed to show that there was any kind of improper motivation behind the administrative decision to redeploy his post”.<sup>744</sup> On the contrary, it was warranted that “the Administration was involved in a process of revision of activities [...], rationalisation of staff, realignment of functions, and reduction of budget. [...] [The Applicant, on the other hand, simply wanted] to maintain the status quo so as to continue with his fixed-term appointment [...] regardless of the Administration’s needs and despite the restructuring process that took place.”<sup>745</sup>

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<sup>737</sup> *Hepworth* 2015-UNAT-503, para. 45. See also, *Kaddoura* 2011-UNAT-151, para. 38; *Kamunyi* 2012-UNAT-194, para. 3; *Gehr* 2012-UNAT-482, paras. 29-31; *Abdullah* 2014-UNAT-482, para. 59; *Awe* 2016-UNAT-667, para. 25; *Harris* 2019-UNAT-897, para. 20.

<sup>738</sup> *Abdullah* 2014-UNAT-482, para. 60. See also generally, *Assad* 2010-UNAT-021; *Sanwidi* 2010-UNAT-084; *Abbasi* 2011-UNAT-110; *Chemingui* 2019-UNAT-930, para. 39.

<sup>739</sup> *Rees* 2012-UNAT-266, para. 58. See also, *Chemingui* 2019-UNAT-930, para. 40.

<sup>740</sup> *Perez-Soto* 2013-UNAT-329, para. 31.

<sup>741</sup> *Chemingui* 2019-UNAT-930, para. 42.

<sup>742</sup> *Ibid.*, para. 45.

<sup>743</sup> *Azzouni* 2010-UNAT-081, para. 26. See also generally, *Jennings* 2013-UNAT-329, para. 25; *Obdeijn* 2012-UNAT-201, para. 38; *Beqai* 2014-UNAT-434, para. 23.

<sup>744</sup> *Khalaf* 2016-UNAT-678, para. 33.

<sup>745</sup> *Ibid.*, paras. 34 & 37.

The Administration must inform a staff member that he/she is to be transferred and about the reasons for this administrative decision.<sup>746</sup> However, “[c]onsultations are not negotiations, and it is not necessary for the Administration to secure consent or agreement of the consulted parties.”<sup>747</sup> But, a reassignment should be at the staff member’s grade.<sup>748</sup> Last but not least, there is no “legal difference between an ‘assignment’ and a ‘reassignment’”.<sup>749</sup>

### **B. Loan/Secondment/Inter-Agency agreement**

“Appeals against administrative decisions taken before or after a transfer, or during a period of secondment or loan, will be heard by the appropriate appeals body of the organization which took the decision that is being appealed and will be dealt with under the regulations and rules of that organization.”<sup>750</sup> A staff member on loan cannot be transferred to the new agency without respecting the loan agreement and without terminating his relationship with the releasing agency.<sup>751</sup> “[I]n cases of secondment, staff members do not lose their service lien with their parent organization.”<sup>752</sup>

### **C. Conversion to permanent appointment**

The Administration has broad discretion in matters of conversion and DT’s role is not to substitute its decisions for that of the Administration.<sup>753</sup> “In reviewing administrative decisions regarding appointments and promotions (and, by analogy, applications for conversion), the [DT] examines [...] [w]hether the procedure as laid down in the staff regulations and rules was followed; and [...] [w]hether the staff member was given fair and adequate consideration.”<sup>754</sup> In that sense, staff members “are entitled to individual, ‘full and fair’ [...] consideration of their suitability for conversion to permanent appointment”.<sup>755</sup> However, “[t]he right of a staff member [...] is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently considered for permanent appointment.”<sup>756</sup>

In *Thiombiano*, UNAT held that the FTA carries some expectations to conversion as indicated in Staff Rules 4.13(c) and 4.14(b), in case of a “successful completion of a competitive examination according to Staff Rule 4.16, [and] after two years on a fixed-term appointment, subject to satisfactory service”.<sup>757</sup> Accordingly, there is no automatic conversion of a FTA to a continuing appointment, as this is “an open-ended appointment granted through the

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<sup>746</sup> *Gehr* 2012-UNAT-236, paras. 29-30. See also, *Obdeijn* 2012-UNAT-201, paras. 32-38.

<sup>747</sup> *Leboeuf et al.* 2015-UNAT-568, para. 91, quoting UNDT’s judgment *Leboeuf et al.* UNDT/2014/033, para. 117.

<sup>748</sup> *Kamunyi* 2012-UNAT-194, para. 35; *Rees* 2012-UNAT-266, para. 58.

<sup>749</sup> *Tarr* 2017-UNAT-710, para. 21.

<sup>750</sup> *Iskandar* 2011-UNAT-116, para. 27 quoting paragraph 11 of the Inter-Organization Agreement.

<sup>751</sup> *Iskandar* 2012-UNAT-248, paras. 25-28.

<sup>752</sup> *Skoda* 2010-UNAT-017, para. 6.

<sup>753</sup> *Malmström* 2013-UNAT-357, para. 38; *Santos* 2014-UNAT-415, para. 35.

<sup>754</sup> *Santos* 2014-UNAT-415, para. 33. See also, *Kulawat* 2014-UNAT-428, para. 30.

<sup>755</sup> *Malmström* 2013-UNAT-357, para. 66. See also, *Longone* 2013-UNAT-358, para. 33; *Ademagic et al.* 2013-UNAT-359, para. 38; *Santos* 2014-UNAT-415, para. 31.

<sup>756</sup> *Malmström* 2013-UNAT-357, para. 70. See also, *Longone* 2013-UNAT-358, para. 33; *Ademagic et al.* 2013-UNAT-359, para. 38; *Santos* 2014-UNAT-415, para. 32; *Kulawat* 2014-UNAT-428, para. 30.

<sup>757</sup> *Thiombiano* 2020-UNAT-978, para. 35.

established procedures [...] on the basis of the continuing needs of the Organization [...]”<sup>758</sup> Other requirements are “selection through competitive process, assessment by the Secretariat review body, a performance rating of at least ‘meets expectations’ or equivalent in the four most recent performance appraisal reports, a certain number of years of service remaining before reaching the mandatory age of separation from the Organization, not to mention the requirements related to the geographical recruitment area and the absence of any disciplinary measures during the five years prior to considering the person in question for a continuing appointment”.<sup>759</sup>

According to UN Staff Rules, “staff members with permanent appointments ‘shall be retained in preference to those on all other types of appointments’ [...] [This] requires more than placing them in the same competitive pool as other applicants for a position”.<sup>760</sup> For example, in *Zachariah*, UNAT held that “any permanent staff member facing termination due to abolition of his or her post [...] must show an interest in a new position by timely and completely applying for the position; otherwise, the Administration would be engaged in a fruitless exercise, attempting to pair a permanent staff member with a position that would not be accepted”.<sup>761</sup> “Once the application process is completed, [...] the Administration is required [...] to consider the permanent staff member on a preferred or non-competitive basis for the position, in an effort to retain the permanent staff member. This requires determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. Only if there is no permanent staff member who is suitable, may the Administration then consider the other, non-permanent staff members who applied for the post.”<sup>762</sup>

“[R]esignation by a staff member, whether voluntarily or upon request by the Administration in order to take up a new appointment, results in a break in service, which may in turn disqualify a staff member for consideration for a permanent appointment.”<sup>763</sup> In addition, it is not possible for DT to review and make “purported findings on the ‘facts’ [of a staff member’s] respective separation [] that resulted in [his/her] breaks in service”.<sup>764</sup>

For example, in *Kulawat*, the Applicant “was separated from service on 31 August 2006, and was not reappointed until 9 September 2006. And [...] [she] [did] not dispute her separation from service and had never sought management review of it”.<sup>765</sup> Accordingly, UNAT held that

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<sup>758</sup> *Thiombiano* 2020-UNAT-978, paras. 35-36.

<sup>759</sup> *Thiombiano* 2020-UNAT-978, paras. 35-36. For an example where a staff member did not meet the requirement to be granted a continuing appointment, see; *Colati* 2020-UNAT-980, paras. 30-40.

<sup>760</sup> *Zachariah* 2017-UNAT-764, para. 32.

<sup>761</sup> *Ibid.*, para. 34.

<sup>762</sup> *Ibid.*, para. 35. See also the dissenting opinion by Judge Knierim not agreeing with the majority opinion in this case. See also, *Fasanella* 2017-UNAT-765.

<sup>763</sup> *Hajdari* 2015-UNAT-570, para. 26.

<sup>764</sup> *Ibid.*, para. 27. See also, *Kulawat* 2014-UNAT-428, paras. 32-35.

<sup>765</sup> *Kulawat* 2014-UNAT-428, para. 33.

“[DT] was not competent to reconsider or change [her separation] when reviewing the administrative decision that [she] was not eligible for conversion.”<sup>766</sup>

The famous example from UNAT’s jurisprudence about conversion to permanent appointment is the situation of ICTY staff members. In *Malmstrom*, UNAT found that the Administration’s “blanket policy of denial of permanent appointments to ICTY staff members [...] simply because the ICTY was a downsizing entity [...] [was discriminatory] because of the nature of the entity in which they were employed. As such, the [Administration’s] decision was [found to be] legally void, being tainted by arbitrariness and a violation of the staff members’ due process rights.”<sup>767</sup> The Administration failed to provide staff members with the “appropriate individual consideration in the ‘suitability’ exercise, [...] as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the UN Charter”.<sup>768</sup> UNAT held that “[e]ach candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied.”<sup>769</sup> The case was remanded to the Administration.

In *Marcussen et al.*, the case came back before UNAT with respect to the Administration’s obligation to make “every reasonable consideration” to the staff members’ “proficiencies, competencies and transferable skills”. UNAT upheld UNDT’s judgment where it considered that “the [Administration] did not address, and even less pronounce herself on, the question of whether the respective Applicants possessed [transferable] skills, let alone which ones they possess and to what extent”.<sup>770</sup> UNAT held that “the Administration’s conversion exercise was, in essence, a reliance on form over substance and did not meet the “full and fair consideration” mandated by the [previous] Appeals Tribunal Judgment in the absence of any substantive consideration[.]”<sup>771</sup>

In a case of a conversion to permanent appointment, the staff member may be granted a permanent appointment limited to a particular department/office.<sup>772</sup> However, “[i]f the staff member is subsequently recruited under established procedures [...] for positions elsewhere in the [UN] Secretariat, the limitation is removed.”<sup>773</sup>

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<sup>766</sup> *Ibid.*, para. 34. For similar examples, see also *Carrabregu* 2014-UNAT-485, paras. 21-27; *Schoone* 2013-UNAT-375, paras. 31-32. For examples regarding the calculation of five years of continuous service, see, *Branche* 2013-UNAT-372, paras. 25-26; *Guedes* 2014-UNAT-418, paras. 17-19. For an example regarding conversion to permanent appointment in the case of a secondment, see, *O’Hanlon* 2013-UNAT-303, paras. 20-23.

<sup>767</sup> *Malmstrom* 2013-UNAT-357, para. 68. See also, This was also reaffirmed in *Longone* 2013-UNAT-358, para. 33; *Ademagic et al.* 2013-UNAT-359, para. 38.

<sup>768</sup> *Malmstrom* 2013-UNAT-357, para. 67.

<sup>769</sup> *Ibid.*

<sup>770</sup> *Marcussen et al.* 2016-UNAT-682, para. 41.

<sup>771</sup> *Ibid.*, para. 42. This was also reaffirmed in *Featherstone* 2016-UNAT-683, para. 28; *Ademagic et al.* 2016-UNAT-684, para. 35; *Gueben et al.* 2016-UNAT-692, paras. 24-28. For another example where an applicant did not possess the transferable skills to be granted permanent appointment, see *Gueben* 2020-UNAT-988. For another example retroactively granting a permanent appointment, see *Lamb* 2020-UNAT-989.

<sup>772</sup> *Marcussen et al.* 2016-UNAT-682, para. 49.

<sup>773</sup> *Ibid.*, para. 54. This was also reaffirmed in *Featherstone* 2016-UNAT-683, paras. 34-36; *Ademagic et al.* 2016-UNAT-684, paras. 41-43; *Gueben et al.* 2016-UNAT-692, paras. 29-41.

In *Balan*, the decision not to grant a permanent appointment was found to be lawful where the Applicant was recruited in her capacity as a national of Romania for the specific post in Bucharest, in “an entity that was downsizing or expected to close ‘in the near future’”.<sup>774</sup>

“[A] position more than one level higher than the staff member’s current grade level cannot be considered ‘suitable’, let alone for purposes of [retaining a staff member with permanent appointment].”<sup>775</sup>

Regarding the highest standards of efficiency, competence and integrity, “the mere existence of an administrative/disciplinary sanctions on a staff member’s official status file is not a charter for the Administration to refuse conversion”.<sup>776</sup> But, a disciplinary measure of “‘demotion for sexual harassment’ would of itself be sufficient to impugn the discretion vested in the Administration when considering applications for conversion [...]”.<sup>777</sup> Accordingly, the discretion vested in the Administration cannot be considered to be “unfairly or capriciously exercised, given [an applicant’s] recorded misconduct and the proximity of that misconduct and the disciplinary measures imposed therefor to his application for conversion to a permanent appointment”.<sup>778</sup>

#### D. **Benefits and entitlements**

##### ➤ *Receivability*

“[P]ursuant to Staff Rule 3.17(ii), [the staff members] [are] required to make a written request for retroactive SPA payments within one year following the date on which they would have been entitled to the initial payment.”<sup>779</sup> “[The Applicant] made her claim for SPA for the period [...] from 1 December 2009 to 10 May 2011, for the first time on 5 September 2011. [Accordingly], her written claim was due within one year following the date on which she would have been entitled to the initial payment, which means her claim was due by 1 December 2010.”<sup>780</sup>

In the absence of a clear reference in a request for management evaluation for the relevant type of claimed entitlement, DT is not competent to receive a specific entitlement claim and decide on its merits.<sup>781</sup> In *Pirnea*, DT stated that the Applicant referred to entitlements and did not specifically use the word “DSA”.<sup>782</sup> UNAT held that “[b]ecause [the Applicant’s] request for management evaluation focused solely on the decision not to renew his appointment, and did not identify the denial of his claim for the DSA, [...] [DT] [...] exceeded its jurisdiction in receiving the DSA claim and reaching its merits.”<sup>783</sup>

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<sup>774</sup> *Balan* 2014-UNAT-462, para. 20.

<sup>775</sup> *Hassanin* 2017-UNAT-759, para. 52.

<sup>776</sup> *Santos* 2014-UNAT-415, para. 30.

<sup>777</sup> *Ibid.*, para. 40.

<sup>778</sup> *Ibid.*, para. 41.

<sup>779</sup> *Fitsum* 2017-UNAT-804, para. 3.

<sup>780</sup> *Ibid.*, para. 18.

<sup>781</sup> *Pirnea* 2013-UNAT-311, paras. 41-42.

<sup>782</sup> *Ibid.*, para. 42.

<sup>783</sup> *Ibid.*

Also, UNRWA DT consistently held that “in matters of financial entitlements, a staff member has a right to request to be attributed entitlements, as long as the Agency has not explicitly or impliedly refused his/her request, and only a request filed by the staff member himself/herself can trigger such an administrative decision”.<sup>784</sup>

➤ Staff member’s status

The personal status of a staff member is to be determined “by reference to the law of the competent authority under which the personal status has been established”.<sup>785</sup> In that sense, “a staff member cannot assert that a marriage concluded through any means or in any place must lead to the award of entitlements by the Organization and, if it does not, that such a decision violates his or her freedom to marry”.<sup>786</sup>

➤ Examples

“[A] staff member’s appointment contract gives rise to entitlements upon the signing and acceptance by the staff member of his/her letter of appointment. [...] While staff members’ acquired rights do not operate to prevent the [GA] from supplementing or amending the provisions of the Staff Regulations [...], the administration may not subvert the entitlements of a staff member by abusing its powers, in violation of the provisions of the Staff Regulations and Staff Rules.”<sup>787</sup> In the same vein, an irregularity committed by the Administration in the recruitment procedure cannot deprive the staff member, who acted in good faith, from her/his rights, such as a relocation grant.<sup>788</sup>

The acceptance of a lump-sum option for home-leave does not preclude the staff member from contesting before DT the wrongful calculation of it.<sup>789</sup> In *Wang*, UNAT held that it is in the discretion of the SG, under exceptional and compelling circumstances, to authorize a country other than the country of nationality as the home leave country. This authorization is not permanent and can be revoked.<sup>790</sup>

In *Castelli*, UNAT held that a “continuous employment for a period of one year or longer gives rise to an entitlement to [a relocation] grant, regardless of whether the period exceeding a year is a result of a single contract, or two consecutive contracts”.<sup>791</sup>

In *Leclercq*, UNAT held that sick leave is an entitlement and “is not granted in compensation for the loss of earning or loss of expectations, but because of incapacitation for service by reason of illness”.<sup>792</sup>

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<sup>784</sup> *Abed* UNRWA/DT/2018/057, para. 25. See also, *Enaya* UNRWA/DT/2020/002, para. 27; *Alquza* 2020-UNAT-1065, para. 37.

<sup>785</sup> *Al Abani* 2016-UNAT-663, paras. 22 and 33-36.

<sup>786</sup> *Ibid.*, para. 33.

<sup>787</sup> *Castelli* 2010-UNAT-037, para. 24.

<sup>788</sup> *Ibid.*, para. 26.

<sup>789</sup> *Jarvis* 2010-UNAT-031, paras. 26-28.

<sup>790</sup> *Wang* 2011-UNAT-140, paras. 1-3.

<sup>791</sup> *Castelli* 2010-UNAT-037, para. 19.

<sup>792</sup> *Leclercq* 2014-UNAT-429, para. 16.

For other examples, please refer to *Servas* for a case regarding eligibility for a repatriation grant and home leave;<sup>793</sup> *Awe*, for DSA and hardship allowance;<sup>794</sup> and *Vattapally* for eligibility for mobility allowance where UNAT held that the rule stated “five consecutive years” and not “five years of continuous service”.<sup>795</sup> In *Vattapally*, the Applicant’s temporary appointment was to be added in the calculation of five years for the attribution of the mobility allowance.<sup>796</sup> In *O’Hanlon*, UNAT held that the Applicant’s service with UNRWA should have been taken into account in the calculation of five years of continuous service for conversion to permanent appointment.<sup>797</sup>

“The issuances [about an Acting appointment allowance (AAA)] bestow discretionary powers which must be exercised reasonably, fairly and flexibly in accordance with their internal substantive legal requirements. A staff member thus has no contractual right to receive an AAA. He or she, however, does have an expectation that the Agency will exercise its discretion to grant an AAA properly”.<sup>798</sup>

In *Alquza*, UNAT underlined that “SPA can only be granted if the conditions of ST/AI/1999/17 are met, *inter alia*, that staff members have been assigned to and have discharged the full functions of a post which has been both classified and budgeted at a higher level”.<sup>799</sup> These conditions were not met in Ms. Alquza’s case.

In *Yabowork*, UNAT was not convinced that the Applicant’s tasks were commensurate to her post (G-7) and that she was not exactly fulfilling all the duties and responsibilities of a P-2 post.<sup>800</sup>

➤ *Early Voluntary Retirement (EVR)*

According to UNRWA Area Staff Rule 109.2, area staff members do not “enjoy an unconditional right to EVR”.<sup>801</sup>

➤ *False or fraudulent claims*

In *Bastet*, by falsifying documents, the staff member had illegally obtained a rental subsidy for an apartment of which he was the official owner. The staff member was dismissed from duty.<sup>802</sup>

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<sup>793</sup> *Servas* 2013-UNAT-325, paras. 25-31.

<sup>794</sup> *Awe* 2016-UNAT-667. In this case, staff member was in Baghdad for 9 days but wrongfully his duty station was modified to Baghdad. Couple of months later, the error has been corrected. Nevertheless, he asked for DSA and hardship allowance according to the Baghdad even though he was not there. UNAT affirmed UNDT judgment declaring that the decision to change the duty station from Baghdad to Kuwait did not violate Mr. Awe’s rights, and that he was only entitled to the DSA and hardship allowances applicable to Baghdad for the days that he actually spent there.

<sup>795</sup> *Vattapally* 2018-UNAT-891, paras. 31-32.

<sup>796</sup> *Ibid.*, paras. 33-34.

<sup>797</sup> *O’Hanlon* 2013-UNAT-303, paras. 20-23.

<sup>798</sup> *Husseini* 2016-UNAT-701, para. 15. See also, *Abusondous* 2018-UNAT-812, paras. 10-16.

<sup>799</sup> *Alquza* 2020-UNAT-1065, para. 28.

<sup>800</sup> *Yabowork* 2020-UNAT-1037, paras. 34-44.

<sup>801</sup> *Madi* 2018-UNAT-853, para. 27.

<sup>802</sup> *Bastet* 2015-UNAT-511, para. 56.

➤ Signing a waiver form

“[A] staff member’s disagreement with the content of the waiver form does not exempt her from the general obligation to sign it in order to be able to receive the benefits deriving from her service with the [UN].”<sup>803</sup>

➤ Acquired rights

“An ‘acquired’ right should be purposively interpreted to mean a vested right, and employees only acquire a vested right into their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not *acquired* rights until such time as the *quid pro quo* for the promise has been performed or earned.”<sup>804</sup>

E. Service incurred injury

“Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.”<sup>805</sup> “A claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.”<sup>806</sup>

“Appendix D, which is a workers’ compensation system, is a no fault insurance or scheme whereby employers must cover occupational injury or illness. Employees do not have to prove employers’ negligence in order to obtain benefits.”<sup>807</sup> “The goal of a workers’ compensation system is to reduce disputes and litigation arising from work-related injuries and illnesses. The system also sets fixed awards for employees who suffer work-related injuries or illnesses.”<sup>808</sup>

“There are two elements that must be established for a claim under Appendix D: i) the medical assessment of whether the claimant suffered from the injury or illness as alleged; and ii) the non-medical factual determination whether the illness or injury was attributable to the performance of official duties on behalf of the Organization (causation). To make these determinations, the ABCC [Advisory Board on Compensation Claims] may decide on procedures as it may consider necessary in discharging its responsibilities.”<sup>809</sup>

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<sup>803</sup> UNAdT Judgment No. 1212, *Stouffs* (2004) para. XI. See also, *Anshasi* 2017-UNAT-790, paras. 37-43; *Ahmed* 2013-UNAT-386, para. 21.

<sup>804</sup> *Lloret Alcañiz et al.* 2018-UNAT-840, para. 90, emphasis in original. See also, *Nicholas* 2020-UNAT-1045, paras. 47-58.

<sup>805</sup> *Dahan* 2018-UNAT-861, para. 20. See also, *James* 2015-UNAT-600, para. 25; *Wamalala* 2013-UNAT-300, paras. 25-27.

<sup>806</sup> *Wamalala* 2013-UNAT-300, paras. 25-27. See also, *James* 2015-UNAT-600, para. 25; *Dahan* 2018-UNAT-861, para. 22.

<sup>807</sup> *Dahan* 2018-UNAT-861, para. 20. See also, *James* 2015-UNAT-600, para. 25; *Wamalala* 2013-UNAT-300, paras. 25-27.

<sup>808</sup> *Wamalala* 2013-UNAT-300, para. 26. See also, *James* 2015-UNAT-600, para. 25; *Dahan* 2018-UNAT-861, para. 22.

<sup>809</sup> *Kisia* 2020-UNAT-1049, para. 33. See also, *Peglan* UNDT/2016/059, para. 71.

For example, in *Jobrani*, “[i]n assessing the Applicant’s claim for compensation, the principle issue for the ABCC was whether the injury [...] resulted as a natural incident of performing duties on behalf of the UN. This was a question of fact to be established by evidence.”<sup>810</sup>

“[W]hen seized of an application challenging a decision under Appendix D, DT shall examine whether the proper procedure had been followed, and it cannot put itself in the place of the medical expert or of the decision-maker [] [...] [as] DT is not competent to make medical findings.”<sup>811</sup> For example, in *Frechon*, based on the conclusion of the Medical Board, UNDT held that Frechon was incapable of further service. UNAT affirmed that conclusion and underlined that “[UNDT’s] conclusion was not tantamount to it having stepped into the shoes of the UN Medical Director.”<sup>812</sup> In *Baron*, due to the lack of evidence and medical certificates that established independently the type and degree of the Applicant’s condition, DT ordered the composition of a medical board.<sup>813</sup> In *Wamalala*, UNDT found that the Administration failed to follow the proper procedure established in articles 17(a) and 17(b) of Appendix D by not convening a medical board for reconsideration.<sup>814</sup>

“In a challenge to a decision concerning a claim for compensation, it is for the Applicant to demonstrate that the process in the relevant article was disregarded.”<sup>815</sup>

“Article 17 of Appendix D does not make it obligatory for the staff member to request that a medical board be convened to review the SG’s determination nor does it institute such a request as a condition of receivability of the application for judicial review of the relevant (negative) administrative decision taken on behalf of the SG. This is just an option afforded to the staff member, if the latter wishes to bring his/her case before a medical board.”<sup>816</sup> Accordingly, there is a fork in the road for the staff members: they must either make a request for reconsideration or submit their application to DT.<sup>817</sup>

“[DT] is not allowed to substitute its appreciation of medical issues for that of a medical practitioner, nor would it have the expertise to do so. The proper way for the Applicant to request reconsideration of the conclusions reached by the Medical Services Division was to make use of art. 17 of Appendix D, to have the matter re-examined by a group of medical experts.”<sup>818</sup>

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<sup>810</sup> *Jobrani* UNDT/2015/111, para. 54.

<sup>811</sup> *Likukela* UNDT/2016/180, para. 27. See also, *Karseboom* 2015-UNAT-601, paras. 41-47; *Likukela* 2017-UNAT-737.

<sup>812</sup> *Frechon* 2011-UNAT-132, para. 54.

<sup>813</sup> *Baron* UNDT/2011/174, para. 38.

<sup>814</sup> *Wamalala* UNDT/2014/133, paras. 30-33. See also, UNAdT Judgment No. 1133, *West* (2003); *Shanks* UNDT/2011/209, para. 96.

<sup>815</sup> *Peglan* UNDT/2016/059, para. 67. See also, *Frechon* 2010-UNAT-003, para. 16.

<sup>816</sup> *Baracungana* 2017-UNAT-725, para. 27.

<sup>817</sup> *Ibid.*, paras. 24-28. See also, *Simmons* UNDT/2012/167, para. 16; *Baron* UNDT/2011/174, para. 36; *Kisia* UNDT/2016/023, para. 31.

<sup>818</sup> *Likukela* UNDT/2016/180, para. 28. See also, *Christensen* UNDT/2012/094, para. 35; *Likukela* 2017-UNAT-737.

The Administration cannot delay separating a staff member on medical grounds following an alleged service incurred injury pending an investigation process concerning his/her alleged misconduct, without determining whether the injuries were work-related or not.<sup>819</sup>

In the context of UNRWA, there is no provision requiring the Agency “to provide for an adequate time to recovery before convening a Medical Board”.<sup>820</sup> Accordingly, in *Abu Fardeh*, UNAT held that “[t]he Commissioner-General had broad discretion to decide when a medical examination is required and [...] [that] the decision to convene a Medical Board five months after [a] service-incurred injury in order to examine [the Appellant’s] fitness for continued service with the Agency was reasonable.”<sup>821</sup>

“A decision based on a regular medical process cannot be considered unreasonable without clear medical evidence and a medical assessment that neither the [Administration] nor the Tribunal is qualified to carry out. The purpose of the regulatory framework [...] is to establish a clear and fair process in which the rights and obligations of the parties are balanced and which can lead to clear and useful recommendations from the Medical Board. It is therefore not reasonable to consider that the documents submitted after the Medical Board, and which the Board did not have an opportunity to review, are as such relevant to rebut the medical conclusion and recommendations of the Board.”<sup>822</sup>

In the context of UNRWA, “the Agency’s regulatory framework does not create any obligation on the Agency to find an alternative post for a staff member who is found unfit to continue his/her service in his/her current post” and the Tribunal “is not competent to create an obligation to find the staff member a suitable placement”.<sup>823</sup>

➤ *Referral to a Medical Board*

In *Sirhan*, the Applicant was terminated on medical grounds following the Medical Board’s conclusion. The Respondent argued that a referral to a Medical Board is not a challengeable administrative decision based on UNRWA DT’s Judgment in *Fahjan*.<sup>824</sup> Nevertheless, Judge Colgan, in his dissenting opinion, rejected this ground for denying receivability, by noting that the “termination decision [was] attributable directly to the Medical Board’s recommendations, which in turn [were] linked directly to the Board’s convening by a decision of the Agency”.<sup>825</sup>

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<sup>819</sup> *Dibs* 2017-UNAT-798, paras. 25-31.

<sup>820</sup> *Abu Fardeh* 2020-UNAT-1011, para. 36.

<sup>821</sup> *Ibid.* For a similar judgment, see also *Sirhan* 2020-UNAT-1023. However, in this judgment, Judge Colgan dissented with the majority, despite his agreement with the majority in *Abu Fardeh*.

<sup>822</sup> *Abu Fardeh* 2020-UNAT-1011, para. 40.

<sup>823</sup> *Ibid.*, para. 42. See also, *Mansour* 2020-UNAT-1036, para. 55.

<sup>824</sup> *Fahjan* UNRWA/DT/2018/028.

<sup>825</sup> *Sirhan* 2020-UNAT-1023, para. 68.

# **PART III: DISCIPLINARY MEASURES**

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## 13. Investigation

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### A. Initiating an investigation

DT is “not clothed with jurisdiction to itself conduct *ab initio* an investigation of a harassment complaint”.<sup>826</sup>

“Initiating an investigation is merely a step in the investigative process and is not an administrative decision which [DT] is competent to review under Article 2(1) of its Statute.”<sup>827</sup> Similarly, “[d]eciding to set up a fact-finding panel is not of itself a decision relating to the contractual rights of a staff member.”<sup>828</sup>

“As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.”<sup>829</sup> For example, in *Belkhabbaz*, UNAT held that “UNDT’s order directing the ASG/OHRM to ‘institute’ disciplinary proceedings impinges upon the discretion of the ASG/OHRM. The appropriate order is one directing the ASG/OHRM to act in terms of Section 5.18(c) of ST/SGB/2008/5.”<sup>830</sup>

UNAT also stated that “[w]here there was no risk of undermining the investigation, it is good practice to hear both sides in order to decide whether there are sufficient grounds to warrant establishing a formal fact-finding investigation and assigning a case to a panel.”<sup>831</sup> In addition, the Administration “has a degree of discretion as to how to conduct a review and assessment of a complaint, and may decide whether an investigation regarding all or some of the charges is warranted.”<sup>832</sup>

### B. Challenging a decision to/not to investigate

A staff member who alleges that he/she has been subjected to harassment and discrimination may challenge a decision not to investigate his/her claim.<sup>833</sup> “[S]erious and reasonable accusations and requests for investigations constitute important instruments to improve administrative procedures and to ensure that day-to-day actions by the Administration are in compliance with the Organization’s law.”<sup>834</sup> Therefore, “in a case of a serious and reasonable accusation, a staff member does have a right to an investigation against another staff member, and this process may be subject to judicial review”.<sup>835</sup> In addition, “the discretion of the Administration can also be confined in the opposite direction. There are situations where the

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<sup>826</sup> *Argyrou* 2019-UNAT-969, paras. 37-38. See also, *Messinger* 2011-UNAT-123.

<sup>827</sup> *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 34.

<sup>828</sup> *Auda* 2017-UNAT-786, para. 28. See also, *Birya* 2015-UNAT-562, para. 47.

<sup>829</sup> *Abboud* 2010-UNAT-100, para. 34. See also, *Oummih* 2015-UNAT-518, para. 31; *Benfield-Laporte* 2015-UNAT-505, para. 37.

<sup>830</sup> *Belkhabbaz* 2018-UNAT-873, para. 87.

<sup>831</sup> *Benfield-Laporte* 2015-UNAT-505, para. 38. See also, *Oummih* 2015-UNAT-518, para. 34.

<sup>832</sup> *Benfield-Laporte* 2015-UNAT-505, para. 38. See also, *Oummih* 2015-UNAT-518, para. 34.

<sup>833</sup> *Nwuke* 2010-UNAT-099, paras. 36-37.

<sup>834</sup> *Ibid.*, para. 39.

<sup>835</sup> *Nadeau* 2017-UNAT-733, para. 33.

only possible and lawful decision of the Administration is to deny a staff member's request to undertake a fact-finding investigation against another staff member."<sup>836</sup>

"[A] fact-finding investigation may only be undertaken if there are 'sufficient grounds' or, respectively, 'reason[s] to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed'. Consequently, if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 or ST/AI/371 can have a negative impact on the staff member concerned."<sup>837</sup>

It is also important to underline that "a staff member who requests an investigation or makes accusations capable of leading to disciplinary proceedings can also be held responsible for his/her application, for instance when acting in a frivolous, negligent, abusive, or mischievous way, causing unnecessary administrative action or even prejudice."<sup>838</sup>

Regarding the required time to decide not to initiate an investigation, a period of four months from the filing of the complaint to the refusal to launch a fact-finding investigation is excessive and "far from prompt".<sup>839</sup> In *Masykanova*, "there were several differently constituted panels to hear one complaint and a total of 26 months elapsed before a decision was given".<sup>840</sup> UNAT held that this was a breach of the ST/SGB/2008/5 on prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, "which requires that complaints are addressed promptly".<sup>841</sup>

### C. Investigative process

"During the preliminary investigation stage, only limited due process rights apply."<sup>842</sup> Allegations need to be apprised and an opportunity to respond needs to be given.<sup>843</sup> "The investigation phase is not a disciplinary proceeding, which is only initiated after the completion of the investigation."<sup>844</sup> "It is only after the investigative process is over and the disciplinary process has begun that the staff member has a right to receive written notification of the formal allegations and to respond to them; these due process entitlements do not exist during the investigation stage."<sup>845</sup> Similarly, there is no "right to be apprised of the assistance of counsel

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<sup>836</sup> *Ibid.*

<sup>837</sup> *Nadeau* 2017-UNAT-733, para. 34.

<sup>838</sup> *Nwuke* 2010-UNAT-099, para. 39.

<sup>839</sup> *Benfield-Laporte* 2015-UNAT-505, para. 40. See also *Abubakr* 2012-UNAT-272.

<sup>840</sup> *Masykanova* 2016-UNAT-662, para. 23.

<sup>841</sup> *Ibid.*

<sup>842</sup> *Powell* 2013-UNAT-295, para. 24; *Akello* 2013-UNAT-336, para. 36; *Ibrahim* 2017-UNAT-776, para. 32; *Benamar* 2017-UNAT-797, para. 57.

<sup>843</sup> *Powell* 2013-UNAT-295, paras. 23-24. This was also confirmed in *Akello* 2013-UNAT-336, paras. 35-36; *Benamar* 2017-UNAT-797, paras. 55-57.

<sup>844</sup> *Benamar* 2017-UNAT-797, para. 53.

<sup>845</sup> *Ibid.*, para. 54. See also, *Ibrahim* 2017-UNAT-776, paras. 26-28; *Powell* 2013-UNAT-295, para. 23; *Akello* 2013-UNAT-336, paras. 35-36.

during the investigation stage”.<sup>846</sup> This means that there is no right to assistance of counsel during the investigative process, for example, during the interview with the investigators.

#### D. Administrative leave pending investigation

A staff member may only be placed on administrative leave without pay (ALWOP) in exceptional circumstances.<sup>847</sup> “[T]he applicable standard of proof to determine whether exceptional circumstances warranting the placement of a staff member on ALWOP existed is that of probable cause.”<sup>848</sup> “[R]easonable grounds to believe that sexual misconduct had occurred is a circumstance that may reasonably be considered as exceptional.”<sup>849</sup> “[A]ny decision to extend ALWOP must be reasonable and proportional. A decision to extend ALWOP is a drastic administrative measure and normally should be of short duration.”<sup>850</sup>

In *Allen*, the Applicant’s placement on administrative leave with pay was lawful, as there were allegations against him and he was the Head of the mission.<sup>851</sup>

#### E. Report of investigation

“OIOS operates under the ‘authority’ of the Secretary-General, but has ‘operational independence’. [...] [I]nsofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General’s administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System. To the extent that any OIOS decisions are used to affect an employee’s terms or contract of employment, the OIOS report may be impugned. For example, an OIOS report might be found to be so flawed that the Administration’s taking disciplinary action based thereon must be set aside.”<sup>852</sup>

“[S]ending the reports of the two investigation panels to [the subject staff member] [is] not the same as charging her/[him] with misconduct.”<sup>853</sup> Also, “the decision to provide or not a complainant with a copy of the investigation report should be made on a case-by-case basis, taking due account of the ‘requirements of good faith and fair dealing’.”<sup>854</sup> However, in *Bertucci* and *Wishah*, UNAT held that the Administration’s refusal to give the staff member access to the investigation file was unlawful.<sup>855</sup> In addition, “if the findings of the report concluded that no prohibited conduct took place the case is closed”.<sup>856</sup> “[When] the matter is a closed matter and [the Applicant] has not presented any cogent argument to show that there are

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<sup>846</sup> *Akello* 2013-UNAT-336, para. 38.

<sup>847</sup> UN Staff Rule 10.4; UNRWA International Staff Rule 10.4; UNRWA Area Staff Rule 110.2 (3).

<sup>848</sup> *Gisage* 2019-UNAT-973, para. 35. See also, *Muteeganda* 2018-UNAT-869, paras. 30-32.

<sup>849</sup> *Muteeganda* 2018-UNAT-869, para. 40.

<sup>850</sup> *Gisage* 2019-UNAT-973, para. 40.

<sup>851</sup> *Allen* 2019-UNAT-951, paras. 14 & 32.

<sup>852</sup> *Koda* 2011-UNAT-130, paras. 41-42.

<sup>853</sup> *Rangel* 2015-UNAT-535, paras. 72. This was also confirmed in *Muindi* 2017-UNAT-782, para. 51.

<sup>854</sup> *Masykanova* UNDT/2015/088, para. 99. See also, *Adorna* UNDT/2010/205; *Haydar* UNDT/2012/201.

<sup>855</sup> *Bertucci* 2011-UNAT-114, para. 20; *Wishah* 2013-UNAT-289, paras. 31-33.

<sup>856</sup> *Ivanov* 2015-UNAT-519, para. 17.

exceptional circumstances which might otherwise have entitled [her/him] to the investigation report[,] [...] [he/she] is not entitled to receive a detailed copy of the investigation report.”<sup>857</sup>

#### F. Disciplinary proceedings & Due process rights

“[N]o disciplinary proceedings can be instituted against a staff member unless he has been notified of the allegations held against him. This is the stage when the staff member’s due process rights come into operation.”<sup>858</sup> Evidently, the presumption of innocence has to be respected.<sup>859</sup> “[D]ue process entitlements [...] come into play in their entirety once a disciplinary process is initiated.”<sup>860</sup> “To observe a party’s right of due process, especially in disciplinary matters, it is necessary for the Dispute Tribunal to undertake a fair hearing and render a fully reasoned judgment.”<sup>861</sup> In *Tosi*,<sup>862</sup> UNAT distinguished the case from *Kadri* and held that “although succinct, the UNDT’s consideration satisfies the requirement of including stated reasons [...], so as to enable Mr. Tosi to appeal against the Judgment by contesting its arguments[.] [...] While the UNDT could have detailed its reasoning further, there was no error in this respect in the Judgment that could justify a possible remand for additional considerations on the matter”.<sup>863</sup>

##### ➤ Nulla poena sine lege

“The general legal principle that a sanction may not be imposed on any person unless expressly provided for by a rule in force on the date of the facts held against that person must be respected, in disciplinary matters, within the internal legal framework of the United Nations.”<sup>864</sup>

##### ➤ Closed proceedings

“[T]he regularity of the closed proceedings can [] be examined, when challenged by any staff member whose rights were allegedly violated during the proceedings.”<sup>865</sup>

##### ➤ Anonymous witnesses & Adversary procedures

“The use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, even though anonymity does not permit confrontation with the witnesses themselves but only with the person who recorded the statements of the anonymous witnesses. However, such statements may be used as evidence only in exceptional cases because of the difficulties in establishing the facts, if such facts are seriously prejudicial to the work, functioning and reputation of the Organization, and if

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<sup>857</sup> *Ibid.*, para. 18. This was also confirmed in *Elobaid* 2018-UNAT-822, para. 29.

<sup>858</sup> *Cabrera* 2012-UNAT-215, para. 47. See also, *Applicant* 2012-UNAT-209, paras. 42-43; *Flores* 2015-UNAT-525, paras. 14 & 23.

<sup>859</sup> *Liyanarachchige* 2010-UNAT-087, para. 17. This was also confirmed in *Hallal* 2012-UNAT-207, para. 28; *Bagot* 2017-UNAT-718, para. 47.

<sup>860</sup> *Akello* 2013-UNAT-336, para. 36.

<sup>861</sup> *Negussie* 2016-UNAT-700, paras. 19. See also, *Kadri* 2015-UNAT-512, para.30.

<sup>862</sup> *Tosi* 2019-UNAT-946, para. 50.

<sup>863</sup> *Ibid.*

<sup>864</sup> *Yapa* 2011-UNAT-168, para. 27.

<sup>865</sup> *Fedorchenko* 2015-UNAT-499, para. 33.

maintaining anonymity is really necessary for the protection of the witness. Furthermore, it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements.”<sup>866</sup>

In addition, UNAT clarified that “while the use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, a disciplinary measure may not be founded solely on anonymous statements.”<sup>867</sup> Also, “[t]here is no legal or administrative provision obliging the Administration to re-interview a staff member subject to a disciplinary investigation after each statement is obtained.”<sup>868</sup>

A staff member cannot be placed on special leave with pay or without pay as “a ‘veiled disciplinary measure’ or a ‘*de facto* disciplinary suspension’.”<sup>869</sup> In *Cabrera*, UNAT held that “Mr. Cabrera was put on leave using all the reasons under which he could be suspended even though he was not. Therefore, even though Mr. Cabrera was exonerated at the end of the investigation, the OIOS investigation was a full-fledged investigation. The UNDT also correctly held that Mr. Cabrera was entitled to all the due process rights [...] [and] was therefore entitled to compensation for the violation of his due process rights.”<sup>870</sup> Due process also requires that an applicant is provided with adequate opportunity to respond to charges.<sup>871</sup> For example, In *El-Khalek*, UNAT held that “[w]hen a staff member is offered only 24 hours to defend himself against a very serious accusation and not even provided with details of the charges and the supporting evidence, the procedure becomes a parody of due process, and cannot be considered lawful.”<sup>872</sup>

### G. **Retaliation**

“[M]isconduct involving retaliation against another staff member [is] an exception whereby justice to the victim entitles the victim to know whether the disciplinary measure [is] commensurate in gravity with the misconduct.”<sup>873</sup> “[T]he victim of retaliation is entitled to know whether justice was done to the perpetrators of the retaliation, and that it is fair and reasonable to require [the Administration] to provide this information, regardless of whether or not there is any legal provision to that effect. It is [the Administration’s] responsibility to dispense justice for the victim.”<sup>874</sup>

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<sup>866</sup> *Liyanarachchige* 2010-UNAT-087, para. 19.

<sup>867</sup> *Ibid.*, para. 2.

<sup>868</sup> *Sall* 2018-UNAT-889, para. 36.

<sup>869</sup> *Cabrera* 2012-UNAT-215, para. 51.

<sup>870</sup> *Ibid.*

<sup>871</sup> *El-Khalek* 2014-UNAT-442, paras. 28-29.

<sup>872</sup> *Ibid.*, para. 28.

<sup>873</sup> *Rahman* 2014-UNAT-453, para. 42.

<sup>874</sup> *Ibid.*, para. 44.

## 14. Disciplinary measures

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“Disciplinary cases are not criminal, so that criminal law procedure and criminal definitions [...] are not applicable.”<sup>875</sup> For example, in *Ainte*, UNAT held that “[d]ouble jeopardy is a principle of criminal law which is not applicable [...], since disciplinary cases are not criminal.”<sup>876</sup>

The Administration “is empowered by its written law to take disciplinary measures against its staff members in cases of misconduct, irrespective of whether the conduct in question is referred to a local court or the accused person is convicted or acquitted in such proceedings”.<sup>877</sup>

There are five elements relating to judicial review of disciplinary sanctions: 1) broad discretion of the Administration, 2) establishment of facts, 3) misconduct 4) proportionality, and 5) substantive or procedural irregularity.<sup>878</sup> “Fraudulent [or dishonest] intent is not a requisite element of the offenses [in disciplinary proceedings].”<sup>879</sup>

### A. Discretion of the Administration

“Disciplinary matters are within the discretion and authority of [the Administration].”<sup>880</sup> “As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.”<sup>881</sup>

If the level of sanction is not unfair or disproportionate to the seriousness of the offence, UNAT is “deferential not only to the Administration but also to [DT], which is charged with finding facts”.<sup>882</sup> This is also known as the non-substitution principle.

The SG has the discretionary authority to issue a non-disciplinary administrative measure – such as a written reprimand – with regard to a former staff member.<sup>883</sup> However, UNRWA’s legal framework restricts the Agency’s authority to take disciplinary measures against former staff members. This is not the case under the UN system in accordance with ST/AI/2017/1.<sup>884</sup>

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<sup>875</sup> *Jahnsen Lecca* 2014-UNAT-408, para. 24. See also, *Molari* 2011-UNAT-164, para. 30; *Majut* 2018-UNAT-862, para. 74.

<sup>876</sup> *Ainte* 2013-UNAT-388, para. 30.

<sup>877</sup> *Toukolon* 2014-UNAT-407, para. 23. See also, *Abu Ghali* 2013-UNAT-366, para. 43; *Ganbold* 2019-UNAT-976, paras. 32-34.

<sup>878</sup> *Maslamani* 2010-UNAT-028, para. 20. This was also confirmed in *Haniya* 2010-UNAT-024, para. 31; *Mahdi* 2010-UNAT-018 para. 27; *Masri* 2010-UNAT-098; *Applicant* 2013-UNAT-302 para. 29; *Kamara* 2014-UNAT-398 para. 29; *Nasrallah* 2013-UNAT-310 para. 23; *Walden* 2014-UNAT-436 para.24; *Koutang* 2013-UNAT-374 para. 28; *Portillo Moya* 2015-UNAT-523 para. 17; *Wishah* 2015-UNAT-537 para. 20.

<sup>879</sup> *Ganbold* 2019-UNAT-976, para. 31.

<sup>880</sup> *Abu Hamda* 2010-UNAT-022, para. 37. See also, *Portillo Moya* 2015-UNAT-523, paras. 19-21.

<sup>881</sup> *Abboud* 2010-UNAT-100, para. 34. See also, *Oummih* 2015-UNAT-518, para. 31; *Benfield-Laporte* 2015-UNAT-505, para. 37.

<sup>882</sup> *Cabrera* 2010-UNAT-089, para. 27. This jurisprudence was reaffirmed in *Koutang* 2013-UNAT-374, paras. 29-30; *Nasrallah* 2013-UNAT-310, para. 24.

<sup>883</sup> *Gallo* 2016-UNAT-706, paras. 16-18.

<sup>884</sup> *Hamdan* 2018-UNAT-839, paras. 33-42.

## B. Facts established to the required standard

“[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.”<sup>885</sup> “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.”<sup>886</sup>

In *Applicant*, UNAT also looked for clear and convincing evidence where the sanction was not termination but rather was two years of demotion.<sup>887</sup> In *Asghar*, UNAT also held that “[a] finding of fraud against a staff matter [...] is a serious matter” and that “the UNDT generally should reach a finding of fraud only on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. In other words, the commission of fraud must be shown by the evidence to have been highly probable.”<sup>888</sup> In any case, it is important to note that in this case of *Asghar*, the sanction was termination.<sup>889</sup> UNAT also indicated and clarified in *Suleiman* that, in all cases other than termination, preponderance of evidence is sufficient.<sup>890</sup>

If a disciplinary measure of termination is based on several grounds, including mitigating and aggravating factors, there must be clear and convincing evidence for all these facts or elements.<sup>891</sup>

“Clear and convincing evidence of misconduct [...] imports two high evidential standards. The first (‘clear’) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (‘convincing’) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.”<sup>892</sup> In other words, “the evidence justifying the potential consequences (including up to the ultimate sanction of dismissal) must be both manifest as opposed to suppositional (‘clear’) and more than meets a balance of probabilities standard (‘convincing’). A sufficient doubt or doubts about the credibility of other evidence (including eyewitness evidence) can be a good indicator that this standard has not been met.

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<sup>885</sup> *Liyanarachchige* 2010-UNAT-087, para. 17. See also, *Nyambuza* 2013-UNAT-364, para. 31; *Diabagate* 2014-UNAT-403, para. 35; *Hallal* 2012-UNAT-207, para. 28.

<sup>886</sup> *Molari* 2011-UNAT-164, para. 30. This jurisprudence reaffirmed in *Abu Ghali* 2013-UNAT-366, para. 33; *Nyambuza* 2013-UNAT-364, para. 31; *Diabagate* 2014-UNAT-403, para. 30; *Mobanga* 2017-UNAT-741, para. 24.

<sup>887</sup> *Applicant* 2013-UNAT-381, paras. 41-44. See also *Nasrallah* 2013-UNAT-310.

<sup>888</sup> *Asghar* 2020-UNAT-982, para. 35.

<sup>889</sup> *Ibid.*, para. 48.

<sup>890</sup> *Suleiman* 2020-UNAT-1006, para. 10.

<sup>891</sup> *Negussie* 2016-UNAT-700, paras. 23-25 and 28; *Negussie* 2020-UNAT-1033, paras. 11-12.

<sup>892</sup> *Negussie* 2020-UNAT-1033, para. 45.

So, too, can be unexplained inconsistency of accounts of events provided at different times by the same witness. The same is true of more than minor discrepancies between the accounts of the same event by different witnesses.”<sup>893</sup>

The required standard of proof in administrative actions, such as written reprimands, is preponderance of evidence.<sup>894</sup>

In *Ibrahim*, the Applicant, a Security Sergeant, was charged with theft due to the disappearance of a bottle of wine. His summary dismissal was affirmed by UNAT.<sup>895</sup> In *Aghadiuno*, the Applicant who committed a fraud in obtaining an educational grant was summarily dismissed.<sup>896</sup>

Administrative leave was without pay in a case in which there was probable cause that a staff member had engaged in sexual exploitation and sexual abuse.<sup>897</sup>

➤ Examples regarding the establishment of facts

In *Applicant*, DT mistakenly failed to give sufficient weight to the Complainants’ testimonies and signed interviews and “focused [instead] on minor inconsistencies in their statements”.<sup>898</sup> Accordingly, DT erred in concluding that the charges against the Applicant had not been established by clear and convincing evidence.<sup>899</sup>

In *Nyambuza*, DT found that the facts had not been established by clear and convincing evidence and UNAT “agreed, albeit for different reasons than proffered by the UNDT”.<sup>900</sup> UNAT underlined that “[w]ritten witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.”<sup>901</sup> In this case, there were several problems with respect to the reliability or truthfulness of the written testimonies.<sup>902</sup> Accordingly, UNAT confirmed that the charges against the Applicant had not been established by clear and convincing evidence.<sup>903</sup>

In *Diabagate*, the Administration failed to demonstrate that the charges against the Applicant had been established by clear and convincing evidence.<sup>904</sup> In addition, in this case, “the UNDT

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<sup>893</sup> *Negussie* 2020-UNAT-1033, para. 49.

<sup>894</sup> *Elobaid* 2018-UNAT-822, para. 35. This was also confirmed in *Yasin* 2019-UNAT-915, para. 47.

<sup>895</sup> *Ibrahim* 2017-UNAT-776, paras. 45-47.

<sup>896</sup> *Aghadiuno* 2018-UNAT-811, paras. 94-105.

<sup>897</sup> *Muteeganda* 2018-UNAT-869, paras. 30-32. See also, Staff Rules 10.4(c) & UNRWA Area Staff Rule 110.2(3).

<sup>898</sup> *Applicant* 2013-UNAT-302, para. 47.

<sup>899</sup> *Ibid.*, paras. 40-47.

<sup>900</sup> *Nyambuza* 2013-UNAT-364, para. 32.

<sup>901</sup> *Ibid.*, para. 35.

<sup>902</sup> *Ibid.*, para. 36.

<sup>903</sup> *Ibid.*, paras. 32-40.

<sup>904</sup> *Diabagate* 2014-UNAT-403, paras. 33-37.

failed to place the burden on the Administration to prove the facts underlying the discipline; instead it shifted the burden to the staff member [...] to disprove the facts”.<sup>905</sup>

In *El-Khalek*, “the Administration failed to demonstrate that Mr. El-Khalek had committed the serious misconduct he had been charged with, because not only did the proceedings fail to provide him with an adequate opportunity to defend himself breaching his right to due process, but also there was not enough evidence supporting the accusation”.<sup>906</sup>

In *Oh*, the staff member was summarily dismissed for engaging in sexual exploitation.<sup>907</sup> The evidence of misconduct was based on statements from four anonymous victim-witnesses, admissions made by the subject staff member that corroborated the victim-witnesses’ statements, and the identification of the staff member by two of the victims from a photo array.<sup>908</sup> UNAT held that “the conditions for the admissibility of anonymous statements set out by the Appeals Tribunal in *Liyanarachchige* were met” and dismissed the appeal.<sup>909</sup>

In *Wishah*, DT failed to correctly evaluate the witnesses’ possible subjective statements, as “the alleged misconduct was committed in a domestic context against the relatives of the staff member”.<sup>910</sup> “This context is particularly common in cases that involve gender violence, such as the first infraction attributed to Mr. Wishah, or family violence, such as the second infraction in which Mr. Wishah was involved.”<sup>911</sup> Therefore, UNAT held that “UNRWA DT erred in finding that there was no clear and convincing evidence in support of the allegations against Mr. Wishah.”<sup>912</sup>

In *Mobanga*, “UNDT erred in not concluding, on the totality of [...] evidence, that there was sufficient evidence against Mr. Mobanga of a clear and convincing nature for the charge of misconduct.”<sup>913</sup>

In *Mbaigolmem*, DT erred in concluding that there was only preponderance of evidence and not clear and convincing evidence establishing that the alleged misconduct of sexual harassment, in fact, had occurred.<sup>914</sup>

### C. **Behaviour at issue constituted misconduct**

“A failure by a staff member to comply with his or her disclosure of information obligations [...], or to observe the standard of conduct expected of an international civil servant is undeniably misconduct.”<sup>915</sup> “As a general rule, any form of dishonest conduct compromises

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<sup>905</sup> *Ibid.*, para. 35.

<sup>906</sup> *El-Khalek* 2014-UNAT-442, para. 24.

<sup>907</sup> *Oh* 2014-UNAT-480, para. 26.

<sup>908</sup> *Ibid.*

<sup>909</sup> *Ibid.*, para. 37. See also the sub-title “Anonymous witnesses & Adversary procedures” in the previous chapter.

<sup>910</sup> *Wishah* 2015-UNAT-537, para. 25.

<sup>911</sup> *Ibid.*, para. 26.

<sup>912</sup> *Ibid.*, para. 27.

<sup>913</sup> *Mobanga* 2017-UNAT-741, para.32.

<sup>914</sup> *Mbaigolmem* 2018-UNAT-819, paras. 31-32.

<sup>915</sup> *Rajan* 2017-UNAT-781, para. 37.

the necessary relationship of trust between employer and employee and will generally warrant dismissal.”<sup>916</sup>

“[W]hen submitting an application for an appointment, it is the candidate’s responsibility to ensure that his application does not contain any inaccuracies and the Organization is under no obligation to prove that a candidate intended to mislead the Organization in his or her answers to the questions on the application form [strict liability].”<sup>917</sup>

For other examples regarding whether facts amount to misconduct: *Abu Hamda* is a case about the manipulation of stocks;<sup>918</sup> *Masri* and *Konate* are related to procurement violations;<sup>919</sup> *Nourain et al.* and *Ogorodnikov* are about providing false information;<sup>920</sup> *Bastet* concerns an applicant who obtained rental subsidies for his own apartment;<sup>921</sup> *Mizyed* is about a case of theft;<sup>922</sup> and *Siciliano* is a case of corruption.<sup>923</sup>

#### D. Proportionality

The Administration “has wide discretion in applying sanctions for misconduct but at all relevant times must adhere to the principle of proportionality”.<sup>924</sup>

“[T]he principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.”<sup>925</sup> Once the facts and misconduct have been established, the appropriateness of the level of sanction can only be considered unlawful in case of “obvious absurdity or flagrant arbitrariness”.<sup>926</sup> In that sense, UNAT “is vested with the authority to overturn a prescribed penalty if it is regarded as too excessive in the circumstances of the case”.<sup>927</sup> “The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his [or her] past conduct, the context of the violation and employer consistency.”<sup>928</sup>

For example, in *Turkey*, UNAT affirmed DT’s judgment where DT replaced the disciplinary measure of separation from service with compensation in lieu of notice and termination

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<sup>916</sup> *Ibid.*

<sup>917</sup> *Rajan* 2017-UNAT-781, para. 39. See also, *Ainte* 2013-UNAT-388, para. 28.

<sup>918</sup> *Abu Hamda* 2010-UNAT-022, para. 30-32.

<sup>919</sup> *Masri* 2010-UNAT-098, paras. 1-2; *Konate* 2013-UNAT-334, paras. 19-20.

<sup>920</sup> *Nourain et al.* 2013-UNAT-362, paras. 22-24; *Ogorodnikov* 2015-UNAT-549, para. 27.

<sup>921</sup> *Bastet* 2015-UNAT-511, para. 56.

<sup>922</sup> *Mizyed* 2015-UNAT-550, para. 27.

<sup>923</sup> *Siciliano* 2016-UNAT-702, para. 56-57.

<sup>924</sup> *Applicant* 2013-UNAT-280, para. 120. See also, *Abu Hamda* 2010-UNAT-022.

<sup>925</sup> *Sanwidi* 2010-UNAT-084, para. 39. This principle was also confirmed in *Applicant* 2013-UNAT-280, para. 120; *Abu Jarbou* 2013-UNAT-292, para. 41; *Akello* 2013-UNAT-336, para. 41; *Samandarov* 2018-UNAT-859, para. 23; *Turkey* 2019-UNAT-955, para. 38.

<sup>926</sup> *Aqel* 2010-UNAT-040, para. 35; *Konate* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para. 25; *Portillo Moya* 2015-UNAT-523, para. 22.

<sup>927</sup> *Rajan* 2017-UNAT-781, para. 48; *Negussie* 2016-UNAT-700, para. 28; *Ogorodnikov* 2015-UNAT-549, paras. 30-35.

<sup>928</sup> *Rajan* 2017-UNAT-781, para. 48.

indemnity with demotion by one grade.<sup>929</sup> DT also ordered two years of compensation in case of non-reinstatement.<sup>930</sup> The Applicant committed the misconduct of driving under the influence of alcohol and had an accident inside the UNFIL compound while driving a UN vehicle.<sup>931</sup> UNAT held that “UNDT correctly balanced the competing considerations and concluded reasonably that the imposition of the sanction of separation from service with compensation in lieu of notice and termination indemnity was disproportionate to the misconduct.”<sup>932</sup>

In *Cobarrubias*, UNAT held that separation from service with compensation in lieu of notice and without termination indemnity for storing pornographic and violent emails in a work computer “could be considered harsh, [but] it was not unreasonable, absurd or disproportionate”.<sup>933</sup> Accordingly, UNAT reversed DT’s judgment and affirmed the disciplinary measure.<sup>934</sup>

In *Applicant*, the Applicant, who was a senior staff member was summarily dismissed for having sexually harassed three local staff members; the sanction was affirmed by UNAT.<sup>935</sup>

In *Konate*, separation from service for procurement violations was considered to be proportionate to the offence.<sup>936</sup>

In *Kamara*, separation from service without termination indemnity for causing the Organization a loss of USD190,000 was considered to be proportionate.<sup>937</sup>

In *Aghadiuno*, regarding the cases of dishonesty and impropriety, UNAT held that “the only proportionate sanction is the ultimate penalty of summary dismissal, without any benefits. The continuation of an employment relationship would be intolerable and untenable in the circumstances.”<sup>938</sup>

In *Samandarov*, the Applicant and the Complainant had some verbal altercations. UNAT held that, “[t]he ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline.”<sup>939</sup> UNAT affirmed DT’s judgment that a written censure and the loss of two steps in grade were disproportionate to the misconduct and that the censure was enough.<sup>940</sup> In *Jenbere*, UNAT held that, “[r]ather than a demotion and a fine, [the Applicant]

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<sup>929</sup> *Turkey* 2019-UNAT-955, paras. 42-43.

<sup>930</sup> *Ibid.*, para. 1.

<sup>931</sup> *Ibid.*

<sup>932</sup> *Ibid.*, para. 39.

<sup>933</sup> *Cobarrubias* 2015-UNAT-510, para. 20.

<sup>934</sup> *Ibid.*

<sup>935</sup> *Applicant* 2012-UNAT-209, paras. 52-55.

<sup>936</sup> *Konate* 2013-UNAT-334, paras. 21-24.

<sup>937</sup> *Kamara* 2014-UNAT-398, paras. 32-37. For other similar examples, see; *Jaffa* 2015-UNAT-545, paras. 23-24; *Bertrand* 2017-UNAT-738, paras. 31-36.

<sup>938</sup> *Aghadiuno* 2018-UNAT-811, para. 103. See also, *Rajan* 2017-UNAT-781, para. 39; *Ainte* 2013-UNAT-388, para. 28.

<sup>939</sup> *Samandarov* 2018-UNAT-859, para. 25. See also, *Turkey* 2019-UNAT-955, para. 40; *Nyawa* 2020-UNAT-1024, para. 90.

<sup>940</sup> *Samandarov* 2018-UNAT-859, paras. 6 & 25-27.

should have been facing summary dismissal”, for sitting on an interview panel for the selection of her husband.<sup>941</sup>

In *Nyawa*, after having concluded that one of the allegations leading to the Applicant being disciplined was not substantiated, DT revised the imposed disciplinary measure from two years of deferment for consideration for promotion and a written censure to only two years of deferment without the censure.<sup>942</sup> UNAT affirmed.<sup>943</sup>

In *Halidou*, in a case of an assault committed by a Security Officer, UNAT vacated UNDT’s judgment where had found that the Applicant’s termination was disproportionate.<sup>944</sup>

In *Haidar*, the Applicant was terminated with compensation in lieu of notice (one-month) and without termination indemnity as well as a fine of one-month net base salary. UNAT reiterated that DT “must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, [...] [that] reasonableness is assured by a factual judicial assessment of the elements of proportionality[,] [...] [and that] proportionality is a jural postulate or ordering principle requiring teleological application.”<sup>945</sup> Accordingly, UNAT concluded that “termination of employment presents for the affected staff member a significant financial onerousness, if not loss of livelihood, combining termination with a fine does not seem to bear rational connection with either the retributive or preventive purpose of the sanction[,] [...] [and that] the UNDT correctly applied the proportionality test and did not err in considering that the disciplinary measure of a fine should be listed”.<sup>946</sup>

#### E. Other issues

The Administration “has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose”.<sup>947</sup> “[C]onstitutive elements of an offence must be considered separately from mitigating and aggravating factors.”<sup>948</sup> For example, in *Abu Hamda*, it was held that, instead of loss of salary and demotion, only written censure would be enough based on mitigating factors.<sup>949</sup> In *Ouriques*, the sanction for physical assault was termination with compensation in lieu of notice and termination indemnity.<sup>950</sup> Given the mitigating circumstances of the long and satisfactory service and the staff member’s personal and stressful situation, the sanction was considered to be appropriate.<sup>951</sup>

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<sup>941</sup> *Jenbere* 2019-UNAT-935, para. 36.

<sup>942</sup> *Nyawa* 2020-UNAT-1024, para. 98.

<sup>943</sup> *Ibid.*, para. 100.

<sup>944</sup> *Halidou* 2020-UNAT-1070.

<sup>945</sup> *Haidar* 2020-UNAT-1076, para. 59.

<sup>946</sup> *Ibid.*, para. 60.

<sup>947</sup> *Toukolon* 2014-UNAT-407, para. 31. See also, *Jahnsen Lecca* 2014-UNAT-408, para. 27; *Portillo Moya* 2015-UNAT-523, paras. 23-24; *Jaffa* 2015-UNAT-545, paras. 16-20.

<sup>948</sup> *Turkey* 2019-UNAT-955, para. 40.

<sup>949</sup> *Abu Hamda* 2010-UNAT-022, paras. 39-43.

<sup>950</sup> *Ouriques* 2017-UNAT-745, para. 16.

<sup>951</sup> *Ibid.*, paras. 20-22. See also the dissenting opinion of Judge Halfeld’s agreeing with UNDT’s decision.

“Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.”<sup>952</sup>  
“[O]nly substantial procedural irregularities will render a disciplinary measure unlawful.”<sup>953</sup>

Finally, a sanction based on charges that are more numerous than those initially imposed is illegal.<sup>954</sup>

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<sup>952</sup> *Applicant* 2013-UNAT-302, para. 29. This case also refers to *Messinger* 2011-UNAT-123 as a leading case regarding above principle and it has been also confirmed in *Molari* 2011-UNAT-164, paras. 29-30; *Nyambuza* 2013-UNAT-364, para. 30; *Diabagate* 2014-UNAT-403, para. 29; *Mizyed* 2015-UNAT-550, para. 18; *Negussie* 2016-UNAT-700, para. 18; *Bagot* 2017-UNAT-718, para. 46.

<sup>953</sup> *Sall* 2018-UNAT-889, para. 33, emphasis added. See also, *Thiombiano* 2020-UNAT-978, para. 34; *Nadasan* 2019-UNAT-918, para. 43; *Abu Osba* 2020-UNAT-1061, para. 66.

<sup>954</sup> *Kamara* 2014-UNAT-398, paras. 34-35.

## 15. Harassment

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### ➤ Scope of review

“As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.”<sup>955</sup> A staff member who alleges that he/she has been subjected to harassment may challenge a decision not to investigate a claim of discrimination.<sup>956</sup> “[T]he scope of the UNDT’s judicial review in harassment and abuse of authority cases is restricted to how [the Administration] responded to the complaint in question.”<sup>957</sup> “[T]he mere existence of a harassment complaint does not render the allegations of harassment true.”<sup>958</sup>

DT has the competence “to examine allegations of harassment” “for the purpose of determining if the impugned administrative decisions were improperly motivated.”<sup>959</sup> “This is different from a *de novo* investigation into a complaint of harassment”, which falls outside DT’s jurisdiction.<sup>960</sup> Thus, DT may not “conduct a fresh investigation into [...] [the] allegation of harassment but [may] draw its own conclusions from the [investigation report].”<sup>961</sup> In the same vein, “the proper function of the UNDT is to judicially review the [contested] decision” and not to make a “first instance assessment” by substituting its decision for that of the Administration.<sup>962</sup> For example, in *Dawas*, UNAT dismissed the Commissioner-General’s arguments and considered that UNRWA DT’s examination was not a *de novo* investigation into a complaint of harassment.<sup>963</sup>

“When a staff member alleges discrimination, he or she bears the burden of proving on a preponderance of evidence that discrimination occurred.”<sup>964</sup> So, “the onus to provide sufficient evidence of harassment prejudice or any kind of improper motivation” is on the Applicant.<sup>965</sup> Harassment might also be based on a single event.<sup>966</sup>

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<sup>955</sup> *Abboud* 2010-UNAT-100, para. 34. See also, *Oummih* 2015-UNAT-518, para. 31; *Benfield-Laporte* 2015-UNAT-505, para. 37.

<sup>956</sup> *Nwuke* 2010-UNAT-099, paras. 36-37.

<sup>957</sup> *Masykkanova* 2016-UNAT-662, para. 6. See also, *Luvai* 2014-UNAT-417, para. 64.

<sup>958</sup> *Loeber* 2018-UNAT-836, para. 16.

<sup>959</sup> *Messinger* 2010-UNAT-123, para. 25.

<sup>960</sup> *Ibid.* This was also confirmed in *Mezoui* 2012-UNAT-220, para. 41 and 46; *Luvai* 2014-UNAT-417, para. 58; *Mashhour* 2014-UNAT-483, para. 45; *Dawas* 2016-UNAT-612, paras. 21-23; *Sarwar* 2018-UNAT-868, paras. 40 – 41.

<sup>961</sup> *Mashhour* 2014-UNAT-483, paras. 46. This was also confirmed in *Dawas* 2016-UNAT-612, para. 24.

<sup>962</sup> *Nielsen* 2016-UNAT-647, para. 41. See also, *Nielsen* 2016-UNAT-648, para. 39; *Nielsen* 2016-UNAT-649, para. 39; *Nielsen* 2016-UNAT-650, para. 41.

<sup>963</sup> *Dawas* 2016-UNAT-612, paras. 20-22.

<sup>964</sup> *Azzouni* 2010-UNAT-081, para. 35. This was also confirmed in *Gehr* 2012-UNAT-234, para. 41; *Charles* 2013-UNAT-284, para. 25.

<sup>965</sup> *Parker* 2010-UNAT-012, para. 38. This was also confirmed in *Nwuke* 2015-UNAT-506, para. 49; *Obdeijn* 2012-UNAT-201, para. 38; *Hepworth* 2015-UNAT-503, para. 25.

<sup>966</sup> *Parker* 2010-UNAT-012, para. 38.

In *Applicant*, UNAT provides a good example about the potential legal aspects of incompatibilities arising from a clash of personalities among staff members and managers.<sup>967</sup>

➤ *Sexual harassment*

“Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.”<sup>968</sup> The absence of “any indication that [a person] had been directly put on notice or reasonably should have understood that [...] his/her conduct was unwelcome or created an intimidating, hostile or offensive work environment, does not meet the conditions set out in the relevant provisions” to establish, by clear and convincing evidence, sexual harassment.<sup>969</sup>

“Like sexual harassment, abuse of authority by itself may be serious misconduct warranting separation from service.”<sup>970</sup>

“[I]f the findings of the report concluded that no prohibited conduct took place the case is closed.”<sup>971</sup> “[When] the matter is a closed matter and [the Applicant] has not presented any cogent argument to show that there are exceptional circumstances which might otherwise have entitled [her/him] to the investigation report [,] [...] [he/she] is not entitled to receive a detailed copy of the investigation report.”<sup>972</sup>

➤ *Examples*

In *Khan*, UNAT held that “[w]hen abuse of authority is coupled with the sexual harassment of two female staff members, the combination clearly warrants the imposition of the harshest sanction available to the Agency.”<sup>973</sup>

In *Edwards*, UNAT concluded that the Administration failed to create a proper work-place atmosphere, free of harassment. The Applicant was awarded two months’ net base salary for moral damage due to the Administration’s breach of its duty and half a month’s net base salary for the excessive delay of more than four years in dealing with her grievances.<sup>974</sup>

In *Nogueira*, UNAT concluded that the Administration failed to create a proper work-place atmosphere, free of harassment. USD25,000 was awarded for a violation of the right to be free of harassment in the workplace.<sup>975</sup>

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<sup>967</sup> *Applicant* 2020-UNAT-1030.

<sup>968</sup> *Mbaigolmem* 2018-UNAT-819, para. 33.

<sup>969</sup> *Bagot* 2017-UNAT-718, para. 65.

<sup>970</sup> *Khan* 2014-UNAT-486, para. 47.

<sup>971</sup> *Ivanov* 2015-UNAT-519, para. 17.

<sup>972</sup> *Ibid.*, para. 18. This was also confirmed in *Elobaid* 2018-UNAT-822, para. 29.

<sup>973</sup> *Khan* 2014-UNAT-486, para. 47.

<sup>974</sup> *Edwards* 2012-UNAT-212; see also *Oummih* 2015-UNAT-518.

<sup>975</sup> *Nogueira* 2014-UNAT-409.

In *Delaunay*, following the Organization’s continuing failure to protect a staff member from harassment, UNAT increased the compensation ordered by UNDT.<sup>976</sup>

In *Nadeau*, the Applicant “filed a complaint pursuant to Section 3.2 of [...] ST/SGB/2008/5 [...] against the [Administration] for failing to take appropriate action against OIOS staff members for allegedly harassing and retaliating against their colleagues and committing wrongdoings identified as misconduct”.<sup>977</sup> UNAT found that “the Administration’s response to Mr. Nadeau’s complaint was [not] adequate”.<sup>978</sup> UNAT held that “UNDT’s last finding of adequacy is [...] not consistent with its own previous statement, nor does it go in harmony with the good practices and the high standards of the Organization to fulfill its own voluntary commitments”.<sup>979</sup> UNAT added that “[w]hereas ordinarily the Organization does not have a duty to make an explicit decision regarding every request it receives, the minimum standards of transparency determine it to comply with its own commitments once these are voluntarily given.”<sup>980</sup>

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<sup>976</sup> *Delaunay* 2019-UNAT-939, paras. 51-62.

<sup>977</sup> *Nadeau* 2020-UNAT-1075, para. 3.

<sup>978</sup> *Ibid.*, para. 40.

<sup>979</sup> *Ibid.*

<sup>980</sup> *Ibid.*

# **PART IV: Remedies**

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## 16. Remedies

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DT and UNAT may “award compensation for actual pecuniary or economic loss, [including loss of earnings<sup>981</sup>] non-pecuniary damage, procedural violations, stress, and moral injury”.<sup>982</sup> “[C]ompensation must be set by the UNDT following a principled approach on a case by case basis, [...] [and] [UNDT] is in the best position to decide on the level of compensation given its appreciation of the case.”<sup>983</sup>

“Relevant considerations in setting compensation include, among others, the nature of the post formerly occupied (i.e. temporary, fixed-term, permanent), the remaining time to be served by a staff member on his or her appointment and their expectancy of renewal,<sup>[984]</sup> or whether a case was particularly egregious <sup>[985]</sup> or otherwise presented particular facts justifying compensation beyond the two-year limit.”<sup>986</sup>

Article 10(5) of DT’s Statute articulates that the two-year limit is two years’ net base salary. Net base salary is obtained by deducting staff assessment from gross base salary.<sup>987</sup>

It is required that “UNDT give a thorough and convincing reasoning as to the amount of compensation awarded. If the UNDT fails to present such reasoning, it is up to [UNAT] to step in and decide whether to remand the case to the UNDT, or set an amount of compensation and modify the UNDT Judgment.”<sup>988</sup> However, DT cannot award compensation in the absence of actual prejudice.<sup>989</sup>

“Absent any error of law or manifestly unreasonable factual findings, [...] [UNAT] will not interfere with the discretion vested in [DT] to decide on remedy.”<sup>990</sup> For example, in *Lutta*,

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<sup>981</sup> *Krioutchkov* 2016-UNAT-691, para. 28. See also, *Cohen* 2011-UNAT-131.

<sup>982</sup> *Antaki* 2010-UNAT-095, para. 21. This was also confirmed in *Nyakossi* 2012-UNAT-254, para. 18; *Faraj* 2015-UNAT-587, para. 26; *Mihai* 2017-UNAT-724, para. 19; *Sirhan* 2018-UNAT-860, para. 19; *Harris* 2019-UNAT-896; para. 61.

<sup>983</sup> *Solanki* 2010-UNAT-044, para. 20. This was also confirmed in *Muwamsaku* 2012-UNAT-246, para. 29; *Rantisi* 2015-UNAT-528, para. 71; *Mushema* 2012-UNAT-247, para. 29; *Muwamsaku* 2012-UNAT-246, para. 29; *Faraj* 2015-UNAT-587, para. 26; *Krioutchkov* 2017-UNAT-712, para. 16; *Sarrouh* 2017-UNAT-783, para. 25.

<sup>984</sup> *Andreyev* 2015-UNAT-501, para. 31; *Gakumba* 2013-UNAT-387, para. 16.

<sup>985</sup> *Mmata* 2010-UNAT-092, para. 32.

<sup>986</sup> *Faraj* 2015-UNAT-587, para. 26. This was also confirmed in *Solanki* 2010-UNAT-044, para. 20; *Krioutchkov* 2017-UNAT-712, para. 16.

<sup>987</sup> See [https://www.un.org/Depts/OHRM/salaries\\_allowances/salary.htm](https://www.un.org/Depts/OHRM/salaries_allowances/salary.htm).

<sup>988</sup> *Mihai* 2017-UNAT-724, para. 15. See also, *Nadasan* 2019-UNAT-918, para. 46; *Ladu* 2019-UNAT-956, para. 19; *Nyawa* 2020-UNAT-1024, para. 52.

<sup>989</sup> *Bertucci* 2011-UNAT-114, para. 18. This was also confirmed in *Applicant* 2012-UNAT-209, para. 48; *Applicant* 2012-UNAT-209, para. 48; *Leal* 2013-UNAT-337, para. 25; *Oummih* 2015-UNAT-518, para. 41. See also, *Sina* 2010-UNAT-094, paras. 24-25; *Obdeijn* 2012-UNAT-201, para. 45; *Nyakossi* 2012-UNAT-254, para. 19; *Abboud* 2010-UNAT-100, para.3; *Charles* 2013-UNAT-286, para. 30.

<sup>990</sup> *Rantisi* 2015-UNAT-528, para.63. See also, *Sarrouh* 2017-UNAT-783, para. 25; *Ho* 2017-UNAT-791, para. 34; *Fedorchenko* 2018-UNAT-867, para. 61; *Robinson* 2020-UNAT-1040, para. 28. See also, *Cieniewicz* 2012-UNAT-232, para. 53; UNDT’s judgment not to award moral damages was confirmed; *Finniss* 2014-UNAT-397, para. 36; award of USD 50,000 in moral damages confirmed; *Anderson* 2013-UNAT-379, para. 20; award of CHF 4,000 in moral damages confirmed; *Goodwin* 2013-UNAT-346, para. 23; the decision not to award any compensation of pecuniary damages and award of USD 30,000 in moral damages were confirmed; *Gusarova* 2014-UNAT-439, paras. 44 and 49; two months’ net base salary instead of USD 3,000 in material damages, moral

UNAT clarified that DT is not obliged to determine the amount of compensation for loss of chance by assessing the percentage chances. It is only one of the methods of assessing damages.<sup>991</sup>

DT is not competent to award compensation “without a previous claim for such damage and compensation.”<sup>992</sup> If no request for such compensation is made by the Applicant, DT lacks jurisdiction to award this kind of compensation *sua sponte*.<sup>993</sup> In *Rehman*, a wrongful award of compensation was allowed to stand because it was not appealed by the SG.<sup>994</sup> As mentioned, compensation must have been requested, and there must be a sufficient evidentiary basis for the damages incurred, for an award of compensation.<sup>995</sup> “The claimant carries the burden of proof about the existence of factors causing damage to the victim’s psychological, emotional and spiritual wellbeing”.<sup>996</sup>

“[W]hen the delay is not a breach of an [applicant’s] substantive or procedural rights, it cannot be the basis for an award of moral damages.”<sup>997</sup> Also, “when unconscionable delays occur on the part of the Administration in dealing with claims of staff members, such may give rise in certain circumstances to a compensatory award”.<sup>998</sup> “But not every delay will be cause for the award of compensation to a staff member.<sup>[999]</sup> Rather, the staff member’s due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights.”<sup>1000</sup>

Moreover, “mere delay in receiving [retroactive compensation] would not cause any moral damage”.<sup>1001</sup> Yet, where the SG has a “pattern [...] of failing to resolve issues within a reasonable timeframe or effectively, [...] payment of [...] compensation for the excessive and inordinate delays and emotional harm [is justified]”.<sup>1002</sup>

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damages were refused; *Goodwin* 2014-UNAT-467, paras. 22 and 36; two years’ net base salary for compensation (material damages) confirmed. *Sprauten* 2012-UNAT-219, para. 23; award of six months’ net base salary for the irregularities in the selection process was confirmed; *Leclercq* 2014-UNAT-429, para. 22; award of one year’s net base salary for material damages was confirmed; *Faraj* 2015-UNAT-587, para. 31; award of two years’ net base salary for material damages and USD 5’000 for moral damages was confirmed; *Maslei* 2016-UNAT-637, paras. 31-32; award of eleven months’ net base salary for material damages and six months’ net base salary for moral damages was confirmed.

<sup>991</sup> *Lutta* 2011-UNAT-117, para. 14.

<sup>992</sup> *Debebe* 2013-UNAT-288, para. 19. See also, *Ten Have* 2015-UNAT-599, para. 15; *Sirhan* 2018-UNAT-860, para. 16; *Harris* 2019-UNAT-896; para. 62; *Fosse* 2020-UNAT-1008, para. 30.

<sup>993</sup> *Sirhan* 2018-UNAT-860, para. 20; *Harris* 2019-UNAT-896; paras. 63-66; *Debebe* 2013-UNAT-288, para. 21.

<sup>994</sup> *Rehman* 2018-UNAT-882, paras. 20-21. See also, *Rehman* 2018-UNAT-885, paras. 12-20.

<sup>995</sup> *James* 2010-UNAT-009, para. 46; *Hastings* 2011-UNAT-109, para. 19; *Goodwin* 2013-UNAT-346, para. 23. This was also confirmed in *Kozlov and Romadanov* 2012-UNAT-228 para. 26; *Abu Jarbou* 2013-UNAT-292 para. 46.

<sup>996</sup> *Massabni* 2012-UNAT-238, para. 32. This was also confirmed in *Israbhakdi* 2012-UNAT-277, para. 24; *Charles* 2013-UNAT-283, para. 21; *Ivanov* 2015-UNAT-572, para. 29; *Diatta* 2016-UNAT-640, para. 35.

<sup>997</sup> *Zeid* 2014-UNAT-401, para. 23; see also, *Asariotis* 2013-UNAT-309, para. 39; *Kamal* 2012-UNAT-204, paras. 26-27.

<sup>998</sup> *Cieniewicz* 2012-UNAT-232, para. 51.

<sup>999</sup> *Wu* 2010-UNAT-042, para. 33; *Zhouk* 2012-UNAT-224, para. 17.

<sup>1000</sup> *Abu Jarbou* 2013-UNAT-292, para. 46. See also, *Jaber et al.* 2016-UNAT-634, paras. 28-32.

<sup>1001</sup> *Tabari* 2010-UNAT-030, para. 23.

<sup>1002</sup> *Meron* 2012-UNAT-198, paras. 27-29.

For example, in *Nchimbi*, UNAT held that the delay of three and a half months was not only reasonable but was necessary, thus rescinded the award of compensation ordered by DT.<sup>1003</sup> In *Gnassou*, the delay was unjustified but the Applicant did not suffer any harm as a result of it.<sup>1004</sup> In *Awe*, UNAT reiterated that there is no provision in DT's Statute for an award of compensation for procedural error.<sup>1005</sup>

Together with compensation, interest needs to be paid at the US Prime Rate "from the date on which the entitlement becomes due and an extra five percent shall be added to the US Prime Rate if the judgment is not executed within the deadline".<sup>1006</sup>

It is not possible to award compensation for damage to career prospects when reviewing a reassignment decision and not a situation of separation from service.<sup>1007</sup>

"[I]f a rescission of the flawed administrative decision is no longer available (i.e., [...] in a reclassification matter, the staff member has retired from the Organization), then compensation is owed by the Administration."<sup>1008</sup> "[W]hen calculating the quantum of compensation, it must be set as of the date of the breach of the staff member's contractual rights and not the date of judgment."<sup>1009</sup>

#### A. Specific Performance

"[T]he order of specific performance is an alternative to the rescission of an administrative decision, [...] [and] an order for compensation in lieu of specific performance is only required when the administrative decision which is rescinded concerns appointment, promotion, or termination."<sup>1010</sup> DT is allowed to "order both the rescission and the performance needed to bring the administrative situation in compliance with the law".<sup>1011</sup>

In *Farr*, the Administration was ordered "to set a new oral exam in French to be taken by Ms. Farr and to take all the necessary appropriate measures, without delay, to afford her fair treatment".<sup>1012</sup> In *Tadonki*, a request for specific performance was vacated due to an unlawful *ex officio* act of DT, as the adjudication of the issue in question was not requested.<sup>1013</sup>

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<sup>1003</sup> *Nchimbi* 2018-UNAT-815, paras. 25-29.

<sup>1004</sup> *Gnassou* 2018-UNAT-865, paras. 23-27.

<sup>1005</sup> *Awe* 2017-UNAT-774, paras. 27-30.

<sup>1006</sup> *Warren* 2010-UNAT-059, paras. 13-17. This was also confirmed in *Iannelli* 2010-UNAT-093, paras. 13-16; *Ansa-Emmim* 2011-UNAT-155, para. 33; *Bekele* 2012-UNAT-190, para. 33; *Shkurtaj* 2013-UNAT-322, paras. 13-16; *Das* 2014-UNAT-493, para. 11; *Ho* 2017-UNAT-791, paras. 25-29.

<sup>1007</sup> *Haroun* 2017-UNAT-720, paras. 25-27.

<sup>1008</sup> *Auda* 2017-UNAT-787, para. 46. This was also confirmed in *Egglesfield* 2014-UNAT-399, para. 27; *Aly et al.* 2016-UNAT-622, paras. 30-51.

<sup>1009</sup> *Azzouni* 2011-UNAT-162, para. 23.

<sup>1010</sup> *Kaddoura* 2011-UNAT-151, para. 41.

<sup>1011</sup> *Nwuke* 2010-UNAT-099, para. 37.

<sup>1012</sup> *Farr* 2013-UNAT-350, para. 28. See also *Terragnolo* 2014-UNAT-448, para. 24 where a request for specific performance was denied.

<sup>1013</sup> *Tadonki* 2014-UNAT-400, para. 63.

## **B. Compensation in lieu of rescission - Article 10(5)(a) of DT's Statute**

In case of appointment, promotion or, termination, DT, while rescinding an administrative decision, must also set an amount of compensation in lieu of rescission or specific performance.<sup>1014</sup> “Compensation in lieu of rescission [...] shall be an economic equivalent for the loss of a favourable administrative decision.”<sup>1015</sup> “[B]efore awarding any in-lieu compensation, the UNDT has to [expressly] order the rescission of the impugned administrative decision.”<sup>1016</sup>

An award of an in-lieu compensation would be excessive if “a staff member on a temporary appointment [is] compensated for a period higher than the expectation of the duration of [his/her contract]”.<sup>1017</sup> “[A]ny consideration of an award of damages for persons who are recruited on fixed-term contracts must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the time of any alleged breach.”<sup>1018</sup>

Compensation for non-pecuniary damages “is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative”.<sup>1019</sup> In the same vein, “[a]n award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages.”<sup>1020</sup> Also, UNAT held that “there is no reason to reduce [in-lieu compensation] by the amount of termination indemnity or to require mitigation”.<sup>1021</sup>

Within the framework of this article, it is important to clarify what is a case of appointment, promotion or termination (APT). For example, rescission of a transfer is not a case of APT.<sup>1022</sup> Placement between assignments is not a case of APT.<sup>1023</sup> An administrative decision not to renew a staff member’s fixed-term appointment is not a case of APT.<sup>1024</sup> A disciplinary measure, with the exception of a termination, is not a case of APT.<sup>1025</sup> Lateral transfer is not a case of APT.<sup>1026</sup>

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<sup>1014</sup> *Verschuur* 2011-UNAT-149, para. 48; *Faraj* 2015-UNAT-587, para. 25.

<sup>1015</sup> *Mihai* 2017-UNAT-724, para. 19.

<sup>1016</sup> *Ibid.*, para. 14.

<sup>1017</sup> *Kasmani* 2013-UNAT-305, para. 36. For similar examples, see also *Maiga* 2016-UNAT-638, para. 29; *Mihai* 2017-UNAT-724, para. 20.

<sup>1018</sup> *Andreyev* 2015-UNAT-501, para. 31. See also, *Gakumba* 2013-UNAT-387, para. 16; *Bagot* 2017-UNAT-718, para. 74.

<sup>1019</sup> *Gakumba* 2013-UNAT-387, para. 19. See also, *Eissa* 2014-UNAT-469, para. 27; *Zachariah* 2017-UNAT-764, para. 36.

<sup>1020</sup> *Eissa* 2014-UNAT-469, para. 31.

<sup>1021</sup> *Zachariah* 2017-UNAT-764, para. 36. See also, *Eissa* 2014-UNAT-469, para. 27, the dissenting opinion by Judge Knierim not agreeing with this majority opinion. See also, *Fasanella* 2017-UNAT-765.

<sup>1022</sup> *Kaddoura* 2011-UNAT-151, paras. 7, 19 & 41; *Rantisi* 2015-UNAT-528, paras. 61-65.

<sup>1023</sup> *Parker* 2010-UNAT-002, para. 14.

<sup>1024</sup> *Ncube* 2017-UNAT-721, para. 31.

<sup>1025</sup> *Hamdan* 2018-UNAT-839, para. 44.

<sup>1026</sup> *Koduru* 2019-UNAT-907, para. 19. For further examples of APT, please refer to the chapter on suspension of action.

For other examples of in-lieu compensation, please refer to *Muindi*, for one year's net base salary in a case of a rescission of a summary dismissal;<sup>1027</sup> *Nimer*, for six months' net base salary in a case of a separation for abandonment of post;<sup>1028</sup> and *Haroun*, for an in-lieu compensation being increased from six months to 24 months' net base salary.<sup>1029</sup>

### C. Compensation for harm – Article 10(5)(b) of DT's Statute

DT and UNAT may “award compensation for actual pecuniary or economic loss, [including loss of earnings<sup>1030</sup>] non-pecuniary damage, procedural violations, stress, and moral injury”.<sup>1031</sup> However, “the harm [must] be directly caused by the administrative decision in question”.<sup>1032</sup> “It is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If these other two elements of the notion of responsibility are not justified, only the illegality can be declared but compensation cannot be awarded.”<sup>1033</sup>

“[I]t is incumbent upon the staff member to establish the basis for the in-lieu compensation [...] [and] to the Administration to establish a modifying fact for that compensation such as to provide evidence of gainful employment after [the staff member's] separation from service in order to reduce the amount of the compensation.”<sup>1034</sup> UNAT also consistently stresses that there may not be duplicative compensation.<sup>1035</sup> However, as noted before, “[c]ompensation in lieu and the termination indemnity have two different legal natures and one cannot be deducted from the other.”<sup>1036</sup> Also, in terms of all types of compensations, UNAT adopted the maxim “he that comes to equity must come with clean hands.”<sup>1037</sup>

#### ➤ Pecuniary damages/Economic loss

The very purpose of compensation for actual pecuniary or economic loss “is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations”.<sup>1038</sup>

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<sup>1027</sup> *Muindi* 2017-UNAT-782, paras. 52-56.

<sup>1028</sup> *Nimer* 2018-UNAT-879, paras. 45-49.

<sup>1029</sup> *Haroun* 2019-UNAT-909, paras. 34-39.

<sup>1030</sup> *Krioutchkov* 2016-UNAT-691, para. 28. See also, *Cohen* 2011-UNAT-131.

<sup>1031</sup> *Antaki* 2010-UNAT-095, para. 21. This was also confirmed in *Nyakossi* 2012-UNAT-254, para. 18; *Faraj* 2015-UNAT-587, para. 26; *Mihai* 2017-UNAT-724, para. 19; *Sirhan* 2018-UNAT-860, para. 19; *Harris* 2019-UNAT-896; para. 61.

<sup>1032</sup> *Mihai* 2017-UNAT-724, para. 21. See also, *Israbhakdi* 2012-UNAT-277, para. 24; *Sirhan* 2018-UNAT-860, para. 19; *Kebede* 2018-UNAT-874, para. 20; *Elayyan* 2018-UNAT-887, para. 33; *Harris* 2019-UNAT-896; para. 61;

<sup>1033</sup> *Israbhakdi* 2012-UNAT-277, para. 24. See also, *Mihai* 2017-UNAT-724, para. 21; *Ashour* 2019-UNAT-899, paras. 31-33; *Sirhan* 2018-UNAT-860, para. 19; *Harris* 2019-UNAT-896; para. 61;

<sup>1034</sup> *El-Kholy* 2017-UNAT-730, para. 40.

<sup>1035</sup> *Kasmani* 2013-UNAT-305, paras. 36-37; *Mihai* 2017-UNAT-724, para. 25.

<sup>1036</sup> *El-Kholy* 2017-UNAT-730, para. 39. See also, *Eissa* 2014-UNAT-469, para. 27.

<sup>1037</sup> *Amarah* 2019-UNAT-898, paras. 27-29. This was also confirmed in *Kauf* 2019-UNAT-934, para. 33.

<sup>1038</sup> *Warren* 2010-UNAT-059, para. 10. This was also confirmed in *Iannelli* 2010-UNAT-093 para. 14; *Azzouni* 2011-UNAT-162 para. 23; *Alauddin* 2011-UNAT-181 para. 40; *Applicant* 2015-UNAT-590 para. 61; *El-Kholy* 2017-UNAT-730 para. 38; *Ho* 2017-UNAT-791 para. 30.

Please refer to *Delaunay*, for an example where UNAT ordered the reimbursement of the attorney's fees as part of the compensation for material damage.<sup>1039</sup> "In circumstances where compensation for economic loss or financial harm is awarded [...], [DT] can consider mitigating factors as part of its principled approach in determining the quantum of compensation", such as obtaining of other employment.<sup>1040</sup>

➤ *Loss of opportunity (career advancement)*

In *Ashour*, UNAT held that "[c]ompensation for material damages shall be claimed under Article 10(5)(b) [...] [and an applicant's] claims of being deprived of the opportunity to enhance [his/her] career or improve [his/her] status within the Agency, as well as [his/her] allegations of being discriminated against by [his/her] superiors cannot be taken into consideration for the calculation of the in-lieu compensation."<sup>1041</sup> For example, in *Civic*, UNAT found that "the irregularity of cancelling Ms. Civic's e-PAS and the failure to promptly issue another one, although regrettable, did not suffice to demonstrate a significant chance or a realistic prospect of her retaining another position within the Organization."<sup>1042</sup>

➤ *Compensation for non-pecuniary damages (moral damages)*

"[N]ot every breach will give rise to an award of moral damages [...], and whether a breach will give rise to such an award [...] will necessarily depend on the nature of the evidence put before [DT]."<sup>1043</sup> "A note from a psychotherapist is not sufficient evidence for moral damages, when no medical bills or other evidence have been produced."<sup>1044</sup> Successive short renewals cannot be the basis for moral damages, if no material harm is suffered.<sup>1045</sup>

The rescission of the Administration's decision following an applicant's internal challenge does not count in his/her favour for the purpose of compensation for moral damage, as this "could be perceived as a possible deterrent or discouragement to future rescissions by the Administration, and possibly even a threat to the regular functioning of the informal dispute resolution system within the Organization".<sup>1046</sup>

UNAT's jurisprudence has evolved following the amendment of DT's and UNAT's Statutes by the General Assembly. For that reason, the following *Asariotis* jurisprudence established before the amendment must be read with further clarifications, as this jurisprudence has been reserved by subsequent UNAT judgments.

In *Asariotis*, UNAT held that to award moral damages, DT must first identify the moral injury sustained by the employee: it is either one of the following: 1) if a breach of substantive

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<sup>1039</sup> *Delaunay* 2019-UNAT-939, paras. 63-64.

<sup>1040</sup> *Robinson* 2020-UNAT-1040, paras. 25 and 26. See also, *Ho* 2017-UNAT-791 para. 30.

<sup>1041</sup> *Ashour* 2019-UNAT-899, para. 20.

<sup>1042</sup> *Civic* 2020-UNAT-1069, para. 66.

<sup>1043</sup> *Asariotis* 2013-UNAT-309, para. 37. This was also confirmed in *Wu* 2010-UNAT-042, para. 33; *Marsh* 2012-UNAT-205, para. 32; *Charles* 2013-UNAT-283, para. 21; *Nogueira* 2014-UNAT-409, para. 17; *Diallo* 2014-UNAT-430, para. 35; *Andreyev* 2015-UNAT-501, para. 33; *Benfield* 2015-UNAT-505, para. 41; *Salem* 2015-UNAT-589, para. 35; *Abdullah* 2016-UNAT-623, para. 28.

<sup>1044</sup> *Kozlov and Romadanov* 2012-UNAT-228, para. 26.

<sup>1045</sup> *Appellee* 2013-UNAT-341, paras. 18-19. Accordingly, 10'000.- CHF of moral damages were vacated.

<sup>1046</sup> *Thiombiano* 2020-UNAT-978, para. 43.

entitlements or due process rights, then, the breach is of a *fundamental* nature and the breach *of itself* is enough for compensation; 2) if harm, stress or anxiety directly linked and supported by evidence, it merits a compensatory award.<sup>1047</sup>

For example, in *Hersh* and *Abdullah*, breaches were considered to be *fundamental* in nature.<sup>1048</sup> In *Gehr*, the breach itself was not of sufficient seriousness to merit a compensatory award.<sup>1049</sup> In *Diallo*, the breach itself was considered to be of a *fundamental* nature and the amount of compensation increased from two to six months' net base salary.<sup>1050</sup> In *Goodwin*, compensation of two years' net base salary was affirmed by UNAT.<sup>1051</sup>

In *Abu Malluh et al.*, UNAT clarified that the “cases in which [it] has affirmed awards of moral damages on account of a ‘fundamental breach’ involved findings or allegations such as ‘numerous substantive and procedural irregularities’, ‘reckless abuse of power’, ‘deliberate manipulation of the Organization’s processes’ or significant violations of pertinent provisions with regard to highly consequential decisions, such as termination and transfer to other posts”.<sup>1052</sup>

With *Featherstone*, UNAT reversed its jurisprudence, based on the amendment of article 10(5) of UNDT statute adopted on 18 December 2014 and published on 21 January 2015, and held that compensation for harm must be supported by evidence even in case of a fundamental breach of staff member’s rights.<sup>1053</sup>

Following this amendment, UNAT further held that “the concerned staff member’s testimony by itself is not sufficient to establish that he [or she] suffered compensable harm”.<sup>1054</sup>

With *Kallon* Judgment, a further clarification was added by UNAT regarding the amendment to Art. 10(5) of DT’s Statute and jurisprudence in *Asariotis*. It was held that it would be a “far-reaching interpretation” to argue that “the amendment to Article 10(5) was aimed at precluding awards of moral damages” where the breach is of a *fundamental* nature.<sup>1055</sup> “[A] court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof where the other party has failed to meet an evidentiary burden shifted to it during the

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<sup>1047</sup> *Asariotis* 2013-UNAT-309, paras. 36-42. This was also confirmed in *Goodwin* 2013-UNAT-346 para. 33; *Malmström et al.* 2013-UNAT-357 para. 81; *McIlwraith* 2013-UNAT-360 para. 18; *Zeid* 2014-UNAT-401 para. 19; *Nogueira* 2014-UNAT-409 para. 17; *Diallo* 2014-UNAT-430 para. 35; *Eissa* 2014-UNAT-469 para. 30; *Dia* 2015-UNAT-553 para. 27.

<sup>1048</sup> *Hersh* 2013-UNAT-433, paras. 40-42; *Abdullah* 2014-UNAT-482, paras. 63-65.

<sup>1049</sup> *Gehr* 2014-UNAT-479, para. 43.

<sup>1050</sup> *Diallo* 2014-UNAT-430, paras. 34-39.

<sup>1051</sup> *Goodwin* 2014-UNAT-467, paras. 26-29.

<sup>1052</sup> *Abu Malluh et al.* 2018-UNAT-856, para. 29.

<sup>1053</sup> *Featherstone* 2016-UNAT-683, para. 50. This was also confirmed in *Ademagic et al.* 2016-UNAT-684, para. 63 (Full bench); *Krioutchkov* 2016-UNAT-691, para. 19; *Gueben et al.* 2016-UNAT-692, paras. 50-54. See also, in *Hasan* 2015-UNAT-541, paras. 23-24; *Zamel* 2016-UNAT-602, para. 27; *Maiga* 2016-UNAT-638, para. 30; *Krioutchkov* 2017-UNAT-712; paras. 19-20; *Tsoneva* 2017-UNAT-713, paras. 11-12; *Tsoneva* 2017-UNAT-714, paras. 11-12.

<sup>1054</sup> *Zachariah* 2017-UNAT-764, para. 37. See also, *Fasanella* 2017-UNAT-765. See also, *Ross* 2019-UNAT-926, paras. 57-58; *Auda* 2017-UNAT-787, paras. 62-64.

<sup>1055</sup> *Kallon* 2017-UNAT-742, para. 67.

course of trial in accordance with the rules of trial and principles of evidence.”<sup>1056</sup> In a sense, this was a return back to *Asariotis* jurisprudence, however, with a much more restricted interpretation. UNAT also reiterated in *Civic* that “there is no requirement that [...] corroborating evidence [other than the staff member’s testimony] be of medical nature, since moral harm can be proved by other means (expert or otherwise)”.<sup>1057</sup> UNAT also emphasised that this is “the standard of evidence required to prove non-pecuniary damage”.<sup>1058</sup>

In terms of examples, in *Awe*, sufficient evidence was provided to justify the award of compensation for harm. However, UNAT reduced the amount of compensation from USD15,000 to USD5,000 based on the temporary nature of the harm.<sup>1059</sup>

In *Al Hallaj*, UNAT provided an example demonstrating how to implement the jurisprudence of *Kallon*. It was held that “UNDT has the power and the duty to legitimately infer harm to the *dignitas* of [a staff member] resulting from the unlawful action of the [Administration]. [...] [To do so, UNDT needs to] buil[d] a direct link between facts and harm, by means of evidentiary presumption, corroborated by the context in which the situation occurred and the expected impact the acts would have on an average person.”<sup>1060</sup>

In some other examples, UNAT had to reiterate that *Kallon* was binding on UNDT and that a staff member’s testimony alone was not sufficient to present evidence supporting harm under Article (...)10(5)(b) of UNDT Statute.<sup>1061</sup> In *Kebede*, UNAT reversed UNDT’s award of compensation for moral damages as UNDT relied on the evidence of harm from a previous issue rather than the contested decision.<sup>1062</sup> In *Applicant*, UNAT upheld UNDT’s award of compensation for moral damages given the medical evidence in support of the Applicant’s claim.<sup>1063</sup>

In *Robinson*, the Applicant argued that the Tribunal should have requested further evidence for his claim of moral damages, given the *Kallon* jurisprudence. UNAT held that, as the Applicant was already aware of the *Kallon* jurisprudence, “he should have applied to [DT] to supplement his pleadings and tender this additional evidence”.<sup>1064</sup>

Moreover, in *Robinson*, UNAT further reaffirmed *Kallon* jurisprudence but indicated that it “is not entirely settled given the split decision in *Kallon* and this issue may be revisited by a full bench of the Appeals Tribunal in the appropriate appeal”.<sup>1065</sup>

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<sup>1056</sup> *Kallon* 2017-UNAT-742, paras. 68. For further clarification on *Kallon*, see *Ross* 2019-UNAT-926, paras. 57-58.

<sup>1057</sup> *Civic* 2020-UNAT-1069, para. 77. See also, *Kallon* 2017-UNAT-742, Judge’s Knierim’s concurring opinion para. 4; *Langue* 2018-UNAT-858, para. 18.

<sup>1058</sup> *Civic* 2020-UNAT-1069, para. 78.

<sup>1059</sup> *Awe* 2017-UNAT-774, paras. 34-38.

<sup>1060</sup> *Al Hallaj* 2018-UNAT-810, para. 52.

<sup>1061</sup> *Langue* 2018-UNAT-858, paras. 17-18; *Delaunay* 2018-UNAT-864, para. 28.

<sup>1062</sup> *Kebede* 2018-UNAT-874, paras. 24-26.

<sup>1063</sup> *Applicant* 2020-UNAT-1001, paras. 42-43.

<sup>1064</sup> *Robinson* 2020-UNAT-1040, para. 43.

<sup>1065</sup> *Ibid.*, para. 34.

In *Icha*, the Applicant “has provided various medical reports [...] establish[ing] the stress, harm and anxiety that she suffered over an extended period of time, which can reasonably be attributed to the conditions of termination, the gender policy violation and the due process rights breaches”.<sup>1066</sup> Thus, “[a]n amount of 5,000 US Dollars [was] granted for moral damage” by UNAT.<sup>1067</sup>

➤ Retroactive Compensation

A claim for “retroactive monetary compensation” cannot succeed where the claim was made several years after the “initial payment”.<sup>1068</sup>

➤ Causal link/direct link

“[A] causal link is necessary between the administrative decision in question and the harm to the staff member. In other words, the UNDT may only award compensation if the harm, for which compensation is requested, was caused by the administrative decision challenged by the staff member”.<sup>1069</sup> In *Hamdan*, UNAT found that “there is no direct link between the SLWFP decision and the termination indemnity. Mr. Hamdan did not receive termination indemnity because his appointment was not terminated. The SLWFP decision itself did not cause any material harm to Mr. Hamdan [...]”.<sup>1070</sup>

**D. Exceptional circumstances under Article 10(5)(b) of DT’s Statute**

Compensation for loss of earnings must be limited to two years unless there are exceptional circumstances.<sup>1071</sup> “The cap on compensation, which shall normally not exceed the equivalent of two years’ net base salary of the appellant, does not apply where the violation of a staff member’s rights is egregious.”<sup>1072</sup>

“Article 10(5)(b) [...] does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation.”<sup>1073</sup>

For example, in *Mmata*, exceptional circumstances were confirmed for attributing loss of earnings exceeding two years.<sup>1074</sup> In *Aly et al.*, there were sufficient exceptional circumstances justifying compensation equivalent to three years’ net base salary.<sup>1075</sup>

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<sup>1066</sup> *Icha* 2020-UNAT-1077, para. 54.

<sup>1067</sup> *Ibid.*

<sup>1068</sup> *Mizerska-Dyba* 2018-UNAT-831, paras. 33-35.

<sup>1069</sup> *Hamdan* 2020-UNAT-1050, para. 33. See also, *Thiombiano* 2020-UNAT-978, para. 42; *Sarwar* 2018-UNAT-868, para. 44; *Dahan* 2018-UNAT-861, para. 23.

<sup>1070</sup> *Hamdan* 2020-UNAT-1050, para. 33.

<sup>1071</sup> *Cohen* 2011-UNAT-131, para. 22.

<sup>1072</sup> *Aly et al.* 2016-UNAT-622, para. 50. See also, *Ejaz, Elizabeth, Cherian & Cone* 2016-UNAT-615, para. 32.

<sup>1073</sup> *Mmata* 2010-UNAT-092, para. 33. See also, *Cohen* 2011-UNAT-131, para. 20.

<sup>1074</sup> *Mmata* 2010-UNAT-092, paras. 27-33.

<sup>1075</sup> *Aly et al.* 2016-UNAT-622, paras. 37-52. See also, *Ejaz, Elizabeth, Cherian & Cone* 2016-UNAT-615, para. 32.

In *Kasmani*, compensation of 28 months' net base salary was reversed by UNAT and reduced to 11 months.<sup>1076</sup> In *Abu Nada*, deference was given to DT for the award of 25 months' net base salary.<sup>1077</sup>

In *Bowen*, compensation of two years' net base salary was reversed by UNAT and reduced to six months.<sup>1078</sup>

In *El-Kholy*, exceptional circumstances for a compensation of two years' net base salary were denied and the compensation was reduced to 18 months due to insufficient cooperation by the Applicant.<sup>1079</sup>

#### E. Specific remedies

##### ➤ Request for an apology

The former Administrative Tribunal denied such requests, as the judgments were public and it was therefore public knowledge that an applicant was “wronged and was compensated accordingly”.<sup>1080</sup> UNAT concurred with this approach.<sup>1081</sup> UNRAWA DT also held that “[i]t is in the very nature of an apology that it has to be voluntary. To order someone to apologise is [...] a pointless exercise.”<sup>1082</sup>

##### ➤ Request for purging documents from the personal file

In *Tadonki*, the illegality of the Applicant's e-PAS was established by DT and affirmed by UNAT. Accordingly, UNAT held as follows: “there is no need to purge it from the staff member's file, but what is required is to include, at the same time, the administrative illegal act and the judicial pronouncement that so declares, which makes perfectly understandable why the former is null and only the latter prevails, vindicating the adequate performance evaluation and reputation of the staff member”.<sup>1083</sup>

#### F. Award of costs & Abuse of the appeals process

Frivolous applications will not be tolerated and will be held to be an abuse of process.<sup>1084</sup> “In order to award costs against the SG, it [is] necessary for the UNDT to be satisfied on the evidence that [...] the SG had ‘manifestly abused the proceedings’”.<sup>1085</sup>

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<sup>1076</sup> *Kasmani* 2013-UNAT-305, paras. 29-39.

<sup>1077</sup> *Abu Nada* 2015-UNAT-514, para. 31.

<sup>1078</sup> *Bowen* 2011-UNAT-183, paras. 27-29.

<sup>1079</sup> *El-Kholy* 2017-UNAT-730, paras. 36-38.

<sup>1080</sup> *Appellant* 2011-UNAT-143, para. 64.

<sup>1081</sup> *Ibid.*, paras. 64-66.

<sup>1082</sup> *Titi* UNRWA/DT/2019/068, para. 39.

<sup>1083</sup> *Tadonki* 2014-UNAT-400, para. 64. See also, *Das* 2014-UNAT-421, paras. 44-45; *Bagot* 2017-UNAT-718, para. 70.

<sup>1084</sup> *Ishak* 2011-UNAT-152, para. 30; *Mezoui* 2012-UNAT-220, para. 49; *Balogun* 2012-UNAT-220, paras. 33-34; *Gehr* 2013-UNAT-328, para. 25; *Chaaban* 2016-UNAT-611, paras. 24-26; *Faye* 2016-UNAT-657, paras. 44-45 and *Faye* 2016-UNAT-654, paras. 48-49.

<sup>1085</sup> *Bi Bea* 2013-UNAT-370, para. 30.

In *Gehr*, following “another appeal [...] that lacks merit” and given the warning to the Applicant in a previous judgment, UNAT awarded costs against the Applicant.<sup>1086</sup>

For example, in *Bia Bea*, UNAT struck down the award of costs against the SG in the amount of CHF5,000. The award was made for delays caused by the SG during the proceedings in front of the Joint Appeals Board. UNAT found that DT had failed to make a determination that the SG had manifestly abused the proceedings and therefore erred in law in making the impugned order for costs.<sup>1087</sup>

Please refer to *Delaunay*, for an award of compensation with respect to the fees for legal representation;<sup>1088</sup> *Munyan* for an example where the SG abused the appeals process “by presenting on appeal factual and legal arguments which directly contradict[ed] his submissions to the UNDT”.<sup>1089</sup>

In *Nouinou*, the UNAT held that the Applicant’s “statements are derogatory, baseless, and abusive, in clear violation of Articles 4 and 8 of the Code of Conduct for Legal Representatives and Litigants in Person, which require a party to ‘maintain the highest standards of integrity and ... at all times act honestly, candidly, fairly, courteously, in good faith’ and ‘assist the Tribunals in maintaining the dignity and decorum of proceedings’.”<sup>1090</sup> As the Applicant was warned of her abusive conduct previously, UNAT ordered costs against her in the amount of USD600.<sup>1091</sup>

In *Auda*, UNAT held that it would have awarded costs if the SG had requested it.<sup>1092</sup>

In *Chhikara*, UNAT upheld the costs ordered by UNDT against the SG for submitting misleading and incomplete information. In addition, UNAT agreed with UNDT that the admission of some of the irregularities by the Respondent must be considered “as a mitigating factor, such as to impact on the determination of the amount of costs”.<sup>1093</sup> The cost ordered in the amount of USD3000 was affirmed by UNAT.

In *Abu Rabei*, UNAT held that the threshold of “manifest abuse of appeals process” is “a high threshold for an applicant party to attain and recent case law illustrates that such an order will be rarely made, and usually after the party has been fairly warned of that consequence if the party’s abuse of process continues”.<sup>1094</sup> UNAT added that “the exercise of [the right of appeal] might, in retrospect, appear to have been unwise or its failure inevitable, should not alone be a reason to penalise by costs the exercise of that right”.<sup>1095</sup>

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<sup>1086</sup> *Gehr* 2013-UNAT-333, paras. 16-17.

<sup>1087</sup> *Bi Bea* 2013-UNAT-370. For other examples on award of cost, see *inter alia*; *Terragnolo* 2015-UNAT-566; *Hosang* 2015-UNAT-605, paras. 19-21; *Monarawila* 2016-UNAT-694, paras. 36-37.

<sup>1088</sup> *Delaunay* 2018-UNAT-864, para. 29.

<sup>1089</sup> *Munyan* 2018-UNAT-880, para. 38.

<sup>1090</sup> *Nouinou*, UNAT Order No. 353 (2019), para. 7.

<sup>1091</sup> *Ibid.*

<sup>1092</sup> *Auda* 2017-UNAT-740, para. 28. See also, *Mbok* 2018-UNAT-824, para. 47, where UNAT might have approved the cost if UNDT awarded it.

<sup>1093</sup> *Chhikara* 2020-UNAT-1014, para. 35.

<sup>1094</sup> *Abu Rabei* 2020-UNAT-1060, para. 30.

<sup>1095</sup> *Ibid.*, para. 32.