



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

Judgment No. 2022-UNAT-1245

**Philippe Duparc, Karim El Gaouzi,
Radouan Toualbia & Nicolas Drevon (Duparc *et al.*)
(Respondents/Applicants)
v.
Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Sabine Knierim
Case No.:	2021-1600
Date of Decision:	1 July 2022
Date of Publication:	25 July 2022
Registrar:	Weicheng Lin

Counsel for Duparc <i>et al.</i> :	Robbie Leighton, OSLA
Counsel for Secretary-General:	Amanda Stoltz

JUDGE MARTHA HALFELD, PRESIDING.

1. The Secretary-General appeals against a UNDT Judgment in the present case, concerning various applications filed by Duparc *et al.* before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision of United Nations Office at Geneva (UNOG) to take no further action on their complaint under the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The UNDT rescinded the administrative decision, finding that the investigation was procedurally improper, and therefore could not have served as grounds for the contested administrative decision. The UNDT further ordered a remand of Duparc *et al.*'s complaint to the Director-General, UNOG, for a proper treatment. The Secretary-General appeals.

2. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the UNDT Judgment.

Facts and Procedure

3. On 4 April 2017, Messrs. Duparc, Gaouzi, Toualbia and Drevon (Duparc *et al.*), all Firearms Training Officers (FTO) of the Security and Safety Service (SSS), UNOG,¹ e-mailed a memorandum dated 3 April 2017, with attachments, to the Chief, SSS/UNOG, conveying their discontent with his decision to send a colleague, Mr. R., to an FTO training in Haiti. They further alleged breaches of ethics and integrity by Mr. R. and the Chief, SSS/UNOG.

4. On 10 April 2017, Duparc *et al.* forwarded their memorandum of 3 April to the Director-General, UNOG, for his attention. In this e-mail, they further clarified that the issues were pertinent to abuse of authority and discrimination.

5. By e-mail dated 18 April 2017, the Director, Division of Administration (DA), UNOG, informed Duparc *et al. inter alia* that the Director-General, UNOG, had tasked him, and he had, in turn, requested the Human Resources Management Service (HRMS), UNOG, to establish the facts so as to clarify the situation.

¹ The name of the fifth co-complainant, Mr. M. A., is not included here for reason of simplicity. He was also the co-complainant of a subsequent complaint dated 23 October 2017 filed by Duparc *et al.* But Mr. M. A. withdrew from Duparc *et al.* on 5 September 2018.

6. Following this, the Legal Team, Legal and Policy Advisory Section (LPAS), HRMS/UNOG, conducted a preliminary analysis of the matter and concluded that an investigation was warranted.

7. According to the Secretary-General, around September 2017, a staff representative, UNOG, who had been advising Duparc *et al.*, contacted the then Chief, LPAS/HRMS/UNOG, to inform her that Duparc *et al.* would lodge an official complaint under ST/SGB/2008/5. It was thus agreed to put the case on hold pending receipt of the official complaint.

8. By e-mail dated 23 October 2017 to the Assistant Secretary-General for Human Resources (ASG/HR), Duparc *et al.* filed a joint complaint of abuse of authority, harassment and discrimination under ST/SGB/2008/5 against the Chief, SSS/UNOG, alleging that the latter had unduly favoured Mr. R. in relation to the designation of Mr. R. to participate in training courses such as the Group for Investigations and Special Operations (GEOS), and with regard to the irregularities (cheating) during a certification exam in April 2016. In their communication, they stated that they had sent the complaint to her, and not to the Director-General, UNOG, to avoid any conflict of interest. Further, they requested that an investigation be undertaken by investigators who spoke French and who were not UNOG staff members. On 3 December 2017, the ASG/HR acknowledged receipt of the complaint.

9. By e-mail of 16 January 2018,² Duparc *et al.* submitted to the Office of Internal Oversight Services (OIOS) their ST/SGB/2008/5 complaint against the Chief, SSS/UNOG. On 17 January 2018, OIOS acknowledged receipt of the complaint.

10. On 24 January 2018, the Director, DA/UNOG, received a copy of Duparc *et al.*'s 23 October 2017 complaint forwarded by the Office of Human Resources Management (OHRM).

11. By e-mail of 2 February 2018, the Chief, LPAS, advised the Administrative Law Section (ALS), OHRM, that the April 2017 communication from Duparc *et al.* was not a formal complaint under ST/SGB/2008/5. She outlined the actions taken by UNOG with respect to it and confirmed that it was only on 24 January 2018 that OHRM informed UNOG about Duparc *et al.*'s official complaint filed pursuant to ST/SGB/2008/5.

² Parallely, on 26 December 2017, Mr. Duparc lodged a separate complaint against the Chief, SSS/UNOG, with the OHRM and OIOS.

12. By e-mail of 7 February 2018, ALS/OHRM advised Duparc *et al.* that their complaint filed on 10 April 2017 had not been considered under ST/SGB/2008/5, and that they should officially submit their complaint to the Director-General, UNOG, copying the ASG/HR.

13. By e-mail of 20 February 2018, OIOS referred Duparc *et al.*'s complaint to the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/MSPC), expressing its view that the matter would be best handled by the Office of the USG/MSPC.

14. On 9 March 2018, Duparc *et al.* wrote to the USG/MSPC to complain about the lack of attention to their complaint.

15. Following internal discussions between the Office of the USG/MSPC, UNOG and OIOS on how to proceed, it was decided that UNOG would handle both Duparc *et al.*'s joint complaint and Mr. Duparc's individual complaint, against the Chief, SSS/UNOG, but separately.

16. On 17 July 2018, the Director, DA/UNOG, appointed a two-member Panel to undertake a fact-finding investigation into Duparc *et al.*'s complaint of prohibited conduct within the framework of ST/SGB/2008/5. The two Panel members were staff members of the United Nations Office at Vienna (UNOV), of whom one was retired. They were fluent in both English and French, and were on OHRM's roster of trained investigators. The Director, DA/UNOG, informed Duparc *et al.* of the composition of the Panel on 31 July 2018.

17. The Panel interviewed the complainants, nine witnesses and the Chief, SSS/UNOG, in person or by telephone during the months from August to October 2018.

18. On 15 November 2018, the Panel submitted its report to the Director, DA/UNOG, concluding that "it [had] not been established that [the Chief, SSS/UNOG, had] displayed favouritism to [Mr. R.] or otherwise committed any prohibited conduct as defined under [ST/]SGB/2008/5".

19. In respect of the allegations of favouritism towards Mr. R., the Panel concluded that the decisions to send Mr. R. to various training courses

[did] not, taken singly or cumulatively, demonstrate favouritism on the part of [the Chief, SSS/UNOG] for [Mr. R.]. Instead, the decisions were either taken or requested by others and/or clearly justifiable on the facts as established. The mere fact that

another person could possibly have been sent does not establish favouritism. It is clear from all accounts, including the rating of his past training instructors and the recommendation of Mr. [name redacted], that [Mr. R.] has demonstrated excellent performance. It is also of note that he speaks Spanish, English and French, the three working languages of the United Nations.

20. Regarding the alleged cheating by Mr. R. during the FTO certification exam, the Panel found that “it [had] not been established that [Mr. R. had] cheated during the Use of Force Policy test. It is satisfied that [the Chief, SSS/UNOG] did think that he had looked into the matter of whether [Mr. R.] had the exam as he did not understand that there was a further allegation that he had used that past exam to cheat during the FTO course.”

21. By memorandum dated 18 December 2018, the Director-General, UNOG, informed Duparc *et al.* that he concurred with the Panel’s findings and, accordingly, he had decided to close the matter without any further action.

22. On 19 February 2019, Duparc *et al.* requested management evaluation of the decision not to pursue their complaint against the Chief, SSS/UNOG. By letter dated 18 April 2019, the USG/MSPC advised Duparc *et al.* that the Secretary-General had decided to uphold the contested decision.

23. On 17 July 2019, Duparc *et al.* filed with the Dispute Tribunal four similar individual applications, contesting the decision of the former Director-General, UNOG, to take no further action on their ST/SGB/2008/5 complaint against the Chief, SSS/UNOG.

24. On 30 June 2021, the Dispute Tribunal issued Judgment No. UNDT/2021/077 to dispose of the four individual applications filed by Duparc *et al.* in one judgment. It found for Duparc *et al.*, holding that the decision to take no further action on Duparc *et al.*’s complaint was “unjustifiable and unlawful”,³ as it was “marred with a number of fundamental flaws”.⁴

25. The Dispute Tribunal determined that the Administration had failed to address Duparc *et al.*’s complaint promptly in violation of Sections 5.3, 5.14 and 5.17 of ST/SGB/2008/5, even if one were to accept the Administration’s position that the Director, DA/UNOG, had received a copy of Duparc *et al.*’s complaint only on 24 January 2018. In the

³ Impugned Judgment, para. 87.

⁴ *Ibid.*, para. 89.

view of the UNDT, Duparc *et al.*'s complaint filed on 10 April 2017 was a formal complaint under ST/SGB/2008/5 as it contained the details listed in Section 5.13 of the Secretary-General's Bulletin, and it was addressed to the Director-General, UNOG, though it was not copied to OHRM for monitoring purposes as required by Section 5.11 of the same Bulletin. In that regard, the Dispute Tribunal found "unacceptable" the delays in processing Duparc *et al.*'s complaint, "with no or no reasonable explanation for them".⁵

26. The Dispute Tribunal also reviewed the conduct of the fact-finding investigation by the Panel, and found that the Panel had "failed to consider relevant information while considering irrelevant factors",⁶ and "unreasonably failed to investigate and determine the relevant issues and thus failed to give proper effect to the purpose and prescripts of ST/AGB/2008/5".⁷ In its view, the Panel should have considered or examined issues including whether the repeated selection of Mr. R. to participate in various training courses had affected the career or employment conditions of one or more persons who were similarly situated and might be equally qualified, whether and how often the Chief, SSS/UNOG, had derogated from the established procedure to the benefit of any staff member other than Mr. R., whether the Chief, SSS/UNOG, had distributed available resources among all staff members in an equitable manner, why the funds had been allocated for Mr. R.'s training alone instead of being used to have a trainer come to Geneva to train a group of 10 FTO officers, and whether this allocation was fair and reasonable. In respect of the allegation of cheating by Mr. R., the Dispute Tribunal thought that the Panel should have considered whether and when the Chief, SSS/UNOG, had received the information of the alleged cheating and whether he had taken appropriate action upon receipt of the allegation, rather than finding the assertion by the Chief, SSS/UNOG, to be satisfactory.

27. The Dispute Tribunal concluded that those "serious deficiencies raise[d] questions about the appearance of the impartiality of the investigation and [were] thus sufficient to make the resulting report unreliable for the purpose of making a final decision based on it".⁸

⁵ *Ibid.*, para. 60.

⁶ *Ibid.*, para. 69.

⁷ *Ibid.*, para. 85.

⁸ *Ibid.*, para. 86.

28. The Dispute Tribunal decided to remand Duparc *et al.*'s complaint to the Director-General, UNOG, so that the case could be "properly addressed" by a new fact-finding panel.⁹ But it rejected Duparc *et al.*'s request for compensation for delay, unfair/discriminatory treatment and damages to their career prospects for lack of any evidence of the alleged harm.

29. The Secretary-General appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) on 30 August 2021. Duparc *et al.* submitted an answer to the appeal on 21 December 2021.

Submissions

The Secretary-General's Appeal

30. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, except for paragraph 91 rejecting Duparc *et al.*'s request for compensation for harm suffered.

31. The Secretary-General contends that the Dispute Tribunal erred in law and exceeded its jurisdiction in finding that the contested decision to close the matter was unjustifiable and unlawful. The Administration met its obligation pertaining to the review of Duparc *et al.*'s complaint and the investigation process as set out in ST/SGB/2008/5. Section 5.20 of ST/SGB/2008/5 provides that an appeal may be filed where an aggrieved individual or alleged offender has grounds to believe that the procedure followed was improper. In the present case, the UNDT engaged in a detailed and substantive review of the content of the investigation records and the Panel's Report. It is not vested with the authority to do so. By defining the nature of the evidence and inquiry relevant to the investigation, the UNDT exceeded its authority, as it is not the role of the UNDT to substitute itself for the role and exclusive authority of the Secretary-General in disciplinary matters, to seek to guide or redo an investigation, or to determine the relevance of the evidence.

32. The Secretary-General also contends that there is no legal or factual basis for the UNDT's conclusion that there had been a "miscarriage of justice". Even assuming that the Appeals Tribunal were to consider the errors identified by the UNDT as correct, the UNDT

⁹ *Ibid.*, para. 90.

failed to consider if such errors on the part of the Panel had any impact on the decision to not impose any disciplinary measures in this case. In the view of the Secretary-General, the errors identified by the UNDT were not sufficient to establish any illegality, irrationality, procedural incorrectness or disproportionality in connection with the Administration's reliance on the Panel's Report when deciding to close the matter.

33. The Secretary-General submits that the UNDT exceeded its jurisdiction and erred in fact and law in finding that the Panel had failed to investigate and determine the relevant issues. Contrary to the findings of the UNDT, at the time of the alleged incident, the relevant legal framework was ST/AI/371 (Revised disciplinary measures and procedures), and not ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), the latter of which entered into force on 26 October 2017. ST/AI/371 did not impose an obligation on responsible officers to forward any possible complaint of unsatisfactory conduct directly to OIOS. Instead, under ST/AI/371, the head of department or office had the responsibility to review the information and to undertake an investigation only where there was reason to believe that a staff member had engaged in unsatisfactory conduct. The UNDT also erred in law in referring to ST/AI/1997/4 (Upgrading of substantive and technical skills) in its discussion of the issue of use of financial resources for training, when ST/AI/2010/10 (Upgrading of substantive and technical skills) was applicable. The Secretary-General clarifies that ST/AI/1997/4 was abolished and replaced by ST/AI/2010/10, and that the relevant content of those two administrative issuances is similar but not identical for the purposes of the present case. ST/AI/2010/10 does not create an obligation for each head of department or office to consider in every instance whether every allocation of funds for each specific training activity somehow "maximizes" the use of the available funds, or to weigh the benefits of training one staff member over any other staff members or to consider the treatment of other staff members equally qualified or similarly situated when taking managerial actions within its discretion.

34. The Secretary-General also submits that the various factual findings by the Dispute Tribunal were not supported by the evidence. For instance, Contrary to the UNDT, the Panel did consider whether and when the Chief, SSS/UNOG, had received the information about the alleged cheating and whether he had taken appropriate action. The Panel also considered the circumstances surrounding the decision to sent Mr. R. on training

in Haiti instead of bringing a trainer to Geneva as well as the circumstances in which an internal reassignment may be effected without a call for expressions of interest.

Duparc *et al.*'s Answer

35. Duparc *et al.* requests that the Appeals Tribunal uphold the UNDT Judgment, or in the alternative, remand the matter to the Dispute Tribunal for consideration of those elements of the case that the UNDT did not expressly address in the Judgment, should reversible error be found in the UNDT Judgment.

36. Duparc *et al.* contends that the UNDT did not err in fact or law in finding the Panel had failed to properly investigate the allegations of favouritism in selecting Mr. R. for training and reassignment to GEOS. In their view, the UNDT did not usurp the authority of the Secretary-General in critically assessing the clear deficiencies in the investigation conducted by the Panel. The UNDT did not conduct *ab initio* an investigation; it made no finding as to whether harassment or abuse of authority occurred or drew any conclusions regarding the elements of the complaint. Instead, the UNDT remanded the matter for a proper investigation, to which Duparc *et al.* were entitled but which they had not received. In this connection, Duparc *et al.* draws attention to the similarity between the investigation in *Belkhabbaz*¹⁰ and the present case. Deference should be shown to the UNDT's conclusion that the investigation was so deficient as to render the contested decision unlawful.

37. Duparc *et al.* maintains that the Secretary-General has not provided any authority in support of his argument that, where the UNDT finds an investigation to be sufficiently deficient, it must take a further step and determine if such errors had any impact on the rationality of the resulting decision.

38. Duparc *et al.* agrees that the UNDT's reliance on ST/AI/2017/1 was misplaced given the date on which that administrative instruction came into force. The applicable law was ST/AI/371. But even prior to ST/AI/2017/1, managers had an obligation to investigate reports of misconduct. The UNDT's assessment of the inaction by the Chief, SSS/UNOG, in respect of the cheating allegations, was not impacted by the alleged error of law in applying the provisions of ST/AI/2017/1. But if the Appeals Tribunal finds that the UNDT's conclusions regarding the need to refer to OIOS represents a reversible error of law, the

¹⁰ *Belkhabbaz v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873.

appropriate course of action is to remand the matter to the Dispute Tribunal, rather than to reverse a finding based on law Duparc *et al.* did not argue.

Considerations

39. The Secretary-General did not appeal the UNDT's finding that the Administration failed to promptly address the complaint, and that it incurred unacceptable delays in processing Mr. Duparc *et al.*'s complaint under ST/SGB/2008/5 with no or no reasonable explanation for them, in violation of the applicable legal framework. This aspect of the UNDT Judgment therefore stands.

40. The main issue under consideration and determination in the Secretary-General's appeal is whether the UNDT erred in law or in fact, resulting in a manifestly unreasonable decision, when it found that: i) the investigating Panel had unreasonably failed to determine relevant issues, thus, failed to give proper effect to the purpose and precepts of ST/SGB/2008/5; and ii) hence, the contested decision to take no further action on Duparc *et al.*'s complaint against the Chief, SSS/UNOG, was unjustifiable and unlawful.¹¹

The Scope of the Judicial Review

41. As previously held by the Appeals Tribunal, Section 5 of ST/SGB/2008/5 provides that where informal resolution of complaints of abuse or harassment is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the responsible official with authority. If there are sufficient grounds to warrant a formal fact-finding investigation, the responsible official is obliged to appoint a panel to conduct such a fact-finding investigation. If the investigation finds that no prohibited conduct took place, the responsible official will close the case. If the investigation establishes that there was a factual basis for the allegations, depending on the gravity of the abuse or harassment, the responsible official should refer the matter to the ASG/HR for disciplinary proceedings, or merely recommend managerial action. Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to Chapter XI of the Staff Rules.¹²

¹¹ Impugned Judgment, para. 87.

¹² *Argyrou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-969, para. 37.

42. In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal hence concludes that when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request a judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) undertaken by the Administration after a request for investigation, and to decide if this activity was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.¹³ The UNDT is thus competent under its jurisdiction to determine if there was a proper investigation in terms of ST/SGB/2008/5 and to review whether any administrative decision arising from the process complied with the aggrieved individual's terms of appointment.¹⁴

43. The discretion bestowed upon the Administration is indeed not unfettered. This is because, in any administrative decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members.¹⁵ The exercise of discretion could be described as an inherent power for any manager, including one within the Organization, as it would face great difficulty without its management exercising some discretion when choosing among different alternatives available. This flexibility in management is necessary for the dynamic nature of the work environment since it would be impossible to lay down a guideline for every imaginable eventuality. However, this power must be exercised with moderation. In this regard, the Appeals Tribunal has consistently held that:¹⁶

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. *The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered*, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.

¹³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 36.

¹⁴ *Argyrou, op cit.* Judgment, para. 38.

¹⁵ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 34, citing *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-844, para. 18.

¹⁶ *Nouinou, Ibid.*, para. 48, citing *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 44 (internal footnote omitted), in turn citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 28, in turn citing *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40 and cites therein.

44. The UNDT is hence also limited in its analysis. It is, however, not vested with jurisdiction to itself conduct *ab initio* an investigation of a harassment complaint. Article 2 of the UNDT Statute indeed does not authorise the UNDT to conduct investigations into complaints of abuse or harassment.

45. In the present case, the Secretary-General maintains that the UNDT conducted an investigation *de novo* and thus exceeded its authority and usurped his sole and exclusive authority in disciplinary matters when it looked into how the Panel reviewed Duparc *et al.*'s complaint and found failings in how it had conducted its investigation. Further, the Secretary-General claims that the UNDT should *not* have stopped at its finding of errors on the part of the Panel but should rather have also considered whether such errors had any impact on the subsequent decision to close the matter. These arguments are, however, not persuasive in the circumstances of the case, and the latter appears to contradict the former, which claimed that the UNDT exceeded its jurisdiction.

46. Moreover, on the one hand, the UNDT found that the errors committed by the Panel rendered its report unreliable and the resulting decision to close the matter unlawful.¹⁷ In so doing, the UNDT considered that, in the particular circumstances of the case, the flaws in the report were so fundamental that it became clear that the outcome of the investigation could have been different had these failings not existed. This is to say that the failings impacted on the report, which in turn served as the basis for the contested administrative decision not to take further action on the complaint. Even the Secretary-General in his appeal seems to agree that the UNDT had authority to “consider the process adopted by the Panel insofar as it may have impacted the Administration’s final decision”.

47. On the other hand, when the UNDT identified the failure of the procedure followed by the Panel, rescinded the decision based on its report, and “remanded” the case to the Director-General, UNOG, “for a proper treatment to the applicable rules and procedures pointed out by the [Dispute] Tribunal”,¹⁸ it did not draw any conclusion, but rather ordered specific performance, as authorised by Article 10.5(a) of the UNDT’s Statute. In this regard, the UNDT analysed the way in which the Panel produced its report which served as grounds for the Administration to reach its decision before deciding that the decision was unlawful because the Panel had failed to consider relevant material. The UNDT made no finding as to

¹⁷ Impugned Judgment, para. 86.

¹⁸ *Ibid.*, para. 92.

whether bias, discrimination or favouritism had occurred. Instead, it limited its analysis to whether a proper investigation into the allegations had taken place. The Secretary General's argument to the contrary is thus rather disingenuous.

48. In this respect, the Panel was only appointed because there were “sufficient grounds to warrant a formal fact-finding investigation”. Duparc *et al.* had filed a complaint alleging the existence of bias or discrimination against them, as well as the recurring favouritism towards Mr. R. in the selection for various training courses and a reassignment. It was then incumbent upon the Administration to provide a proper answer to the complaint. The role of the Panel was thus to thoroughly *investigate* the circumstances of the case, rather than merely *validate* the contested administrative decision, by being “satisfied” with the reasons provided by the Administration, or finding that the argument of discretion would suffice to dismiss the complaint of favouritism. Such reasoning would be tantamount to a rigid conception that the exercise of discretion is not subject to judicial review, which is contrary to our jurisprudence and the principles of labour and administrative law. Considering that the Panel shall include in its report a “full account of the facts that they have ascertained in the process” with the “relevant information about the conduct alleged”,¹⁹ more was indeed needed from the Panel, in order to respect the proper procedure, as prescribed by ST/SGB/2008/5.

49. In this respect, the UNDT found that the deficiencies indicated in its Judgment cast serious doubts about the appearance of the impartiality of the investigation. It also found that the Panel had unreasonably failed to investigate and determine relevant issues and thus, failed to give proper effect to the purpose and prescripts of ST/SGB/2008/5;²⁰ thus, “the procedure followed in respect of the allegations of prohibited conduct was improper”,²¹ and this negatively affected the terms of Duparc *et al.*'s appointments. This analysis was undoubtedly within the authority of the UNDT.

50. The Secretary General's argument that, by so doing, the UNDT engaged in a “detailed and substantive review” of the content of the investigation as opposed to a procedural analysis, and that the UNDT interfered with his discretion in disciplinary matters is misconceived. Rather, the UNDT limited its analysis to the finding that the procedure

¹⁹ Section 5.16 and 5.17 of ST/SGB/2008/5.

²⁰ Impugned Judgment, para. 85.

²¹ Section 5.20 of ST/SGB/2008/5.

followed by the Panel had been improper, in light of the failure of the investigation. It did not engage in an investigation *de novo* into the allegations of favouritism and allegations of cheating. Nor did it substitute its own findings to those reached by the Panel. The UNDT rather uncovered the flaws in the Panel's Report, which led to the unlawfulness of the contested administrative decision, and then ordered *the Administration* to correctly perform its duties according to the applicable legal framework.

51. Having set the premises above, the Appeals Tribunal will now turn its attention to the Secretary-General's claim regarding the UNDT's error in assessing the lawfulness of the contested administrative decision.

The Lawfulness of the Contested Administrative Decision

52. The UNDT found that, since the decision under scrutiny had been based on an unreliable report and since the procedure leading to it had been marred by a number of fundamental flaws, of which many concerned the very foundations of the regime established in ST/SGB/2008/5, this decision must be rescinded, and the investigation must be set aside.²²

53. In his appeal, the Secretary-General contests this finding and maintains that the Panel did not fail to investigate and determine the relevant issues, as indicated in the UNDT Judgment. The Appeals Tribunal will hence assess each issue raised by the UNDT in turn.

54. With regard to the action taken by the Chief, SSS/UNOG, after he had been informed about an alleged cheating by Mr. R. during the FTO certification exam in Geneva in April 2016, the parties agree that the UNDT erred in relying on ST/AI/2017/1 instead of ST/AI/371, in force at the relevant time. The latter instrument did not require that the Chief forward the information about unsatisfactory conduct to OIOS, which retained the ultimate authority to decide which cases it would consider and to determine whether the information of unsatisfactory conduct merited any action. Therefore, the UNDT erred when it mentioned that the Panel should have considered whether the Chief, SSS/UNOG, had taken appropriate action upon receipt of the allegation, namely, by forwarding it to OIOS.²³

²² Impugned Judgment, para. 89.

²³ *Ibid.*, para. 84.

55. However, this mistake is inconsequential and has no bearing on the UNDT's finding that the Panel had failed to consider whether in any event the Chief had taken appropriate action upon receipt of the information of misconduct on the part of Mr. R. This is because ST/AI/371, in force at the time of the relevant event, also required the undertaking of a "preliminary investigation" when there was reason to believe that a staff member had engaged in unsatisfactory conduct.²⁴ Instead of taking the initiative of this preliminary investigation, as had been recommended by the Assistant Chief, the Chief, SSS/UNOG, addressed what he understood of the matter and discarded the allegation of misconduct, by assuming that it was common for officers to have access to past tests. However, the Panel further reported that the Chief, SSS/UNOG, only learned during his interview with the Panel about the allegations that Mr. R had cheated by using a copy of a past test while writing the test during the FTO course.

56. Even in light of the witnesses confirming the allegation of cheating on Mr. R.'s part, the Panel was satisfied that the Chief, SSS/UNOG, "believed that he had addressed the matter" and took no further action at the time. Despite having concluded that Mr. R. "clearly had the other test", the Panel did not investigate whether the Chief, SSS/UNOG, should have initiated a preliminary investigation at the time or made himself thoroughly apprised of the complaint whose entirety he only learned during his interview with the Panel. The Panel also did not investigate why the Chief, SSS/UNOG, had not followed the Assistant Chief's advice on the matter, who, in an e-mail dated 12 May 2016, following Mr. R.'s report of a physical threat to his person in relation to the allegation that he had cheated in the FTO exam, proposed various courses of action to deal with the case, namely, i) informal resolution through mediation to avoid litigation; ii) a formal complaint to be filed by Mr. R.; or iii) the launch of an internal fact-finding investigation to investigate both the allegation of cheating and that of a physical threat to Mr. R., for which the Assistant Chief proposed the retrieval of images and sound recordings. In the Appeals Tribunal's view, the allegation of Mr. R.'s malpractice led to an allegation of a physical threat to Mr. R., both of which were brought to the Chief's attention. Despite the Chief having requested the Assistant Chief's intervention on the matter, the Chief did not follow the Assistant Chief's advice and this was not considered in the Panel's investigation.

²⁴ ST/AI/371, para. 2.

57. In these circumstances, the Appeals Tribunal cannot but agree with the UNDT that the Panel should have enquired over the Chief's reaction when he received such information, which eventually concerned not only one of his subordinates (Mr. R.) who had allegedly cheated during an exam, but also Mr. R.'s own request for action as a result of Mr. R.'s allegation of his being threatened.²⁵

58. Further, with regard to the allegation of favouritism in the selection of Mr. R. to participate in training courses, it is true that the UNDT relied on Section 3.2 of the abolished ST/AI/1997/4, instead of Section 3.2 of ST/AI/2010/10 in force at the relevant time. However, as found above in this Judgment, this error did not undermine the UNDT's reasoning, since both provisions contain the same general command, that is, when various training plans reveal common needs, "centrally coordinated training programmes may be proposed for the consideration of the Office of Human Resources Management to maximize use of resources".²⁶ This minor error of law is hence inconsequential to the effect of challenging the basis of the UNDT findings.

59. The Secretary-General further claims that Section 3.2 of ST/AI/2010/10 does not create an obligation to weigh the benefits of sending one staff member for training in Haiti, as was the case regarding Mr. R., against the possibility of bringing a trainer to Geneva to train a number of staff members at similar expense. For the Secretary-General, the UNDT thus erred when it found that the Panel had failed to consider why the funds had been allocated for Mr. R.'s training rather than had been used for a group of ten FTO officers. For the Secretary-General, the UNDT usurped the discretionary authority of the Administration.

60. The assessment of the lawful exercise of discretion is among the competences of the tribunals in the internal justice system, as discussed previously in this Judgment. Moreover, the UNDT rightly found that the Panel had failed to consider the fair and reasonable use of the financial resources, for instance, in the situation where Mr. R. was sent alone for training in Haiti against the recommendation by the then Officer-in-Charge of the Training Unit, SSS/UNOG, to bring a trainer to Geneva at similar expense. This would have seemingly been more in accordance with the *general principle* of maximisation of use of administrative

²⁵ E-mail from Mr. R. dated 11 May 2016, in Annex 5 to Duparc *et al.*'s answer.

²⁶ Section 3.2 of ST/AI/1997/4 reads *inter alia* that "When the various plans reveal common needs, centrally organized training programmes may be proposed to maximize use of resources".

resources enshrined in ST/AI/1997/4, insofar as it would have benefited a group of ten officers rather than only Mr. R.²⁷

61. The Secretary-General takes issue with the fact that the Chief, SSS/UNOG, did not personally take all the decisions regarding the selection of staff members to participate in training courses. This argument is only partially true and in any event is not persuasive enough so as to challenge the UNDT's finding. Moreover, the Panel failed to consider whether the repeated selection of Mr. R. to participate in various training courses, as indicated in the complaint, affected one person or a group of persons similarly situated, as provided by Section 1.1 of ST/SGB/2008/5, particularly given the recurrent deviation from the established procedure of requesting an expression of interest when selecting Mr. R. to participate in training courses.²⁸ Since such existing practice of requesting an expression of interest was repeatedly waived for the benefit of Mr. R., it would have been expected from the Panel to investigate whether the discretion had been exercised in a legal manner. In reality, it failed to do so. Furthermore, the Panel did not examine either, for example, whether the selection to participate in training courses had been distributed equitably among all *eligible* staff members.²⁹

62. The UNDT was thus correct when it found that, in light of the circumstances of the case, the Panel had failed to consider whether the limits of the managerial discretion, which is not unfettered, as highlighted earlier in this Judgment, were respected.³⁰

63. Lastly, regarding the selection/reassignment for a position in GEOS in November 2015, the Secretary-General concedes that there was a standard operating procedure in development, which included a request for expression of an interest in situations such as the present one. However, the Secretary-General claims that it was the Chief's prerogative to reassign staff members and that there were situations where such assignments might be undertaken without a call for interest. Moreover, the Secretary-General contends that the reassignment was taken not by the Chief at that time, but by a former Chief of Section.

²⁷ Impugned Judgment, para. 75.

²⁸ *Ibid.*, paras. 70 and 71.

²⁹ Impugned judgment, paras. 72 and 74.

³⁰ Impugned judgment, para. 72.

64. Since there was an allegation of recurrent favouritism towards Mr. R. to the detriment of other staff members, the UNDT was correct when it found that the Panel should have enquired about whether the justification provided by the Administration that Mr. R. had “unique experience and skills ... on close protection” was fair, just and transparent to justify singling him out from the other “similarly situated” staff members. The reading of the Panel’s Report makes it clear that, while the Panel highlighted Mr. R.’s “relevant experience in difficult circumstances” and good performance during temporary assignments, it did not engage in a comparative evaluation between Mr. R.’s skills and qualifications and other staff members’ abilities or their possible suitability for the post, “even if previous testing and training had been done to identify potential candidates”. The other staff members did not appear to have been given due consideration for the GEOS position.

65. This analysis would have been of particular importance given that the normal procedure as established by Staff Regulation 4.3 is that the selection shall be made on a competitive basis “[s]o far as practicable”, that is, after a call for expressions of interest. Since this did not occur, the Panel should have delved into the assessment of the lawfulness of the justification provided by the Administration to have chosen Mr. R. for the position with no competitive selection.

66. In this sense, the Panel’s finding that the decision “was within the discretion of the management of SSS/UNOG” and that there was no obligation to ensure that every decision was taken after a request for an expression of interest by candidates was not convincing. It was the result of misinterpretation of the purpose of Staff Regulation 4.3, which establishes that the selection on a competitive basis should be complied with, with the only exception being when it is not “practicable”. Moreover, the Panel’s conclusion downplayed the role of competition in a selection exercise and made it an *extraordinary* event, whereas it should be the *ordinary* standard operating procedure for selecting staff members. In other words, since the normal rule was for the selection exercise to be conducted on a competitive basis, the Panel should have investigated if the reason provided by the Administration for waiving this was fair, just and transparent. The Panel failed to do so and merely accepted the justification provided by the Chief, SSS/UNOG, without further analysis.

67. In light of the above, the UNDT correctly found that the Panel had failed to assess the fundamental issues directly related to the complaint of discrimination against the Chief, SSS/UNOG under ST/SGB/2008/5. The UNDT further correctly applied the law to the case

at hand when it made the determination that the investigation had failed for not having assessed the entire situation considering the particular circumstances of the case. Therefore, the procedure followed in respect of the allegations of prohibited conduct was improper and the contested decision should indeed have been rescinded since it was based on an unreliable report. All the orders of the UNDT Judgment must stand.

68. Considering what was decided above, there is no need to address Duparc *et al.*'s additional requests in their answer to the Secretary General's appeal.

Judgment

69. The appeal is dismissed and Judgment No. UNDT/2021/077 is affirmed.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022.

(Signed)

Judge Halfeld, Presiding
New York, United States

(Signed)

Judge Sandhu
New York, United States

(Signed)

Judge Knierim
Hamburg, Germany

Judgment published and entered into the Registry on this 25th day of July 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar