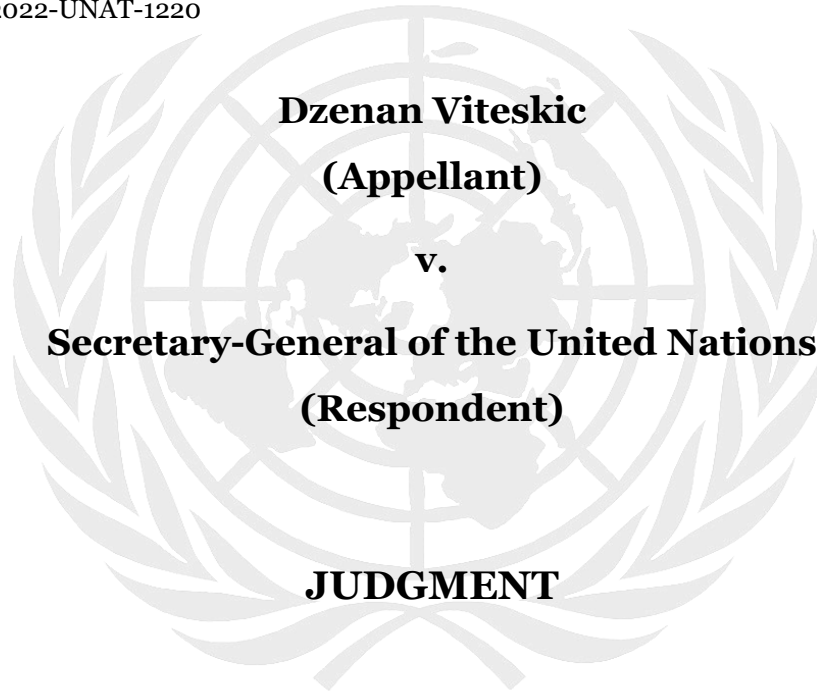




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1220



**Dzenan Viteskić
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2021-1566
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Rupa Mitra

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Dzenan Viteskic (the Appellant) appeals Judgment No. UNDT/2021/037 of 19 April 2021 (the Impugned Judgment) before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
2. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Viteskic contested the decision of the Office of Internal Oversight Services (OIOS) not to launch an investigation into his complaint against a staff member of the United Nations Interim Administration Mission in Kosovo (UNMIK). Mr. Viteskic had submitted a complaint to UNMIK in which he claimed the staff member had made false and malicious allegations against him. In the Impugned Judgment, UNDT rejected Mr. Viteskic's application.
3. For the reasons below, we uphold the UNDT's judgment and dismiss the appeal.

Facts and Procedure

4. From August 2013 to November 2016, the Appellant served as a Chief Security Officer, UNMIK, under a UNDP contract.¹
5. The following facts are taken from the Impugned Judgment²:
 4. Before the Applicant's departure from UNMIK, on 28 October 2016, the Applicant issued a reassignment letter to a local staff member, Ms. A, who was a member of his section.
 5. On 20 November 2016, Ms. A filed a complaint against the Applicant, with UNMIK, concerning the reassignment decision. Among other things, Ms. A complained that the reason for the reassignment decision was not clear and that she had been subjected to continuous sexual advances from the Applicant. Ms. A provided several examples in her complaint: (a) the Applicant asked her to go out with him for lunch or dinner, which she declined; (b) the Applicant gave her a surprise birthday gift; and (c) the Applicant offered her a ride several times, which she declined.
 6. On 12 December 2016, Ms. A's complaint was forwarded to OIOS, who in turn referred the matter to the UNDP Office of Audit and Investigations ("OAI") since the Applicant was serving under a UNDP contract.

¹ Impugned Judgment, para. 3.

² *Ibid.*, paras. 4-22.

7. On 11 May 2017, OAI notified the Applicant that he was under investigation regarding a workplace harassment and abuse of authority complaint filed by Ms. A.

8. On 19 July 2017, OAI informed the Applicant that after an assessment of the allegations made by Ms. A, it determined that a formal investigation was not warranted and had closed the case.

9. On 10 August 2017, after determining that Ms. A's allegations against the Applicant may not have been made in good faith, OAI referred this matter to OIOS for appropriate action.

10. On 29 August 2017, in response to the Applicant's inquiry, OAI informed him that the decision not to launch a formal investigation was taken because "a deep assessment [had] not established any wrongdoing from [his] part". OAI also stated that Ms. A's complaint "seemed not accurate with the facts" and that OAI did not find Ms. A's allegations "credible" and that it had referred the matter to OIOS.

11. On 7 November 2017, the Applicant submitted a complaint to UNMIK stating that Ms. A made false and malicious allegations against him.

12. On 23 November 2017, UNMIK Conduct and Discipline Officer asked the Applicant several questions regarding his complaint.

13. On 29 November 2017, the Applicant answered UNMIK Conduct and Discipline Officer's questions.

14. On 19 December 2017, OIOS decided to put the case concerning Ms. A in abeyance pending the conclusion of a related investigation.

15. Following the finalization of a related investigation, OIOS prepared an assessment report dated 24 January 2019, in which OIOS determined that there were "insufficient elements to justify the initiation of a mala fide investigation against [Ms. A]".

16. On 28 June 2019, in response to the Applicant's inquiry, UNMIK advised him that his complaint was forwarded to OIOS and that on 2 May 2019, OIOS informed UNMIK that as of 20 February 2019 it decided to close the investigation with no further action.

17. On 23 July 2019, in response to the Applicant's inquiry, OIOS advised the Applicant that OIOS determined that there were insufficient grounds to pursue an investigation against Ms. A.

18. On 8 August 2019, the Applicant filed a request for management evaluation of the decision to not launch an investigation into his complaint against Ms. A.

19. By memorandum dated 18 October 2019, the Management Evaluation Unit (“MEU”) informed the Applicant that MEU considered that he did not have standing before the MEU and thus rejected his request as not receivable.

20. On 15 January 2020, the Applicant filed [his UNDT] application.

21. On 19 February 2020, the Respondent’s reply was filed by UN Women. In the reply, UN Women argued that it is not the appropriate organization to defend the contested decision in this case.

22. On 14 April 2020, the Respondent filed a motion informing the Tribunal that UN Women and the Appeals and Accountability Section (“AAS”), Administrative Law Division (“ALD”) of the Secretariat would act jointly as Counsel for the Respondent in this case and that the Respondent could supplement the reply if the Tribunal considered it necessary.

...

24. On 15 February 2021, pursuant to Order No. 11 (GVA/2021), the Respondent filed a complete reply. In the reply, the Respondent submitted an OIOS assessment report dated 24 January 2019 and the OIOS Director’s memorandum dated 20 April 2020 addressed to AAS concerning this matter.

25. On 12 March 2021, pursuant to Order No. 58 (GVA/2021), the Applicant filed a response to the Respondent’s reply of 15 February 2021.

6. On 19 April 2021, UNDT issued the Impugned Judgment.

The UNDT Judgment

7. The UNDT held that the governing legal framework was ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and that ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) was not applicable as Mr. Viteskic had not alleged that he was subjected to discrimination, harassment, or abuse of authority by Ms. A.

8. On Mr. Viteskic’s argument that UNMIK violated his due process rights by asking questions concerning his complaint in violation of ST/AI/2017/1, which amounted to an unauthorized investigation, UNDT held that, while it was unfortunate that UNMIK did not follow the provisions of ST/AI/2017/1, this procedural mistake was irrelevant to the contested decision.³

³ *Ibid.*, para. 49.;

9. On Mr. Viteskic's argument that there was a failure to disclose information to him, UNDT held he had no such right under the applicable legal framework and rejected the argument.⁴

10. UNDT rejected Mr. Viteskic's challenge to the methodology of OIOS's preliminary assessment, including whether or not the OIOS assessment report was in strict compliance with the OIOS Investigations Manual. UNDT held that whether or not the assessment report was in strict compliance with the Investigations Manual had no impact on the fact that the assessment report was considered in making the contested decision in the case, and that the alleged procedural mistake did not qualify as a substantial procedural irregularity that could render the administrative decision unlawful.⁵ UNDT did not find that the OIOS Director's additional consideration that launching an investigation against a sexual harassment complainant would have a potential "chilling effect" on victims coming forward to be unreasonable.⁶ Having reviewed the OIOS assessment report, UNDT found that OIOS reasonably determined not to conduct the investigation based on its preliminary assessment of existing evidence.⁷ UNDT did not find any fault with OIOS's analysis and found that it exercised its discretion reasonably by deciding to close the case.⁸

11. Finally, UNDT found that the delay in notifying Mr. Viteskic of the contested decision did not violate any terms or conditions of his employment and rejected Mr. Viteskic's argument that there was undue delay in considering his complaint.⁹

12. UNDT found that the contested decision was lawful and rejected the application.¹⁰

Procedure before the Appeals Tribunal

13. On 16 June 2021, the Appellant submitted his appeal to UNAT.

14. On 20 August 2021, the Respondent submitted his response to the appeal.

⁴ *Ibid.*, paras. 51-53.

⁵ *Ibid.*, para. 59-62.

⁶ *Ibid.*, para. 64.

⁷ *Ibid.*, para. 65.

⁸ *Ibid.*, para. 67.

⁹ *Ibid.*, para. 72.

¹⁰ *Ibid.*, paras. 73-74.

Submissions

Mr. Viteskić's Appeal

15. The Appellant submits that the UNDT used the incorrect legal standard, under ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which was promulgated on 26 October 2017.¹¹ Relying on section 13.2 of ST/AI/2017/1¹², the Appellant submits that as the “inception date” of the case was 10 August 2017, therefore ST/AI/371 and ST/AI/371/Amend.1 are applicable. Further, the Appellant submits that the UNDT failed to recognize that the OIOS Investigation Manual repeatedly refers to ST/AI/371 and ST/AI/371/Amend.1 as applicable.

16. The Appellant submits that because he was unaware of the date and content of referral made by OAI to OIOS until it was disclosed to him on 23 February 2021, this “subsequently affected the direction of the whole case and the Applicant’s ability to address various substantive and procedural flaws”. He also claims that the scope and content of his 15 January 2020 submission to the UNDT was significantly affected.

17. The Appellant submits that by accepting joint representation by UN Women and the Administrative Law Division (ALD) of the United Nations Secretariat, the UNDT violated regulations established under ST/SGB/2011/2 (Authority of the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) in matters relating to human resources management. In addition, the Appellant submits that this put him at a significant unfair disadvantage and set a dangerous precedent by giving the Administration access to “massive legal resources”.

18. The Appellant submits that the decision of UNDP to close his case was a binding administrative decision unless determined otherwise by UNDT or UNAT, and that the “conclusion of the OIOS cannot violate the administrative decision issued by UNDP” because otherwise OIOS has the power to change to administrative decision of any United Nations organ.

¹¹ Enters into force with immediate effect on date issued (26 October 2017).

¹² “13.2 Investigations and disciplinary processes initiated prior to the entry into force of the present instruction shall continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1.”

19. The Appellant submits that the UNDT failed to address a number of procedural violations which he presented, as summarised below:

- (a) the UNMIK Conduct and Discipline Officer misinformed the Applicant that OIOS had closed the investigation into the Applicant's complaint while, in fact, no investigation was conducted by OIOS;
- (b) a violation of OIOS Investigations Manual, section 3.2.2, as to when the Applicant should have been informed that information was received;
- (c) MEU's violation of its own Terms of Reference regarding its obligation not to refer the case to UN Women and deadlines established in the General Assembly resolution A/RES/62/228;
- (d) the failure of OIOS to provide rules or procedures governing assessment;
- (e) the failure of OIOS to disclose documents to UNDT and the Appellant as referenced in its memorandum to the ALD; and
- (e) the misrepresentation of cases in the Administration's reply to the UNDT.

20. The Appellant submits that all of the OIOS arguments for its dismissal of the OAI assessment and its decision not to launch an investigation were "defective"¹³ for the following reasons:

- (a) OIOS labelled the corrective measures as a threat, however reassignment within the section at the same grade or step, without any form of disciplinary or administrative action and when operationally justified, such as replacing a pregnant colleague, was not a punishment and therefore could not be characterised as a threat;
- (b) Efforts to resolve interpersonal efforts were ongoing for months, not two weeks;
- (c) Reassignment letters were issued to five, not three, different staff members, out of which two were actioned and three cancelled by the Appellant's successor, therefore it was not only Ms. A who was reassigned; and

¹³ Impugned Judgment, paras. 25-30.

(d) One of OIOS's reasons for its decision was that OAI did not interview Ms. A, but there was no requirement to interview her.

21. The Appellant submits that none of the reasons provided by the OIOS as justification for dismissal of the OAI assessment and its decision not to launch the investigation were accurate or based on fact, and that the UNDT did not address these issues in its ruling.

22. The Appellant submits that UNDT accepted OIOS's explanation for delays due to a related investigation without evidence of any related investigation.

23. The Appellant submits that the UNDT failed to recognise that a total of 21 months of unjustifiable delays occurred.

24. The Appellant submits that the UNDT did not correctly acknowledge the violation of Article 10.1 of the UNDT Rules of Procedure of the Administration's reply being filed 12 months after the deadline, noting that at no point did the Administration file a request for an extension of deadline for filing its reply or to reenter proceedings. The Appellant submits that this practice gives the perception of the UNDT being lenient with the Administration whereas strict on staff members for meeting time limits.

25. The Appellant submits that the UNDT failed to detect a defect in the OIOS assessment whereby after the OIOS Director of Investigations Division decided to close the case, the OIOS investigator concluded the case four days later [Appeal, para. 35]. The Appellant submits that by making the decision to close the case before the assessment was completed, OIOS violated basic principles of due process and section 6.3.1 of its own Investigations Manual, which states that final reports are approved by the Director after being completed.

26. The Appellant submits that the UNDT failed to address the procedural irregularity of information received as to when the assessment of the OAI case was completed and he was unable to present this irregularity in his statement because of limits set by the UNDT on the length of his submission and the fact that he only received these documents a few days before he had to submit his statement to the UNDT.

27. As relief, the Appellant requests that: all procedural irregularities and inordinate delays are recognised; the UNDT decision to reject his application be set aside; UNAT issue a final ruling in the case; and the OIOS decision that the OAI assessment was defective be set aside.

The Respondent's Answer

28. The Respondent submits that the UNDT correctly found that the relevant legal framework governing the case was ST/AI/2017/1. The Respondent submits that the cited provision does not refer to “inception dates” of investigations, the term used by the Appellant. The Respondent states that neither OIOS nor OAI opened an investigation, but rather OIOS made an assessment of the OAI assessment, and that “even then, it was not until 30 November 2017” that OIOS requested copies of the evidence gathered during the OAI investigation. The Respondent submits that all the relevant dates are after the date of entry into force of ST/AI/2017.

29. The Respondent submits that the fact that the OIOS Investigation Manual “which is intended as a tool and a guide for investigation” had not been updated did not mean that the older, superseded versions of Administrative Instructions applied. Further, the Respondent submits that the Appellant fails to acknowledge UNDT’s holding that “a possible lack of strict compliance” with the OIOS Investigation Manual had no impact on the fact that the OIOS Director considered the assessment report in making the contested decision and therefore the alleged non-compliance was irrelevant to how the decision was made. The Respondent submits that whether or not the OIOS Investigation Manual refers to an old or new Administrative Instruction is irrelevant.

30. The Respondent submits that the Appellant fails to establish any error by the UNDT with regard to alleged procedural violations. The Respondent submits that the UNDT provided an adequately detailed and reasoned Judgment and was not required to address each and every aspect of the Appellant’s claims (*Negussie*¹⁴, *Al-Ashi*¹⁵). Further, the Respondent submits that the UNDT correctly held that only substantial procedural irregularities can render the administrative decision unlawful.

31. Notwithstanding the Respondent’s submission that not all claims needed to be considered by UNDT, the Respondent submits that the UNDT did, in fact, address a number of the issues raised by the Appellant.

¹⁴ *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700.

¹⁵ *Al-Ashi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, 2018-UNAT-838.

32. On the Appellant's claim, which he argued before UNDT, that UNMIK had misinformed him that the OIOS had closed an investigation into his complaint, the UNDT held that a procedural mistake of UNMIK was irrelevant to the contested decision, which was made by OIOS. The Respondent submits that the Appellant provided no explanation as to how UNMIK's alleged action could have affected the contested decision.

33. On the Appellant's claim that the UNDT failed to address his complaint that the MEU violated its terms of reference, the UNDT addressed this by stating that the Administration's response to a request for management evaluation was not a reviewable administrative decision and UNDT would only review the contested decision itself¹⁶.

34. On the Appellant's claim that the UNDT failed to address his claim that OIOS neglected to disclose all documents to him, the Respondent submits that UNDT correctly held that the Appellant had no right to be provided with information from OIOS about what documents it had relied upon in its assessment, relying on Section 4.7 of ST/AI/2017/1.

35. On the Appellant's argument that the OIOS assessment report was unsigned and therefore in violation of the OIOS Investigations Manual, the Respondent submits that this claim was addressed by the UNDT and the Appellant had not made any arguments as to how the UNDT made any error.

36. The Respondent submits that the Appellant fails to make any attempt to show how the allegations he now repeats before UNAT, even if they were founded, affected the contested decision. The Respondent submits that the Appellant's claims of misrepresentation of cases is baseless.

37. Noting that the Appellant claims that he could have been informed that OAI had referred the matter to OIOS in alleged violation of the OIOS Investigations Manual. The Respondent submits that the Appellant fails to show how, even if there had been such a requirement (which there was not), the outcome of the contested decision would have been different if he had been so informed.

¹⁶ Impugned Judgment, para. 33.

38. Similarly, on the Appellant's complaint that the UNDT failed to address his claim that OIOS did not send him a copy of its procedural framework for assessing cases, the Respondent submits that the Appellant makes no argument that any such alleged violation could have affected the contested decision or impacted the outcome of the Impugned Judgment.

39. The Respondent submits that the Appellant is attempting to relitigate his case because he disagrees with the outcome, which is disallowed by the relevant jurisprudence (*Charles, Ilic*)¹⁷.

40. The Respondent submits that the Appellant fails to demonstrate how any of the alleged omissions on the part of the UNDT resulted in a manifestly unreasonable judgment or would have in any way changed the outcome of the Impugned Judgment.

41. The Respondent submits that the Appellant has failed to demonstrate any error on the part of UNDT with regard to the alleged procedural violations and that, therefore, the Appellant's claims should be dismissed by UNAT.

42. The Respondent submits that the Appellant fails to show that the UNDT committed any error in finding that the OIOS decision not to investigate the Appellant's complaint against Ms. A was reasonable and lawfully taken. Recalling in detail the process which the UNDT followed, the Respondent submits that the Appellant against only attempts to relitigate his case, fails to demonstrate any error on the part of the UNDT in assessing the reasonableness of the contested decision, and fails to show that the UNDT considered irrelevant matters or ignored relevant ones. The Respondent submits that the UNAT should dismiss the Appellant's claims that the UNDT improperly ignored his submissions regarding the reasons underpinning the contested decision.

43. The Respondent submits that the Appellant fails to show any error on the part of the UNDT regarding his claims of undue delay. The Respondent submits that the UNDT fully addressed all of the Appellant's claims regarding delay in the Impugned Judgment. Specifically, the UNDT held that there was no undue delay because there was no time limit for a preliminary assessment under ST/AI/2017/1. The Respondent submits that there is a

¹⁷ *Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-284; *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

rebuttable presumption of regularity, but it is not for the UNDT to conduct due diligence in this regard.

44. The Respondent submits that the Appellant has failed to show any procedural or other error on the part of the UNDT with regard to the joint representation of UN Women and ALD as Counsel for the Respondent. The Respondent submits that the Appellant's claim that ST/SGB/2011/2 delegates authority for the UN Women Executive Director to represent UN Women before UNDT in relation to claims filed by staff members of UN Women is misplaced. The Respondent submits that it is solely for the Respondent to decide who will represent the Respondent in judicial proceedings of the formal system for the administration of justice. Further, the Respondent submits that the Appellant did not contest the joint representation before the UNDT at the time that the representation was first made. Accordingly, the Respondent submits that UNAT should dismiss the Appellant's claim that the UNDT erred in law by accepting the joint representation as Counsel for the Respondent.

45. The Respondent respectfully requests the UNAT to uphold the UNDT Judgment and to dismiss the Appeal.

Considerations

46. The first issue for consideration and determination in this appeal is whether the UNDT erred on a question of law, as argued by the Mr. Viteskic, in holding that the governing legal framework in the case was ST/AI/2017/1. In his appeal, Mr. Viteskic argues that the applicable regulations are either ST/AI/371 and ST/AI/371/Amend.1, as referred to by the OIOS Investigation Manual, or ST/SGB/2022/2. He bases this argument on the premise that, ST/AI/2017/1 entered into force on 26 October 2017, which was after the "inception date" of his case, namely 10 August 2017, "when OAI forwarded its findings to OIOS and which material OIOS used to determine its decision".

47. In the Impugned Judgment, the UNDT found that the governing legal framework in the present case was ST/AI/2017/1 (Unsatisfactory Conduct, Investigations and the Disciplinary process). Even though Mr. Viteskic had also referred to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority) in his application, the UNDT found that ST/SGB/2008/5 was not applicable in this case as he did not allege that he was subjected to discrimination, harassment, or abuse of authority by Ms. A. Rather,

Mr. Viteskic's claim is that Ms. A filed a false and malicious complaint against him, which is not a subject matter governed by ST/SGB/2008/5.¹⁸

48. ST/AI/2017/1 entered into force with immediate effect upon issuance on 26 October 2017. Section 13.2 provides that: "Investigations and disciplinary processes initiated prior to the entry into force of the present instruction shall continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1". Mr. Viteskic's claim that the decisive date of 10 August 2017 is the relevant one for determining the applicable legal framework is groundless. On 10 August 2017 there was no investigation or disciplinary process initiated against Ms. A. What happened on that date was a mere referral from OAI to OIOS "for appropriate action", which ultimately led to the OIOS' report dated 24 January 2019 according to which there were insufficient elements to justify the initiation of an investigation against Ms. A.¹⁹ This was done after the case had been put in suspension pending the conclusion of a related investigation.²⁰ Moreover, from the facts, Mr. Viteskic submitted his complaint against Ms. A on 7 November 2017, the date on which ST/AI/2017/1 was already in force. The UNDT thus did not err on this issue when it held that ST/AI/2017/1 was the governing legal framework in the present case.

49. The second issue for assessment by the Appeals Tribunal is whether the UNDT erred by allowing the joint representation of the Respondent's case by UN Women and the United Nations Secretariat (ALD). Mr. Viteskic maintains that the UNDT violated regulations established under ST/SGB/2011/2, which regulates the representation of the Authority of the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) before the UNDT, in matters relating to human resources management. He claims that the Secretary-General only represents UN Women before the Appeals Tribunal and that by accepting the joint representation before the UNDT, the UNDT placed him at a significant disadvantageous position, in light of the "massive legal resources" available to the Administration.

¹⁸ Impugned Judgment, para. 34.

¹⁹ *Ibid.*, para. 17.

²⁰ *Ibid.*, para. 14. As will be discussed further in the present Judgment, according to Section 4.7 of ST/AI/2017/1, on the right to information related to investigation, Mr. Viteskic was "not entitled to information about an investigation or action taken" by OIOS.

50. According to the Respondent, Mr. Viteskic's claim is misplaced that ST/SGB/2011/2 delegates authority for the UN Women Executive Director to represent UN Women before the UNDT and that the representation of a party in a judicial proceeding is a matter for the Administration to decide.

51. Section 2.1(f) of ST/SGB/2011/2 provides that the Executive Director of UN-Women has the authority, in accordance with the United Nations Staff Regulations and Rules, to represent UN-Women before the United Nations Dispute Tribunal in relation to applications filed by staff members of UN Women. After some internal disputes regarding which office was to serve as Counsel for the Respondent, UN Women and the Secretary-General advised the Tribunal that they would act jointly as Counsel for the Respondent.²¹

52. As acknowledged by Mr. Viteskic in his appeal, since 2016, he has been a current staff member of UN Women, although the background facts concern his complaint to UNMIK about the alleged wrongdoing of one of its staff members, Ms. A. UNMIK was also where Mr. Viteskic had previously worked and where he had issued a reassignment contested by Ms. A. In addition, UNMIK (through OIOS) was responsible for the assessment of Mr. Viteskic's complaint against Ms. A and its final report, which is the contested administrative decision.²² These circumstances justify the joint representation by UN-Women, where Mr. Viteskic currently serves, and UNMIK (through AAS/ALD of the UN Secretariat), given that UNMIK was where the events in dispute occurred. These circumstances before the UNDT also justified the granting of an opportunity to supplement the initial reply with the corresponding opportunity for Mr. Viteskic to respond.²³ The Appeals Tribunal does not see any reason to disagree with the UNDT's ruling in this regard.

53. Furthermore, the Appeals Tribunal agrees with the Respondent that, having not contested the joint representation before the UNDT at the time it was first made, and having been afforded the opportunity to answer the supplementary reply (although he made no comment on this), Mr. Viteskic is now estopped from raising this matter on appeal.²⁴

²¹ *Ibid.*, paras. 28 and 30.

²² *Ibid.*, para. 16.

²³ *Ibid.*, para. 30.

²⁴ *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 37; *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, para. 38; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 25; *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-221, para. 61.

54. Mr. Viteskic maintains that the UNDT failed to consider a number of alleged procedural violations. However, the UNDT addressed the issues of both the UNMIK (OIOS) communication of the documents referenced in its assessment of the OAI case and the outcome of Mr. Viteskic's complaint when it held that Section 4.7 of ST/AI/2017/1, on the right to information related to investigation, provides that "[u]nless expressly provided for in the present instruction or other administrative issuances, staff members and third parties are not entitled to information about an investigation or action taken."²⁵

55. Moreover, as mentioned by the UNDT, in response to his enquiry, Mr. Viteskic received information from both UNMIK and OIOS that OIOS had determined that there were insufficient grounds to pursue an investigation against Ms. A.²⁶ Contrary to Mr. Viteskic's contention, it is not true that it took 17 months between the OIOS decision and the communication to him. If the OIOS' assessment report was concluded on 24 January 2019 and the first communication was made on 28 June 2019²⁷, a period of about five months had elapsed for M. Viteskic to be informed of the outcome of his complaint. Mr. Viteskic argues that this delay affected the direction of his case, his ability to address substantive and procedural flaws, and the scope and content of his 15 January 2020 submission. However, the applicable law states that he was not entitled to any information about the complaint and there was no time limit for a preliminary assessment under ST/AI/2017/1, as correctly found by the UNDT.²⁸

56. There has thus not been a violation of the OIOS Investigations Manual, which is a long-established tool or guide for OIOS and which does not take precedence over the statutory provisions. Mr. Viteskic's contention that OIOS had failed to "provide rules or procedures that govern case assessment process" is baseless. First, Mr. Viteskic is not entitled to claim for such generic provisions to exist, nor to direct the OIOS' management of the complaint. Second, Mr. Viteskic failed to show how, even if there had been such a requirement (which there was not), the outcome of the contested decision would have been different had he been so informed. And third, and more importantly, Section 5 of ST/AI/2017/1, regulating the preliminary assessment of the information about unsatisfactory conduct, stipulates that OIOS has broad

²⁵ Impugned Judgment, para. 52.

²⁶ *Ibid.*, paras. 16 and 17.

²⁷ *Ibid.*, paras. 15 and 16.

²⁸ *Ibid.*, para. 72.

discretion in the decision or assessment of the complaint. Specifically, the relevant provisions of ST/AI/2017/1 read:

5.1 **OIOS retains the ultimate authority to decide** which cases it will consider and shall determine whether the information of unsatisfactory conduct received merits any action, and if so, is better handled by the responsible official or by OIOS. OIOS may at any time decide that a case is better handled by it. [emphasis added]

...

12.3 The operational mandate of OIOS includes handling reports of unsatisfactory conduct received by it in accordance with its internal procedure. Nothing in the present instruction shall be construed to limit the operational independence of OIOS with regard to its mandated activities. Furthermore, **nothing herein shall limit the discretionary authority of OIOS to undertake investigations** into any and all matters concerning the Organization, before or after the separation of a staff member. [emphasis added]

57. Still under the alleged procedural issues raised on appeal, the UNDT also addressed Mr. Viteskic's challenge to the response of the MEU when it found that the Administration's response to his request for management evaluation was not a reviewable administration decision, and therefore it would not review it.²⁹ The contested administrative decision here is undoubtedly the decision not to launch an investigation into Mr. Viteskic's complaint against Ms. A.³⁰ Therefore, the UNDT was correct in applying the long-standing jurisprudence, according to which the response to a request for management evaluation is not an administrative decision subject to judicial review, as we clearly stated in *Auda*: "[T]he judicially reviewable administrative decision is the underlying decision 'that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member'".³¹

58. Further, Mr. Viteskic insists on his submission that the OIOS' assessment was signed by the OIOS Director, but only concluded 4 days later by the OIOS Investigator, and therefore, this was not in strict compliance with the OIOS Investigations Manual. In this regard, the UNDT found the following:

60. In this regard, the Tribunal notes that in the OIOS Director's memorandum dated 20 April 2020, which was prepared for the litigation of this case, the Director noted that the

²⁹ *Ibid.*, para. 33.

³⁰ *Ibid.*, para. 1.

³¹ *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-740, para. 22, citing *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-697, para. 22, in turn quoting *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, paras. 25-30.

assessment report was prepared using OIOS's normal report template, when "it could/should have been prepared as either a Memo or an [Note to File ("NTF")]". The Director further noted that, however, such consideration is irrelevant to the content of the document.

61. The Tribunal finds that whether the OIOS assessment report in question complied with all the formalities required by the OIOS Investigations Manual is irrelevant. Even if the OIOS assessment report was not in strict compliance with the OIOS Investigations Manual, it has no impact on the fact that the OIOS Director considered the assessment report in making the contested decision in this case.

59. The UNDT also found that only substantial procedural errors can render the administrative decision unlawful, and that Mr. Viteskic did not explain how this possible mistake would have affected the contested decision.³² The Appeals Tribunal has no reason to differ from the UNDT, insofar as the "final determinant" to the OIOS Director's memorandum concerning the present application was the OIOS Assessment Report, whose conclusions were transcribed into the former.

60. Finally, Mr. Viteskic claims that the UNDT erred in its Judgment in finding that the OIOS decision not to investigate was reasonably and lawfully taken, considering his arguments that OIOS's reasons were "defective". Mr. Viteskic's submissions in his appeal regarding his justification for Ms. A's reassignment might have been relevant to the outcome of the complaint she had filed against him, which was ultimately closed by the OAI decision. However, these submissions are inconsequential for the purposes of determining whether the OIOS decision regarding the subsequent complaint Mr. Viteskic filed against Ms. A was unreasonable. The OIOS report and exchange of correspondence which followed the decision to close the complaint against Mr. Viteskic demonstrates that Ms. A's complaint seemed factually inaccurate³³, but there is nothing on the record which indicates that the OIOS's conclusion, that there were insufficient elements to justify the initiation of a *mala fide* investigation against Ms. A, was unreasonable.³⁴

61. As previously held by this Appeals Tribunal, only in particular situations, i.e. in a case of a serious and reasonable accusation, does a staff member have a right to an investigation against another staff member which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Statute of the Appeals Tribunal. The mere undertaking of an investigation can have a negative impact on the staff member concerned.³⁵ As discussed, OIOS

³² Impugned judgment, para. 62.

³³ Para. 20 of the OIOS report and OAI e-mail of 29 August 2017.

³⁴ Para. 29 of OIOS report.

³⁵ *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733, paras. 33-34.

had broad discretion in the appreciation of the evidence before it and, although it is clear that Mr. Viteskic was not satisfied with its conclusion, he failed to show any error in the UNDT's finding that the OIOS decision not to investigate the Appellant's complaint against Ms. A was reasonable and lawfully taken.

62. In light of the foregoing, the appeal fails.

Judgment

63. The appeal is hereby dismissed and Judgment UNDT/2021/037 is affirmed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 6th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar