UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1231

Sergio Baltazar Arvizú Trevino

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case Nos.:	2021-1520
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Noam Wiener & André Luiz Pereira de Oliveira

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Sergio Baltazar Arvizú Trevino (the Appellant) against Judgment No. UNDT/2020/211[1], rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 18 December 2020 (the Impugned Judgment). The Impugned Judgment dismissed his application challenging the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC), dated 16 January 2020, not to convene an investigation panel to investigate his harassment complaint filed on 24 July 2019 (the contested decision).

2. For the reasons set out below, we grant the appeal in part.

Facts and Procedure

3. Mr. Arvizú Trevino served with the United Nations from 1 January 2006 as the Deputy Chief Executive Officer (CEO)/Deputy Secretary of the United Nations Joint Pension Board (UNJSPB) and elected to serve as the CEO/Secretary of UNJSPB as of 1 January 2013. He was reappointed to his second term as CEO/Secretary of UNJSPB on 1 January 2018.

4. On 5 November 2018, the Appellant was notified of the decision of the Secretary-General to terminate his contract on health grounds.

5. On 7 January 2019, he separated from service.

6. On 24 July 2019, Mr. Arvizú Trevino filed a harassment complaint with the Director of the Office of Internal Oversight Series (OIOS), in accordance with the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), alleging several staff members had engaged in a defamation campaign against him and engaged in acts aimed to intimidate and damage his reputation. Attached to his complaint he provided a table describing several incidents in detail with supporting documentary evidence. The complaint identified seven staff members as offenders.

[1] *Arvizú Trevino v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/211.

7. On 14 August 2019, the Director of the OIOS by way of e-mail informed the Appellant that his matter "would be best addressed by the Executive Office of the Secretary-General (EOSG), copying the persons responsible for monitoring conduct complaints within the Department of Management Strategy, Policy and Compliance (DMSPC)". The Director also requested the Appellant's consent to share the matter with the EOSG.

8. On 20 August 2019, the Appellant by way of e-mail responded to the Director OIOS consenting that his complaint be shared with the EOSG for their investigation.

9. On 26 September 2019, Counsel for the Appellant contacted the Director of the OIOS requesting confirmation that the complaint had been referred to the EOSG noting that the Appellant had not received any confirmation from the EOSG or any other United Nations official that his complaint was being investigated and noted concern that the United Nations was stonewalling his complaint. Appellant's Counsel requested proof of transmission of his complaint noting that Section 5.14 of the ST/SGB/2008/5 required a "prompt review" but no confirmation that his complaint was being investigated had been communicated.

10. Also, on 26 September 2019, the Director of OIOS, responded to the Appellant's Counsel noting he had referred his complaint to the EOSG.

11. On 2 October 2019, Counsel for the Appellant contacted the Administration for confirmation that his complaint was promptly being investigated and the identity of the constructed fact-finding panel investigators as per ST/SGB/2008/5.

12. On 28 November 2019, Counsel for the Appellant wrote again to the Administration seeking to know the status of his complaint as he had not received any confirmation or status update. His letter noted Article 5.5 of ST/SGB/2019/8 provided that "conduct and discipline focal points" shall respond without undue delay, but normally within two weeks, to queries from affected individuals relating to the handling of a formal report of possible prohibited misconduct. Counsel requested that his query via the instant letter therefore be forwarded to the designated focal point with the EOSG.

13. On 16 January 2020, the Appellant was informed that the USG/DMSPC had received the complaint and materials and decided that:

> ...
>
> In your complaint of 24 July 2019, you allege that the staff members identified in your complaint have subjected you to harassment, "which is on-going, resulted in your significant reputational and career harm as well as in severe deterioration in [your] health and eventual disability."
>
> [...] the statements and comments were made by those staff members in their capacity as staff representatives. Accordingly, any assessment of their statements and comments must take into account the latitude afforded staff members acting as staff representatives, as well as the principle of freedom of association which demands that the Administration refrain from interfering with the activities of staff representatives. Under the circumstances, pursuit of the matter within the context of a disciplinary process would not be warranted.
>
> As a result, we have decided to close the matter.

14. On 26 February 2020, the Appellant requested a management evaluation of the above quoted contested administrative decision. The Appellant did not receive a response.

15. On 26 May 2020, Mr. Arvizú Trevino filed an application before the UNDT challenging the contested decision.

The Impugned Judgment

16. The UNDT first addressed whether the Appellant had standing as a former staff member to bring an application before the UNDT challenging the outcome of a complaint he submitted after he had separated. The UNDT found that the Appellant did in fact have standing per Article 3.1(b) of the UNDT Statute stating applications may be filed by former staff members. The UNDT considered that the Appellant was a former staff member and the contested decision concerned his former employment, namely his complaint alleging harassment experienced in his former workplace. On the merits, the UNDT determined that the contested decision was lawful. The Appellant had alleged that various staff members subjected him to harassment which was ongoing and resulted in significant reputational and career harm as well as in severe deterioration in his health and eventual disability. The USG/DMSPC, as the responsible official, reviewed the complaint to assess whether there were sufficient grounds to warrant a fact-finding investigation.

17. Upon the USG/DMSPC's review, she found seven of the named staff members whose conduct was the subject of the complaint were staff representatives either as active office holders or actively involved with the staff union. The UNDT noted that the statements and conduct identified in the complaint related to the Appellant's conduct in his role as CEO/UNJSPF. The UNDT found it was reasonable for the USG/DMSPC to determine that the status and management of the UNJSPF is a legitimate subject of concern to staff at large and therefore comments made by staff representatives about the management of UNJSPF concern work-related issues, and noted Staff Rule 8.1(f) entitles staff representative bodies to effective participation in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life, and other human resources policies. The UNDT held that the USG/DMSPC was reasonable to determine that the complaint did not contain allegations that would constitute a gross abuse by the staff representatives of their right to express themselves on workplace issues. The UNDT further held that Mr. Arvizú Trevino did not present any evidence to support his claim that the USG/DMSPC's assessment of the complaint was tainted by bias or ill motive, and therefore did not meet his burden of proof.

18. On 12 February 2021, Mr. Arvizú Trevino filed an appeal.

19. On 16 April 2021, the Secretary-General filed his answer.

Submissions

Mr. Arvizú Trevino's Appeal

20. The Appellant requests a full bench decision by the Appeals Tribunal pursuant to Article 10.2 of the UNAT Statute on grounds that this matter has particular complexity and importance to the Organisation to determine truth and facts related to a possible serious systemic flaw which permitted an unethical work culture enabling a series of attacks against the Appellant to go unchecked for years. The Organisation's false pretext raised in the last moment is that it could not interfere due to the freedom of speech and association of the offenders.

21. The Appellant requests UNAT to grant his appeal and vacate the Impugned Judgment in its entirety. He further requests the matter (his complaint) be remanded to OIOS to conduct a fact-finding investigation pursuant to ST/SGB/2008/5, or to consider ordering the matter be investigated by the International Labour Office's (ILO) Chief lnternal Auditor, as the ILO

is a member organisation of the UNJSPF, where the Appellant served as its CEO and Secretary to the Pension Board, and ILO's internal audit function is fully independent and may conduct a transparent, predictable, accountable and objective investigation as the General Assembly requires in resolutions 62/228 and 62/247. As compensation, Appellant requests 2 years' net base salary for harm and damages suffered (which are still ongoing), as supported by his medical report.

22. The UNDT erred in finding the contested decision lawful. No investigation was conducted by OIOS, by the EOSG or by the USG/DMSPC of any of the difference incidents reported. The USG/DMSPC's one paragraph explanation of her decision lacked any reference to due diligence and did not provide any evidence that the individuals were staff union representatives, nor that the statements and conduct of the alleged offenders were related to the staff welfare issues. Further, her presumption without any investigation or corroboration that all perpetrators, including others who might have participated in the alleged wrongdoing but have not yet been identified, were staff representatives was highly prejudicial and unlawful. Neither the Appellant nor any of the witnesses or third parties identified in the complaint were contacted, interviewed, or asked to provide information. Her review was fundamentally flawed, contrary to the facts and in breach of the policy. The UNDT accepted as fact the Administration's submissions as well as its claims without any verification or substantiation when it indicated the statements and conduct of the offenders "appear to be in relation not the Applicant's conduct in his role as CEO/UNJSPF and therefore concerns workplace issues" and that it was "reasonable for the USG/DMSPC to determine that the status and management of the UNJSPF is a legitimate subject of concern to staff at large therefore comments made by staff representatives about the management of UNJSPF concern work-related issues."[2]

23. The UNDT did not conduct a judicial review. It erred in fact as it found the individuals identified in the complaint to be staff representatives and failed to consider the evidence showing they were not. The UNDT instead relied on false allegations made by the Administration. The UNDT also failed to understand that, had an investigation been conducted, additional individuals would have been identified. The UNDT also erred in fact in concluding that the actions of the named individuals concerned only speech and accepted the Administration's unsupported assertion to this effect. However, the Appellant provided

[2] Impugned Judgment, paras. 21 and 22.

evidence that two offenders travelled in contempt of UNAT Order Nos. 284 and 288[3] that ruled against their attendance at the Pension Board meetings, and defied the decision of the Pension Board forbidding their access to the meetings. They were there to influence the career and contract renewal of the Appellant constituting a clear example of harassment and their insubordination is misconduct. Thus, the UNDT erred in fact in concluding that the conduct complained of concerned only statements on valid staff welfare issues. The UNDT's assessment that the decision was rational could only be made on a firm factual record, which was not established by the UNDT. Further it is not possible to assert that all offenders were staff representatives or that all reported incidents were related to free speech without having first conducted a fact-finding investigation.

24. The UNDT further erred in law. It cited staff rule 8.1(f) entitling staff representative bodies to effective participation but the UNDT merely assumed that the identified offenders were staff representatives and did not analyse the conduct itself. Unethical and defamatory conduct is not protected staff union activities and false, slanderous, and inflammatory allegations cannot be protected by the principles of free speech and association. The comments were serious defamatory accusations of massive fraud and mismanagement and were broadly disseminated. The OIOS conducted two investigations into the alleged accusations against the Appellant and proved they were fabricated and without any substantiation.

25. The UNDT also failed to consider the conflict of interest created by the EOSG passing on Mr. Arvizú Trevino's complaint to the USG/DMSPC, since the USG/DMSPC and her department are responsible for human resources management. The USG/DMSPC failed to provide the Appellant with a healthy and safe working environment and this led to his disability. The UNDT also erred in procedure by not holding a hearing and, in turn, failing to obtain any testimony of witnesses to the alleged incidents in his complaint, in particular from Mr. Stephen Kisambira, President, United Nations Staff Union, an independent and objective third party who sent an email dated 30 March 2015 to all United Nations staff members via a United Nations Broadcast stating "it would seem inflammatory and inciting to allege fraud against senior Administration officials by any staff representative and convene a general meeting of the staff before meeting with the relevant officials and establishing the facts"." Another example is the Report of the United Nations Joint Staff Pension Board (A/71/9) to the

[3] *Faye v. United Nations Joint Staff Pension Board*, Order No. 284 (2017); *Rockcliffe v. United Nations Joint Staff Pension Board*, Order No. 288 (2017).

General Assembly which reported that actions of a staff member defamed the Appellant and which did not conform with conduct expected of International Civil Servants. The Report stated in pertinent part:

> 475. The members of and representatives to the Board expressed their strong displeasure about the persistent dissemination and publication of such false allegations, which were considered unnecessary, wholly inaccurate and unfortunate. The statements made in the media about the Fund's leadership were seen as personal defamation not based on facts and full of misinformation, both factually and legally.
>
> 476. [..] The members of and representatives to the Board find the press and other articles highly regrettable, and consider the statements made in the articles and the misinformation provided to the press not only grossly irresponsible but also far below the level of behaviour expected from international civil servants.

26. The United Nations refusal to investigate the serious incident reported in an official report to the UNJSPB, a subsidiary organ of the General Assembly, and its subsequent decision to refuse to investigate the Appellant's complaint is a serious failure and it implied a systemic failure by the United Nations Administration. ST/ SGB/2008/5 provides that every staff member has a right to be treated with dignity and respect in the workplace and work in an environment free from discrimination, harassment, and abuse. Considering the seriousness of his case, the UNDT was obliged by fairness and due diligence to use the tools at its disposal to verify the veracity of the submissions presented by both parties. The UNDT is permitted to call witnesses or experts and may order the production of evidence at any time. The UNDT failed to utilise its authority to ensure the evidentiary questions presented by the claims and submissions were verified before deciding on his application.

The Secretary-General's Answer

27. The Respondent requests the UNAT to uphold the Impugned Judgment and dismiss the appeal. The Respondent argues there is no exceptional issue warranting a full bench and that the Appellant does not have standing to request such.

28. The Appellant fails to demonstrate that the UNDT erred in fact when it held that the contested decision was lawful. UNDT correctly concluded that the Administration had exercised its discretion reasonably. Six of the staff identified in the complaint were elected by participants in the Pension Fund to represent staff members in the UNJSPF Board, while the seventh individual was the former president of the United Nations Staff Union. Further the

fact that two individuals attended the Pension Board's 64th session in 2017 in Vienna (but did not attend the plenary sessions of the Pension Board meetings in their capacity as elected representatives of UNJSPF) did not constitute harassment. The UNDT correctly found that the individuals identified in the complaint were acting as expected representatives of United Nations staff members. Any disputes regarding their election to such roles did not negate that they were acting in their capacity as representatives.

29. The Respondent submits that the UNDT correctly found there was a factual basis to make its decision as the entirety of the relevant evidence was presented by the parties. While the Appellant disagrees as to the legal significance of various facts, the facts are not in dispute, and thus the UNDT was able to draw legal conclusions without further investigation. In turn the UNDT did not err in not holding an oral hearing. The UNDT also correctly found that the staff engaged in speech that was addressing valid staff welfare issues and not defamation.

30. The Appellant fails to demonstrate how the attendance of two alleged "offenders" who attended a meeting of the Pension Board constituted harassment. Neither attended the plenary meetings of the Board's 64th session. They were present on the premises outside the meetings rooms. The Appellant has not demonstrated how their presence constituted misconduct. Contrary to the Appellant's claims, the UNAT did not forbid their attendance at the Pension Board meetings per UNAT Order Nos. 284 and 288[4]. UNAT held it had no competence to analyse the merits.

31. The Appellant fails to demonstrate that the UNDT erred when it found the contested decision was lawful as it was based on sufficient evidence. Nothing in the policies requires an investigation to be opened. Rather Section 5.14 of ST/SGB/2008/5 provides that upon receipt of a complaint the responsible official will promptly review the complaint or report to assess whether there are sufficient grounds to warrant a formal fact-finding investigation. In the instant case, the Administration followed this process and transparently informed the Appellant. It lawfully discharged its duty under the policy.

32. The UNDT correctly found the speech was protected from censure by the Administration. The statements were indisputably made in relation to the discussion of matters that related to the status and management of the UNJSPF. Staff Rule 8.1 affords protections to staff representatives in staff unions and applies to the elected representatives of

[4] See *supra*, footnote 3.

staff participants to the Pension Board and is reasonable and lawful that they are not censured for speaking on staff-related welfare matters.

33. The Appellant failed to demonstrate that the USG/DMSPC had a conflict of interest because she is also responsible for human resources management. This is a bald and unsupported assertion.

34. The Appellant has failed to demonstrate that the UNDT erred when it declined to convene an oral hearing.

35. The Appellant failed to demonstrate he should be awarded compensation for moral damages. The medical report he submitted to UNAT was never submitted to the UNDT, yet it was produced more than two months before the UNDT judgment, which means he had the opportunity to present it to the UNDT but did not.

Considerations

Preliminary matters

The Appellant's request for consideration by a full bench

36. The Appellant requests that, because of the particular complexity of the case as well as of the importance for the Organisation to determine the truth and the facts relative to possible serious systemic problems in it, his appeal be heard by a full bench of the Appeals Tribunal. Article 10 of our Statute provides that cases before the Appeals Tribunal shall normally be reviewed by a panel of three judges and shall be decided by a majority vote. Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgment is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A decision to refer a matter for consideration by a full bench is therefore a matter for the panel or the President of the Appeals Tribunal.[5] The Appellant has no standing to seek consideration by a full bench.

[5] *Ross v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-926, para. 43.

Merits of the Appeal

37. The case raises interesting, delicately balanced, legal issues pertaining to conflict between the freedoms and rights of the staff members of international organisations, as well as to obligations of the latter towards them. It involves the Organisation's duty to provide a safe and secure work environment, to protect a staff member's good name and reputation, and to ensure that their facilities are not abused and its rules and regulations are respected.[6] Additionally, and most importantly, the present case concerns freedom of association and the degree of freedom of speech to which bodies and persons representing staff in international organisations are entitled.

Applicable legal framework

38. There is a commitment that all international organisations must have "zero tolerance" for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority. This is especially true for the United Nations, as such behaviour or conduct is contrary to the spirit of its Charter, Staff Rules and Regulations and the Standards of Conduct for the International Civil Service.

39. The "zero tolerance" policy is aimed at providing a safe environment for all United Nations employees[7], free from discrimination on any grounds and from harassment at work including sexual harassment. As a general rule, this policy aims to tackle the issue of harassment in the workplace mainly by two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.[8]

[6] See, in this context, *Melanne Civic v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1069, para. 73; *Abubakr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-272, para. 44.
[7] ILOAT Judgment No.3106, under B.
[8] *Kenneth Conteh v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1171, para. 41.

40. Concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, paragraph 2.1 of ST/SGB/2008/5 provides that: "every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse".

41. Section 2.2 of ST/SGB/2008/5 adds that "[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed".

42. Section 5.3 of ST/SGB/2008/5 establishes that:

> Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

43. Sections 5.14 and 5.15 of ST/SGB/2008/5 provide:

> 5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.
>
> 5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)].

44. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and, in Section 5.17, the final report of those proceedings is referred to as follows:

> The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence [...]. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

45. Section 5.18(a)-(c) provides for the possible courses of action, one of which the responsible official shall take:

> (a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual;
>
> (b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, a reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;
>
> (c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken. [footnote omitted]

46. A final option is established in paragraph 5.19:

> 5.19 Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

47. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organisation itself, and it is not legally possible to compel the Administration to take disciplinary action. The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.[9] Only in particular situations (i.e., in the 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 Appeals Tribunal Statute.[10] However, the Administration's discretion can also be confined in the opposite direction. There are situations where the 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.[11]

48. When it comes to the discretionary authority of the Administration, the Administration is under an obligation to exercise it lawfully according to the purpose of the authorising statute and within the existing statutory limits. The Administration has not validly exercised its discretion if it has addressed a particular administrative matter in the same way it always has without any additional considerations or has operated under the erroneous belief that it was fettered to make a specific choice, to the exclusion of all other choices amongst the various courses of action open to it. In these situations the Administration has, illegally, not engaged in a balancing exercise of the competing interests by considering all aspects relevant for the exercise of its discretion, in order to select the proper course of action.[12]

49. Further, the Appeals Tribunal recalls its jurisprudence that the discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the

[9] *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para.30; *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33, citing *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 38, *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr.1, para. 31, and *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.
[10] *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 30; *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33, citing *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 40.
[11] *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33.
[12] *Ozturk v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-892, para.16.

employee are implied in every contract of employment. Both parties must act reasonably and in good faith.[13]

50. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance tribunal may consider whether relevant matters were ignored, and irrelevant matters considered, and also examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.[14]

51. As a result of the judicial review, the first instance tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process, the first instance tribunal 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. This process may give an impression to a lay person that the tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker.[15]

[13] *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para.31; *Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para.43; *Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 17.

[14] *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2019-UNAT-927, para.32*; Kule Kongba v. Secretary-General of the United Nations,* Judgment No. 2018-UNAT-849, para. 27; *Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 20.

[15] *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2019-UNAT-927, para.33*; Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2018-UNAT-814, para. 20*; Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2017-UNAT-798, para. 24.

52. As we have stated in *Obdeijn*[16]:

> the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

53. Hence, in compliance with the above stated principles of judicial review, an administrative decision which adversely impacts on a staff member's status must be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised. In this respect, 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.[17]

54. Coming to the material facts of the case, in order to give some context to the events that led to the present dispute, on 24 July 2019, the Appellant lodged a harassment complaint with OIOS in accordance with the Secretary-General's Bulletin on Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2008/5), in force at the material time. The complaint contained information that serious offenses, as per section 5.3 of ST/SGB/2008/5, had taken place and a request for investigation, including a table which described seven incidents of alleged prohibited conduct as well as an enclosure of 18 records of evidence including pictures and reactions from third parties who allegedly witnessed some of the misdeeds.

55. Below follows the indicative list of the alleged prohibited acts (public defamation) against the Appellant with selected quotes that allegedly present false, misleading and slanderous claims or allegations against him, which he submitted to the Administration and to the UNDT:

[16] *Obdeijn v. Secretary-General of the United Nations,* Judgment No. 2012-UNAT-201, para. 36.
[17] *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para.36; *Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para.47; *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 45.

- 27 March 2015: E-mail message sent via United Nations official e-mail system to all staff around the world containing accusations and informing about the "townhall" meeting convened to "denounce" non-existent alleged fraud and mismanagement in the Pension Fund, which provided as follows:

> Dear Colleagues,
>
> In the last month we have received serious allegations of fraud and irregularities committed by the senior management at our $50 billion dollar pension fund.
>
> At the same time we have uncovered attempts by the same senior management to reduce external financial oversight of the fund through new financial regulations and wrest complete control of the fund and its investment management from the United Nations via a new memorandum of understanding, which the fund's board is being lobbied to accept. You may recall that last year Pension Fund's CEO tried unsuccessfully to do exactly the same.
>
> …
>
> To this end we are organizing, together with our Geneva colleagues (my counterpart Ian Richards, who represents the Geneva Pension Found staff, is in town and co-hosts the event) […]
>
> COME AND LEARN WHY WE BELIEVE THAT OUR PENSION IS NOT IN GOOD HANDS!

- 31 March 2015: Townhall meeting held in the United Nations Headquarters Building in New York City, Conference Room 4, during which malicious, inflammatory and unsubstantiated allegations of "massive fraud" and mismanagement were made against the Appellant. and some of which were later disseminated to internet media outlets such as Chief Investment Officer Magazine.

- 31 March 2015: Video transmission of townhall meeting to different United Nations offices around the world.

- 6 April 2015: Publication of online article entitled "UN Pension Accused of Massive Fraud" published online by Chief Investment Officer Magazine or CIO with the sub-heading: "Major conflict has erupted at the $54 - United Nations (UN) pension fund, as union officials counter attempts at a governance overhaul with accusations that the CEO may have committed "massive fraud".

- 22 July 2015: Cartoon entitled "Sergio stay on your side" published on a blog, the author/administrator of whom is a former staff member, according to the Appellant.[18]

- 29 July 2015: Blog entry on Pension Board meeting which states as follows: "Given the dire state of staff-management relations in the Fund, support was needed to prevent retaliation against whistleblowers, which, he stressed, was prohibited by the UN. He called for the Fund management to be held accountable, brought 'back in line, to ensure regulations are upheld, oversight reinforced, violations stopped, honesty restored, labour regulations respected and whistleblowers protected.'"[19]

- 29 July 2015 : Blog entry entitled "[Coordinating Committee for International Staff Unions and Associations (CCISUA)] message at UN Pension Board meeting: Bring the Fund management back in line and restore trust in staff management relations!"[20]

- 6 August (20 May) 2015: Cartoon published entitled "Pension matters: Wolf in sheep's clothing!" by Matthew Chip Bhima Hogan.[21]

- 6 August 2015: Blog entry published entitled, "Pension matters: when the wolf goes after the fox!" including the following excerpt:

> The report mentions that the Fund was 'not on track' with processing client needs within 15 business days and needs to improve client servicing. Let us also pause to recall that the MOU is largely about staff management relations and its potential for negatively impacting morale and performance among Fund Secretariat staff, many of whom are concerned about the CEO's increased leeway for favoritism and retaliation. So there's a connection between the MOU and improved client servicing, right?
>
> [...] Is this a case of the wolf going after the fox?

[18] Accessed at: http://unpension.blogspot.com/2015/07/blog-post.html.
[19] Accessed at: http://unpension.blogspot.com/2015/07/update-pension-board-meeting-doozy-by.html
[20] Accessed at: http://unpension.blogspot.com/2015/07/ccisua-message-at-un-pension-board.html
[21] Accessed at: http://unpension.blogspot.com/2015/08/blog-post.html

- 6 March 2016: Newspaper article entitled, "Des retraités de I'ONU se retrouvent sans un sou" published in the Tribune de Genève, and available online, referencing the Appellant by name in the context of having been accused of falsifying documents, conflict of interest and mismanagement.[22]

- 13 June 2016: Letter by alleged "designated" representative of the staff unions of the United Nations which provided, *inter alia*, as follows:

> Mr. Secretary-General, the timely payment of pensions to retirees is the principle duty of the fund CEO. In the world outside the UN, such a business failure would have led to dismissal and the search for a replacement. That the CEO has failed to carry out this basic job requirement and been less than forthcoming in providing accurate data, leads the staff unions to make the following recommendations … .[23]

- 13 June 2016: The CCISUA website published an article entitled "Unions urge Secretary-General to replace the CEO as payment delays continue", which reported, *inter alia*, that: "Staff unions urged the Secretary-General, in a letter published today, to replace the CEO of the pension fund in the face of a continued and severe backlog in payments to newly-retiring staff. (…) The letter also calls for an OIOS investigation into the backlog and the lack of transparency with regards to the data being provided by the fund."[24]

- 11 July 2016: The CCISUA website published an article entitled, "Protect our Pension Fund: Stop its Exit from the UN at a Time of Outsourcing to Wall Street" stating, *inter alia*, the following:

> This comes as the pension fund CEO, Sergio Arvizú, has obtained new flexibilities in how he manages his staff, giving him space to favour those who turn a blind eye to internal rules and procedures and retaliate against those who don't, thus further removing the fund from the UN.
>
> Meanwhile newly retiring staff continue to wait months for their first pension and serious allegations made against the CEO by his own staff await a full OIOS investigation."[25] The article also provides links to further articles.

[22] Accessed at: https://www.tdg.ch/news/standard/retraites-onu-retrouvent-sou/story/28712143
[23] Accessed at: http://www.ccisua.org/wp-content/uploads/2016/06/LetterSGPensionFundDelays.pdf
[24] Accessed at: https://www.ccisua.org/2016/06/13/continuing-payment-backlog-pension-fund-unions-urge-secretary-general-replace-ceo/
[25] Accessed at: https://www.ccisua.org/2016/07/11/save-pension-fund/

56. On 16 January 2020, the Under Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) responded to the Appellant's complaint with a letter, which reads as follows:

> Dear Mr. A.,
>
> I refer to your letter of 29 November 2019 and to the letter of your counsel, [...] of 2 October 2019. In your complaint of 24 July 2019, you allege that the staff members identified in your complaint have subjected you to harassment, "which is on-going, resulted in significant reputational and career harm as well as in severe deterioration in [your] health and eventual disability."
>
> After a thorough review of your complaint and related materials, it is apparent that the statements and comments were made by those staff members in their capacity as staff representatives. Accordingly, any assessment of their statements and comments must take into account the latitude afforded staff members acting as staff representatives, as well as the principle of freedom of association which demands that the Administration refrain from interfering with the activities of staff representatives. Under these circumstances, pursuit of the matter within the context of a disciplinary process would not be warranted.

57. The question in the case at bar is whether the Organisation was under a duty to protect the Appellant by taking action to investigate his complaint of harassment against the alleged offenders. This has to be considered in the light of the principle of freedom of association. It concerns the degree of freedom of speech to which bodies and persons representing staff in international Organizations are entitled.

58. The right of employees to form and join organisations of their own choosing is an integral part of a free and open society. Freedom of association is both an individual right and a collective right, guaranteed by all modern and democratic legal systems, as well as international law, including Article 11 of the European Convention on Human Rights, Articles 20 and 23 of the Universal Declaration of Human Rights and Article 22 of the International Covenant on Civil and Political Rights. The Declaration on Fundamental Principles and Rights at Work by the International Labour Organization also ensures these rights. This right is manifested, *inter alia*, through the right to join a trade union, to participate in debating societies, political parties, or any other club or association, including religious denominations and organisations, fraternities, and sport clubs and not to be compelled to belong to an association. It is also closely linked to the right to freedom of assembly.

59. The principle of freedom of association is one of the principles of law that must be observed by the organisations of the United Nations Common System.[26] One of its aspects consists in precluding interference by the Organisation in the affairs of its staff union or the organs of its staff union. A staff union must be free to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities. Further, the Organisation must remain neutral when differences of opinion emerge within a staff union: it must not favour one group or one point of view over another. To do so would be to diminish the right of a staff union to conduct its own affairs and to regulate its own activities. Nor does an organisation have any legitimate interest in the actions of staff members in their dealings with their staff union and/or other staff union members with respect to the affairs and activities of the union.[27]

60. As already alluded to, the freedom of association necessarily involves the freedom of discussion and to debate issues concerning the employment of staff, and within this umbrella comes freedom of speech (or expression).[28]

61. It is well recognised in jurisprudence and legal literature across the world, that the rights to freedom of assembly and of association, as well as to expression, serve as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. They are essential components of democracy as they empower men and women to express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.

62. Moreover, freedom of speech, i.e. the right to free expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution or others, not only constitutes one of the essential foundations of any democratic society, but also it is one of the basic conditions for its progress and for each individual's self-fulfillment, and is recognised on the plane of international administrative law by the jurisprudence of the international administrative tribunals, as borne out by a number of their judgments explicitly

[26] *De Kermel v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-239, para.39.
[27] ILOAT Judgment No.3106, Consideration 7.
[28] Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966

making reference to it.[29]

63. Nevertheless, there must be an appropriate balance between the right to freedom of association and the right to freedom of expression in particular, and the need to protect an individual's reputation and dignity, widely recognised by international human rights instruments (see, for example, Article 8 of the European Convention on Human Rights) and the law in countries around the world, as one element of the right to respect for private life.[30]

64. Arguably, in a democratic society, freedom of speech (or expression) must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations. In this context, a staff association enjoys broad freedom of speech and the right to take to task the administration of the organisation whose employees it represents.[31] Thus, freedom of speech must be protected, particularly for officers of a staff association, so that they are not hampered in their task of representing the membership when in dispute with the Administration.

65. The existence of a freedom of discussion and debate, inherent in the freedom of association, can have the consequence that "when feelings run strong the discussion and debate can spill over into extravagant and even regrettable language". So, if comments by a staff member made in the context of a debate about employment matters are defamatory of another staff member (in the sense that the comments have injured a person's reputation or tarnished her or his good name), the fact that they are defamatory does not, by itself, deny the staff member making the comments the protection afforded by the principle of freedom of association.[32]

66. Like any other freedom, however, the freedom of discussion and debate is not absolute and has its bounds. A staff representative's public statements must not impair the dignity of the international civil service. In this regard, he/she is under a special obligation not to abuse his/her rights by using expressions or resorting to behaviour incompatible with the decorum appropriate to his/her status both as an international civil servant and as an

[29] See, G. Ulrich, *The Law of the International Civil Service. Institutional Law and Practice in International Organizations*, 2018, pp. 133 ff., citing relevant jurisprudence.
[30] See in this regard *Radio France v. France*, 2004-II Eur. Ct. H.R. 125, 148.
[31] ILOAT Judgment No. 2227, Consideration 7; see also, ILOAT Judgment No. 911.
[32] ILOAT Judgment No. 4148, Consideration 7; ILOAT Judgment No.3106, Consideration 8; ILOAT Judgment No.274, Consideration 22.

elected staff representative.[33] The same goes for a staff association, which may not resort in public to action that impairs the dignity of the international civil service, save that the degree of discretion required of it is not as great as is expected of an individual staff member: Both law and practice allow it wider freedom of speech and only gross abuse will be inadmissible.[34] Consequently, there may be cases in which an organisation can intervene if, for example, there is "gross abuse of the right to freedom of expression or lack of protection of the individual interests of persons affected by remarks that are ill-intentioned, defamatory or which concern their private lives".[35]

67. In addition, it is to be noted that the law of defamation is not concerned solely with the question of whether a statement is defamatory in the sense that it injures a person's reputation or tarnishes his or her good name. It is also concerned with the questions of whether the statement is false and whether it was made in circumstances that afford a defense. Broadly speaking, the defenses to a claim in defamation mark out the boundaries of permissible debate and discussion. As a general rule, a statement, even if defamatory in the sense indicated, will not result in liability in defamation if it was made in response to criticism by the person claiming to have been defamed, or if it was made in the course of the discussion of a matter of legitimate interest to those to whom the statement was published and, in either case, the extent of the publication was reasonable in the circumstances.[36]

68. The foregoing illustrates that there is a fine balance to be struck between the individual and collective rights and freedoms enjoyed by United Nations staff members and their staff associations and staff representatives, and the need for them to conduct themselves publicly (both at and outside work) in accordance with the standards and aspirations of the United Nations and not to abuse their rights and freedoms. It is not possible to prescribe precisely and in advance where that balance will be struck in any particular case: It will always be a matter of fact and degree in the infinitely variable circumstances of each case relating to the nature of the interests involved, including that of the Organisation, the seriousness of the accusations and offences, the language used to that effect, whether in the office or outside the office and whether connected or not with the

[33] ILOAT Judgment No. 1061, Consideration 3. See also ILOAT Judgment No. 87; ILOAT Judgment No. 911.
[34] ILOAT Judgment No. 2227, Consideration 7.
[35] ILOAT Judgment No.3106, under 8; ILOAT Judgment 2227, under 7.
[36] ILOAT Judgment No.3106 of4 July 2012, under Consideration 9.

affairs of the staff association, the capacity of the allegedly defamed individual etc. For instance, persons acting in an official capacity are subject to wider limits of acceptable criticism than ordinary individuals.[37] Nonetheless, even these persons must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.[38] Some cases will be clear, others so close to that point of balance that they will be hard to decide and attract legal controversy. This case falls towards this latter end of the spectrum of conduct.

69. Against that background, it is likewise clear that in the centre of the present dispute lies the fact that the Administration, in the exercise of its discretion to initiate or not the formal fact-finding procedure, was confronted with a genuine horizontal as well as vertical conflict between the Appellant's right to human dignity and reputation and the alleged offenders' freedom of association as well as their right to expression.

70. In this context, it is evident that the Administration was not allowed to take a course of action by, *in abstracto* and *a priori*, upholding one of the involved freedoms and rights and sacrificing the other for it to come to a resolution of this conflict in the interests of the Organisation and for the purpose of the lawful exercise of the discretion vested in it. Quite the opposite, the Administration should have undertaken the difficult exercise of striking the right balance of the competing interests or values by determining which right deserved preference over the other in the specific case, by weighing the freedoms and rights in question against each other, taking all the circumstances of the specific case into account and putting forth, with clarity, consistency, and transparency, the criteria (i.e., the legal requirements and defenses of the alleged defamation, the seriousness of the infringement, whether the aspects of the rights that enter into conflict belong to the core or the periphery of the human right in question, the probable negative effects for the interest of the Organization etc.) and the methodology adopted in the reasoning of the relevant administrative decision, such as to make feasible the judicial review, as per the settled jurisprudence of the Appeals Tribunal.

[37] See for example, ECHR *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, ECHR 27 June 2017, para. 98; *Morice v. France* [GC], no. 29369/10, ECHR 2015, para. 131.
[38] See for example, *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999-I, para. 33.

71. It is within the above parameters and per the above standards that both the challenged administrative decision and the Impugned Judgment will be assessed for their correctness by this Tribunal.

72. In the first place, the UNDT directed itself to decide whether the impugned administrative decision was a reasonable one. In this respect, the UNDT reviewed the record before it[39] and was satisfied that the contested decision was lawful.

73. The UNDT recorded the following conclusion at paras. 22 and 23 of the Impugned Judgment, respectively:

> 22. The Tribunal finds that it was reasonable for the USG/DMSPC to determine that the status and management of the UNJSPF is a legitimate subject of concern to staff at large and therefore comments made by staff representatives about the management of UNJSPF concern work-related issues. In this regard, the Tribunal notes that staff rule 8.1(f) entitles staff representative bodies to effective participation in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies.
>
> 23. Based on the record, it also was reasonable for the USG/DMSPC to determine that the Applicant's complaint did not identify any statement or conduct that would constitute a gross abuse by staff representatives of their right to express themselves on workplace issues. It is clear that the Applicant is unhappy about how the staff representatives articulated their concerns about the management of UNJSPF. However, the Tribunal notes that sec. 1.2 of ST/SGB/2008/5 clarifies that "[d]isagreement on work performance or on other work-related issues is normally not considered harassment…".

74. Finally, the UNDT, having had regard to these findings, determined the Appellant had not shown that there were sufficient grounds to warrant a formal fact-finding investigation in this matter, or that the Administration had acted unreasonably in making the decision, and therefore it rejected the application before it.

75. The Appellant contends in his appeal that the UNDT erred in law and fact by making these findings because, *inter alia*, the assessment that the decision was rational can only be made on a showing that the decision-maker acted on a firm factual record, which was not established by the UNDT. Since no investigation was conducted, the USG/DMSPC's basis

[39] Impugned Judgment, paras.20 and 23.

for her decision cannot be considered reasonable, transparent or fair.

76. He further asserts that the UNDT did not canvass or make any assessment or analysis of the law; unethical and defamatory conduct is not protected staff union activity or an internal matter within the Staff Union; moreover, long established jurisprudence affirms that staff union representatives that illegally make public, false, slanderous and inflammatory allegations cannot be protected by the principles of freedom of association or free speech. The UNDT thus further erred on a question of law. i.e., whether any speech was protected by freedom of association.

77. In the present case, as discussed and set out above, the Administration was vested with the discretion as to how to address the Appellant's complaint of harassment and whether to begin an investigation in terms of the relevant allegations submitted by him. And it did so by denying the institution of a formal fact-finding investigation reasoning that "[…] the statements and comments were made by those staff members in their capacity as staff representatives. Accordingly, any assessment of their statements and comments must take into account the latitude afforded staff members acting as staff representatives, as well as the principle of freedom of association which demands that the Administration refrain from interfering with the activities of staff representatives".

78. Nevertheless, the impugned denial suffers from the following cumulative legal flaws.

79. First, the reasoning underpinning the Administration's denial of the Appellant's request to address his complaint of harassment is not a lawful reasoning, living up to and complying with the strict standards established by the Appeals Tribunal's case law. It does not reflect in clear and precise terms the specific balancing criteria and standards engaged by the Administration in exercising the discretionary authority vested in it and in making the value judgment upon reaching the negative decision not to pursue a formal fact-finding investigation into the alleged misconducts of harassment and defamation.

80. Rather, it consisted in the generic and somewhat pretorian determination that the allegedly defamatory statements and comments were made by those staff members in their capacity as staff representatives and, accordingly, any assessment of their statements and comments must take into account "the latitude" afforded staff members acting as staff representatives. Notwithstanding this, the Administration did not provide any analytical

thoughts and reasons about the specific set of the alleged facts and their seriousness for the interests of the Organisation, whether they involved any abuse of the freedom of speech and of association, or there were strong and legitimate views of the alleged offenders which gave them the right to criticise the Appellant even not in a entirely temperate or polite language, i.e. because of his engagement in the administration of the Fund, etc. Whether these relevant facts and standards were considered in the balancing equation is not clear and, as a consequence, we are unable to ascertain the answers to these questions.

81. Hence, this was not a duly motivated exercise of the administrative discretion. The failure to ascertain reasons from the challenged administrative decision makes it difficult to judicially review whether there is a "rational connection or suitable relationship" to the value judgment and the consideration of the specific range of factors by the Administration. Put it another way, the reasons for the exercise of the discretion when read together with the outcome serves the purpose of showing whether the exercise of the discretion is lawful and rational. Without the "why" in the reasons, the test of rational connection or relationship to Administration's decision not to pursue a formal fact-finding investigation into the alleged harassment misconduct cannot be met.

82. This was much more so in the case at bar, namely the balancing exercise and the reasoning of its outcome by the decision-maker was indispensable, in view of the specific factual circumstances alleged by the Appellant in his complaint of harassment, which, at least on the face of them, might constitute (an) exceptional situation(s) giving rise to the Appellant's right to an investigation.

83. We hasten to say that this Tribunal has formed no view on whether there existed or not such exceptional situation(s). Nor is it within the competence of this Tribunal or the UNDT to do so or engage in a fact-finding exercise whatsoever to that effect, namely to examine the Appellant's allegations of harassment and do the balancing exercise, prior to the Administration having made its own reasoned determinations in this respect.

84. As the Appeals Tribunal held,[40] the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute.

85. Consequently, while it is true that the UNDT engaged in a fact-finding exercise of its own in the present case and based on the relevant record concluded that a) the status and management of the UNJSPF was a legitimate subject of concern to staff at large and therefore comments made by staff representatives about the management of UNJSPF concerned work-related issues, and b) it was reasonable for the USG/DMSPC to determine that the Appellant's complaint did not identify any statement or conduct that would constitute a gross abuse by staff representatives of their right to express themselves on workplace issues, noting that disagreement on work performance or on other work-related issues is normally not considered harassment, this was not a legitimate exercise of the UNDT's competence. The UNDT was not allowed to undertake the exercise of conducting such an investigation into the Appellant's complaint of harassment and substitute its own decision for that of the Administration by balancing the opposing interests and rights and providing its own reasoned assessment or value-judgment in terms of the outcome of said exercise. Let alone that this undertaking would require sufficient evidence before the UNDT to make such findings, whilst all it had on record before it were submissions, allegations and indications about the Appellant's harassment and indications of the alleged offenders' legitimate interests, which had not been entertained by the Administration and put in an investigation record by way of proof. The proof of contested material facts and points of difference required evidence subjected to examination, cross-examination and re-examination, which then could be assessed or evaluated on the basis of the credibility and reliability of the witnesses, in the light of their bias, demeanour and relationship to the parties; the probabilities attending their versions as tested by contemporaneous evidence of another kind; and ultimately the inherent probabilities. Nothing resembling such a process was conducted by the UNDT in this case.

86. Therefore, under the aforementioned legal and factual circumstances, the Administration's failure to provide adequate reasons for the contested decision and the exercise of its discretion, as required by the above-cited jurisprudence, resulted in the Administration's decision of 16 January 2020 being an unlawful decision. The UNDT hence

[40] *Dawas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-612, para. 23; quoting *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-483, paras. 45-46, quoting *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-220, para. 41.

erred in holding otherwise.

87. Second, upon its reading, the framing of the challenged administrative decision reveals that the Administration acted in the erroneous belief that it did not have and could not exercise any discretion in terms of the Appellant's request to carry out an investigation into the facts of his harassment complaint, or at the very least it was circumspect about its ability to do so, to the extent that the alleged statements and comments were made by those staff members in their capacity as staff representatives. Any assessment of their statements and comments should have taken into account, *inter alia* (i.e. apart from the latitude afforded to staff members acting as staff representatives), "the principle of freedom of association which demands that the Administration refrain from interfering with the activities of staff representatives". Thus, the Administration failed to lawfully exercise the discretionary authority vested in it and to take all relevant considerations into account, in terms of the said request, including by balancing the conflicting interests and freedoms in the best interest of the Organisation—which the UNDT did upon reviewing the legality of the Administration's decision, however inappropriately as alluded above—as well as the Organisation's duty of care vis-à-vis the Appellant etc. Consequently, the Administration's failure to exercise its discretion, resulted in the Administration's decision of 16 January 2020 being an unlawful one for that reason too and, therefore, the impugned UNDT decision, which found otherwise, is not correct and should be set aside.

Remedies

88. Pursuant to Article 9 of the UNAT Statute, the Appeals Tribunal may only order one or both of rescission of the contested administrative decision or specific performance with compensation in lieu of contested decision concerning "appointment, promotion or termination", or compensation for harm.

89. 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, as in this case, the appropriate remedy would be to order the Administration to consider anew all factors or criteria; it is not for the Dispute Tribunal and the Appeals Tribunal to exercise the discretion accorded to

the Administration.[41]

90. Clearly then, the relief to which the Appellant is presently entitled, apart from an order setting aside the impugned UNDT decision, is an order of specific performance directing the Secretary-General to exercise his discretion on this issue.

Compensation

91. There is no compensation in lieu as the administrative decision does not concern "appointment, promotion or termination" as required in Article 9 of the UNAT Statute.

92. As per the Appeals Tribunal's jurisprudence, compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both.[42] It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question. If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded.[43]

93. Further, per our jurisprudence, an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical or psychological report of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal

[41] *Ozturk v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-892, para. 40; *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-798, paras.29-31; *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 27, citing *Branche v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-372 and *O'Hanlon v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-303. See also, *Vattapally v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-891, para. 36.

[42] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 68; *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20; *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 19.

[43] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 68; *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, para. 31; *Sirhan* Judgment, op. cit., para. 19.

is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.[44]

94. This Tribunal has consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and that the Appeals Tribunal will not interfere lightly as "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".[45]

95. The Appellant seeks compensation in the amount of two-year net base salary for damages suffered (and still ongoing) and provides to that effect a medical report, dated 6 October 2020.

96. In the present case, although the Appellant does not expressly state in his appeal that the harm for which he requests compensation constitutes "moral damages", it is evident, from the references, made in his statement of appeal, to his severe health harm due to the failure of the Administration to investigate his complaint of harassment and provide him with "a healthy and safe work environment", and notably from the kind of evidence he furnishes, that it comes to harm which falls within the realm of psychological harm. At any rate, the Appellant does not present any evidence showing that he suffered material damages as a result of the contested administrative decision and, consequently, there can be no award of such compensation in this respect.

97. With regard to the Appellant's request for damages on that basis (moral damages), the Appeals Tribunal notes that this was not simply an issue of lack of due diligence but also of failure by the Administration to follow its own rules and regulations and to ensure protection of the values and principles concerning rights and protection against harassment, enshrined in the Charter. However, we regret to find that, as the Secretary-General correctly claims, the Appellant should have made his case and presented the relevant evidence, i.e., the medical report, dated 6 October 2020, at the UNDT stage. That was not done, though there was sufficient opportunity for him either to make his case for moral damages there or then or, gathering that it was not the intention of the UNDT to have a further hearing, request that such further hearing be convened or time given for written submissions for the purpose of

[44] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 74.
[45] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para.75; *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 31: *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 15.

affording him the opportunity to make his case for moral damages. His claim for moral damages is thus dismissed.

98. Having said that, however, we also take note that the issue of whether the Appellant was actually a victim of harassment and prohibited conduct remains to be determined, in view of the fact that we rescinded the decision of the Administration not to convene an investigation panel to investigate the Appellant's complaint and remanded the case to it for a renewed assessment of the Appellant's complaint of harassment and prohibited conduct. In these circumstances, the determination on the Appellant's claim for moral damages on account of the harassment and prohibited conduct he had allegedly suffered did not come within the purview of our review on appeal—as this matter has not yet been addressed by the Administration and has become pending before it per our Judgment—and, thus, the Appellant is not precluded from raising that claim and make his case in terms of it and present the relevant evidence, i.e., the above mentioned medical report, dated 6 October 2020 or other, at a later stage.

Judgment

99. The appeal succeeds in part and Judgment No. UNDT/2020/211 is hereby vacated and modified as follows:

a) the decision of the USG/DMSPC, dated 16 January 2020, not to convene an investigation panel to investigate the Appellant's harassment complaint is rescinded; and

b) the Administration is directed to lawfully exercise the discretion granted to it in terms of this issue, as per our reasoning.

100. In all other respects, the appeal is dismissed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)	*(Signed)*	*(Signed)*
Judge Raikos, Presiding Athens, Greece	Judge Sandhu Vancouver, Canada	Judge Halfeld Juiz de Fora, Brazil

Entered in the Register on this 19th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar