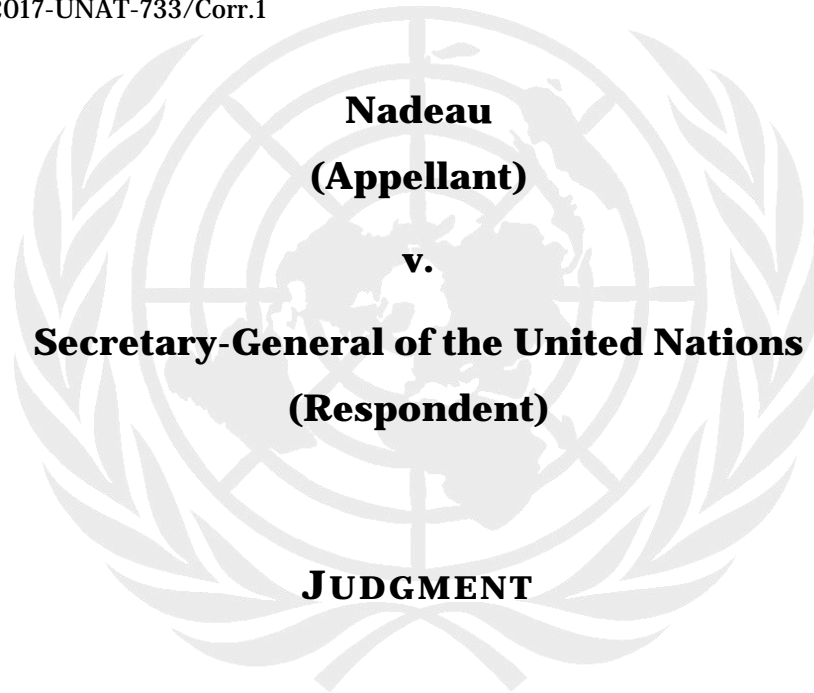




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-733/Corr.1



**Nadeau
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Deborah Thomas-Felix Judge Martha Halfeld
Case No.:	2016-976
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Nadeau:	Self-represented
Counsel for Secretary-General:	Ms. Nathalie Defrasne

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/116, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 August 2016, in the case of *Nadeau v. Secretary-General of the United Nations*. Mr. Yves Nadeau filed the appeal on 23 October 2016, and the Secretary-General filed an answer on 9 January 2017.

Facts and Procedure

2. Mr. Nadeau joined the Office of Internal Oversight Services (OIOS) in 2005. At the time of his application before the UNDT, he served as an Investigator at the P-4 level.

3. On 27 December 2013, Mr. Nadeau submitted to the Under-Secretary-General for Internal Oversight Services (USG, OIOS) a complaint against his first reporting officer Ms. B pursuant to Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). He claimed, *inter alia*, that Ms. B had not responded to his e-mails regarding his interest in training or his perceived conflicts of interest and he took issue with her assignment of cases and the general work environment.

4. Following a meeting in person on 9 January 2014 to discuss the complaint, the USG, OIOS sent Mr. Nadeau an e-mail that same day, in which she stated: "I do not believe the behavior you have identified rises to the level that would attract a finding of misconduct under 2008/5, even if substantiated". She noted, however, that Mr. Nadeau's complaint reflected "several examples of actions that are not helpful in contributing to a harmonious working environment that should be addressed" and informed him of actions she would be taking in that regard.

5. On 18 February 2015, Mr. Nadeau wrote to the USG, OIOS informing her that in his view the complaint remained unresolved and asking whether she would close the matter or establish a fact-finding panel. In her response of the same day, the USG, OIOS pointed out that on 9 January 2014, she had informed Mr. Nadeau in person and in her subsequent e-mail that none of the identified matters qualified as misconduct and that she would not convene a panel to further investigate the issue, underlining that her decision of 9 January 2014 still stood.

6. The next day, on 19 February 2015, Mr. Nadeau filed a request with the Management Evaluation Unit (MEU) for management evaluation of the USG, OIOS' decision to reject his complaint of prohibited conduct.

7. In his response to the request for management evaluation dated 4 March 2015, the Officer-in-Charge of the MEU (OIC, MEU) informed Mr. Nadeau that his request for management evaluation was not receivable *ratione temporis*, stating as follows:¹

Section 5.14 of ST/SGB/2008/5 requires the responsible official to review the complaint 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.” The MEU noted that, on 9 January 2014 the USG, OIOS informed you, in a meeting and in a subsequent email, that she had reviewed your submissions and that nothing in your complaint would attract a finding of misconduct under ST/SGB/2008/5, *even if substantiated*. The MEU considered that this e-mail clearly and unequivocally conveyed to you, a seasoned investigator, that the USG, OIOS had reviewed your complaint pursuant to section 5.14 and had concluded that there was no basis for a fact-finding investigation. The MEU further noted that the USG, OIOS informed you of how she would proceed to address the issues you had raised. None of the actions she described either indicated or even implied that she would establish a fact-finding panel. The MEU considered that this communication conveyed a final decision following her section 5.14 review. Her subsequent email to you on 18 February 2015, over a year later, did no more than reiterate her communication of 9 January 2014. The MEU therefore considered that you were notified of the decision of the USG, OIOS on your complaint on 9 January 2014.

The MEU considered that, as you did not submit a request for a management evaluation within 60 calendar days from 9 January 2014, your request is not receivable as it is time-barred. Confirmation of her prior decision by the USG, OIOS following your request over a year later did not reset the time limit.

8. On 29 May 2015, Mr. Nadeau filed an application before the UNDT in New York against the USG, OIOS' decision of 18 February 2015 not to convene an investigation panel.² By Order No. 184 (NY/2015) of 13 August 2015, the UNDT transferred the case to the UNDT Registry in Geneva (Case No. UNDT/GVA/2015/152) in order to accommodate Mr. Nadeau's request for the proceedings to be held in French.

¹ Impugned Judgment, para. 3 (italics in original letter).

² *Nadeau v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/097, para. 1.

9. On 28 August 2015, Mr. Nadeau filed two complaints against the OiC, MEU with the Under-Secretary-General for Management (USG, DM) regarding:³

- i. “comments made by [the OiC, MEU] in his response of 4 March 2015 to [Mr. Nadeau’s] request for a management evaluation” pursuant to ST/SGB/2008/5 (Complaint 1); and,
- ii. the “failure of [the OiC, MEU] to discharge his responsibilities under the applicable legal framework, as evidenced by the contents of the [abovementioned] response ... [of] 4 March 2015” pursuant to Administrative Instruction ST/AI/371 (Revised Disciplinary Measures and Procedures) (Complaint 2).

With respect to Complaint 1, he referred to the following passage of the OiC, MEU’s 4 March 2015 answer, which he described as “objectionable, abusive, alarming and demeaning”:⁴

The MEU considered that this e-mail clearly and unequivocally conveyed to you, a seasoned investigator, that the USG, OIOS had reviewed your complaint pursuant to section 5.14 and had concluded that there was no basis for a fact-finding investigation.

10. On 15 October 2015, the UNDT in Geneva issued Judgment No. UNDT/2015/097 in Case No. UNDT/GVA/2015/152 in French language dismissing the application as irreceivable *ratione materiae* as a result of Mr. Nadeau’s failure to timely seek management evaluation.

11. On 24 November 2015, Mr. Nadeau submitted two further requests for management evaluation arguing that the USG, DM had violated paragraph 5.14 of ST/SGB/2008/5 and ST/AI/371 by not responding to his complaints of 28 August 2015.

12. On 27 November 2015 the Director of the Office of the USG, DM informed Mr. Nadeau of the following:⁵

In response to the two letters you sent [the USG/DM] on 28 August 2015 with respect to the non-receivability letter dated 4 March 2015 that you received from [OiC/MEU] of the MEU.

I understand you received a letter from the MEU informing you that based on its review of the chronology of facts, your request for management evaluation was time-barred.

³ Impugned Judgment, para. 3.

⁴ *Ibid.*, para. 27.

⁵ *Ibid.*, para. 3.

Having reviewed the matter in question, I can report that [the USG/DM] does not consider that any action is warranted under the ST/SGB/2008/5 or the ST/AI/371 based on the content of such letter.

I am aware that you have already received a decision from the [Dispute Tribunal] confirming the MEU decision of non-receivability. As you may be aware, decisions or findings of the MEU are not new administrative decisions which can be contested before the Tribunals.

13. On 3 December 2015, the MEU informed Mr. Nadeau that his two management evaluation requests had “become moot” because he had received a response from the Office of the USG, DM.

14. On 1 January 2016, Mr. Nadeau submitted two new requests for management evaluation of the administrative decisions following the USG, DM’s refusal to take action to address the complaints against the OiC, MEU allegedly violating paragraph 5.14 of ST/SGB/2008/5 and ST/AI/371. The MEU received the requests on 4 January 2016.

15. On 26 January 2016, the MEU informed Mr. Nadeau that his requests were not receivable considering that he was “in substance challenging the outcome of the MEU decision [of 4 March 2015]”, which does not constitute a new administrative decision. In addition, the MEU argued that Mr. Nadeau had “availed [himself] of the right to file an application with the UNDT after receiving the MEU’s non-receivability letter” and that he brought the requests in violation of the principle of *res judicata* since the UNDT in Judgment No. UNDT/2015/097 had already decided on the matter which was now only phrased differently.

16. On 21 March 2016, Mr. Nadeau filed an application in French with the UNDT in New York contesting the 24 November 2015 decision by the USG, DM not to proceed with an investigation with respect to either of his complaints against the OiC, MEU.

17. The ensuing procedural history is taken from the UNDT Judgment:⁶

... On 22 March 2016, the [UNDT] Registry acknowledged receipt of the application and instructed the Respondent to submit his reply by 21 April 2016. The parties were further informed that the application had been sent for translation into English and that they would be notified when the English version of the application would be available.

⁶ *Ibid.*, paras. 4-11.

... On 28 March 2016, the [UNDT] Registry informed the parties that an English translation of the application was now available through the eFiling portal.

... On 21 April 2016, the Respondent filed his reply.

... On 14 July 2016, the present case was assigned to [Judge William H. Hunter Jr.], of which the parties were informed by the New York Registry's email of the same date.

... By Order No. 185 (NY/2016) dated 28 July 2016, the [Dispute] Tribunal instructed the Applicant to file his comments, if any, to the submissions included in the Respondent's reply by 12 August 2016 ...

... On 12 August 2016, the Applicant filed his comments to the Respondent's reply as per Order No. 185 (NY/2016). As the comments were in French, the Registry submitted these comments for translation into English and on 17 August 2016, notified the parties that the translation was available in the eFiling system.

... On 19 August 2016, the Applicant submitted a motion in French, requesting the [Dispute] Tribunal's permission to file an objection concerning the translation of the case documents. On 22 August 2016, the motion was sent for translation into English. On 25 August 2016, the English translation of the motion was made available to the parties on the eFiling portal. In the motion, the Applicant objected to the translation of case documents by stating that:

... First, the English translation of the application of 21 March 2016 and of the Applicant's comments on the Secretary-General's reply to his application is of poor quality; for example, phrases from the French text have been omitted in the English translation, the terminology used in the English translation is imprecise, and the respect expressed towards the [Dispute] Tribunal in the original version of the comments is absent from the English translation.

... Second, the Applicant consulted his case file on the eFiling portal on 18 August 2016, and the Secretary-General's reply to the request of 21 March 2016 had not yet been translated into French.

... Lastly, the Tribunal has already granted the Applicant the right to have his case heard in French and to receive a judgment in that language: case No. UNDT/GVA/2015/152.

... In view of the fact that the Applicant stated in paragraph 35 of the application that "the use of a language other than French in the proceedings in this case would place him at a disadvantage", he reiterates his request to have his case heard in French by the [Dispute] Tribunal and to receive a French translation of the Secretary-General's pleadings, in accordance with General Assembly resolution 2(I) [General Assembly resolution 2(I) of 1 February 1946].

18. The UNDT issued the impugned Judgment on 26 August 2016. As of the date of the Judgment, the Secretary-General's reply had not been translated into French. In its Judgment, the UNDT dismissed the application in its entirety. With regard to the language of the proceedings, the UNDT first denied Mr. Nadeau's request that the proceedings be conducted in French stating that no such right was contemplated in the legal framework governing the UNDT proceedings and that English was "the only official working language of the United Nations Headquarters in New York", adding that the deciding Judge was "Anglophone".⁷ As to Mr. Nadeau's objection to the translations of the case documents, the UNDT considered itself "bound to rely on [the] accuracy and authenticity" of these official translations.⁸ Concerning Mr. Nadeau's request for an oral hearing, the UNDT held that he had already been given the opportunity to present his case in French in writing and that there was no need for further clarification because the UNDT was in possession of all pertinent information for it to issue a judgment. Turning to the merits of the case, the UNDT concluded that there was "no basis for finding that the OiC[,]MEU's writing in the MEU's 4 March 2015 letter amounted to a breach of either ST/SGB/2008/5 or ST/AI/371 and the USG[,]DM, therefore, did not infringe on [Mr. Nadeau's] rights when dismissing his complaints against the OiC[,]MEU".⁹

19. On 14 September 2016, the UNDT Registry transmitted the French translation of the impugned Judgment to the parties.

Submissions

Mr. Nadeau's Appeal

20. Mr. Nadeau submits that the UNDT committed an error in procedure such as to affect the decision of the case by denying his request for an oral hearing. While under Article 16(1) of the UNDT Rules of Procedure, the Judge has the discretionary authority to hold oral hearings, this discretion is not absolute and must be exercised in accordance with the principle of procedural fairness. The UNDT failed to give reasons for its denial and cited provisions that are unrelated to the issue of oral hearings, namely Articles 10(1) and 19 of the UNDT Rules of Procedure. The UNDT should have, in the specific circumstances of this case, conducted a preliminary meeting to determine that the hearing of witnesses was necessary for a full disclosure of the facts.

⁷ *Ibid.*, para. 12.

⁸ *Ibid.*, para. 13.

⁹ *Ibid.*, para. 29.

21. He further argues that the UNDT erred in law and violated his right to procedural fairness in various respects concerning the language of the proceedings: (i) The UNDT erroneously declined his request to have his case heard in French. It incorrectly stated that English was the only working language of the United Nations Headquarters in New York in contradiction to, *inter alia*, General Assembly resolution 2(I) and Article 8(6) of the UNDT Statute. The language skills of judges are to be taken into account when assigning cases, as exemplified by the transfer of the parallel case (No. UNDT/GVA/2015/152) to Geneva in an attempt to avoid placing an applicant at a disadvantage. (ii) The UNDT erred in concluding that it was bound by official translations and erroneously rejected his objections to the provided translations of his submissions. (iii) The UNDT disregarded the fact that the Secretary-General's reply was not translated from English into French penalizing him because the Secretary-General had received his application and submissions in both languages. (iv) Since several annexes to his application were not translated into English, the Anglophone Judge could not properly assess his case in its entirety.

22. On the merits, Mr. Nadeau contends that the UNDT committed several errors of law when it decided that the contested decision was lawful: (i) The UNDT exceeded its jurisdiction by “substitut[ing] its opinion for that of [the USG, DM]” when the UNDT itself concluded that nothing in the letter constituted harassment or warranted disciplinary measures instead of simply reviewing whether the USG, DM's decision was reasonable. (ii) The UNDT failed to consider the subjective nature of the definition of “harassment” as contained in Section 1.2 of ST/SGB/2008/5, read together with the obligation of staff members to act with sensitivity (Section 2.3 of ST/SGB/2008/5) and thus ignored that the 4 March 2015 letter contained words that “harmed” Mr. Nadeau. (iii) The UNDT erred in concluding that the USG, DM was fully and adequately apprised of the matters before him when dismissing Mr. Nadeau's complaint against the OiC, MEU. (iv) The UNDT could not have been properly apprised of the matters before it because his 28 August 2015 complaints were not translated into English; and (v) the UNDT erroneously failed to consider the conflict of interest as defined in the Appeals Tribunal Judgment in *Masri*¹⁰ faced by the MEU when reviewing a decision made by the USG, DM in his capacity as head of the department who is also “responsible” for the MEU.

¹⁰ *Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-626, para. 21.

23. Mr. Nadeau therefore requests the Appeals Tribunal to vacate the impugned Judgment, to remand the case to the UNDT for new proceedings before a new Judge, to order the UNDT to hear his case in French and to award compensation in the amount of USD 5,000 for the violation of his language rights.

The Secretary-General's Answer

24. The Secretary-General responds that the UNDT did not err in concluding that the USG, DM's decision not to proceed with an investigation of either of Mr. Nadeau's complaints was lawful. He reiterates the Appeals Tribunal's jurisprudence affirming that the investigation of disciplinary charges is a matter of managerial discretion and the Administration cannot be forced to take disciplinary action. In this regard, the UNDT's role is limited to a determination of whether a decision not to investigate the alleged prohibited conduct under ST/SGB/2008/5 and ST/AI/371 affected the staff member's rights and whether it was taken in accordance with the applicable law.

25. He further submits that Mr. Nadeau has failed to establish any error by the UNDT warranting reversal of the impugned Judgment. First, the UNDT did not commit a procedural error in a way that affected the decision of the case by denying his request for his case to be heard in French. While the Secretary-General concedes that English is not the only working language of the United Nations Headquarters in New York, he underscores that it is a matter of case management for the UNDT to decide which Judge to assign to a particular case and that the Appeals Tribunal has consistently held that it will not interfere lightly with the UNDT's broad discretion in case management. In addition, the fact that an applicant submits his application in a specific language does not give him the right to have the judgment issued in, or all materials translated into, a specific language. Both the 4 March 2015 letter and the subsequent decision not to act upon Mr. Nadeau's complaints were issued in English and Mr. Nadeau's application was officially translated. Therefore, the UNDT had all the necessary documents to make a fair and reasoned determination.

26. Secondly, the Secretary-General argues that Mr. Nadeau has failed to establish that the UNDT erred on a question of procedure by denying his request for an oral hearing. Pursuant to Articles 16(1) and 16(2) of the UNDT Rules of Procedure, the denial falls within the UNDT's discretion in the management of its cases, with which the Appeals Tribunal does not lightly

interfere. Moreover, Mr. Nadeau has not provided any evidence that the denying of his request unfairly affected the decision of the case.

27. The Secretary-General further contends that Mr. Nadeau has failed to establish any errors of law warranting reversal of the UNDT's determination that the contested decision was lawful. The UNDT correctly applied the aforementioned standard of review and did not substitute its opinion for that of the USG, DM by reviewing the language of the 4 March 2015 letter and holding that it was "simple, plain and everyday conversational English".¹¹ The Dispute Tribunal also properly held that the USG, DM was well within the bounds of his discretionary authority in determining whether all, certain, or none of the allegations in the complaint warranted formal fact finding. Moreover, the Secretary-General refutes the argument that the UNDT Judge could not properly apprise the application because the two complaints against the OiC, MEU were not translated into English. In fact, these complaints were described in detail in Mr. Nadeau's application to the UNDT which was translated into English and the material documentation of the case was the 4 March 2015 response and subsequent decision of the USG, DM which were both issued in English. Regarding the alleged conflict of interest, the Secretary-General submits that nothing in the MEU's response indicated that the OiC, MEU had failed to undertake his duties and responsibilities in an impartial and objective manner. In addition, the MEU was not involved in the taking of the USG, DM's decision and thus had no conflict of interest in reviewing it.

28. Finally, the Secretary-General recalls the Appeals Tribunal's consistent jurisprudence that it is not sufficient for a party to simply reargue his or her case on appeal. Mr. Nadeau merely repeats the arguments raised before the UNDT and does not identify specific grounds of appeal.

29. Therefore, he respectfully requests the Appeals Tribunal to dismiss the appeal.

Considerations

Preliminary issue: Oral hearing before the Appeals Tribunal

30. As a preliminary matter, Mr. Nadeau filed a request for an oral hearing before the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The factual

¹¹ Impugned Judgment, para. 27.

and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

Did the UNDT commit an error of procedure such as to affect the decision of the case by denying Mr. Nadeau’s request for an oral hearing?

31. Under Article 2(1)(d) of its Statute, the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNDT in which it is asserted that the UNDT has committed an error in procedure, such as to affect the decision of the case. It follows that a party, in order to be successful on appeal, not only has to assert and show that the UNDT committed an error in procedure but also that this error affected the decision on the case. As Mr. Nadeau has given no convincing reason on appeal as to why and how an oral hearing before the UNDT would have had an impact on the decision of the case, on this ground alone his appeal must fail. Furthermore, we do not find that by denying Mr. Nadeau’s request for an oral hearing the UNDT committed an error of procedure. The Judge lawfully exercised the discretion vested in him by Article 16(1) of the UNDT Rules of Procedure. In stating that “the reason behind the Applicant’s request for an oral hearing is not that he wishes to present any new evidence or legal contentions which he has otherwise been prevented from submitting during the proceedings but rather that he wishes to present his arguments in person in French to the Tribunal”,¹² the UNDT has given a reasonable explanation for not holding an oral hearing.

Did the UNDT err in law and in procedure so as to affect the decision of the case 1) by denying Mr. Nadeau’s request for the proceedings to be conducted in French; 2) by dismissing Mr. Nadeau’s objections to the English translations of his application and other documents; 3) by not having the Secretary-General’s reply translated into French before issuing its Judgment; and, 4) by failing to have annexes 2, 3, 8, 10, 14, 16 and 19 to Mr. Nadeau’s application to the UNDT translated into English?

32. We cannot find any error in the proceedings before the UNDT. Mr. Nadeau’s due process rights were not violated. As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties and therefore enjoys a wide margin of discretion in all matters relating to case management.

¹² *Ibid.*, para. 16.

The Appeals Tribunal “must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for dispensation of justice”.¹³ This Tribunal has also ruled that the determination of venue is a matter entirely for the Dispute Tribunal.¹⁴ Following Article 8(6) of the UNDT Statute, Mr. Nadeau was able to file his application in French. Mr. Nadeau has not, on appeal, identified weaknesses of the English translation of his application which could be relevant for the decision of the case. Mr. Nadeau’s due process rights were not violated by the fact that the Respondent’s reply was not translated into English. This Tribunal has explicitly stated that the respondent’s reply does not have to be translated.¹⁵ Furthermore, the documentary evidence shows that Mr. Nadeau understands English perfectly, so the lack of translation was not prejudicial to him. With regard to annexes 2, 3, 8, 10, 14, 16 and 19 of his application, we find that it is irrelevant that they were not translated into English and Judge Hunter could not read and understand them. The 4 March 2015 MEU letter and the (translated) application which the Judge could read and understand contain all the facts which are relevant and necessary for the case.

Did the UNDT err in law and/or exceed its jurisdiction by considering that there was no basis for finding that the MEU’s 4 March 2015 letter amounted to a breach of either ST/SGB/2008/5 or ST/AI/371 and thus, the dismissal of Mr. Nadeau’s complaints by the USG, DM did not violate his rights?

33. We find that the UNDT did not commit an error of law or exceed its jurisdiction. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.¹⁶ 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.¹⁷ Only in particular situations, i.e. in a case of a serious and reasonable accusation, does a staff member have a right to an investigation against another staff member

¹³ *Bastet v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-423, para. 14, citing *Khambatta v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-252, para. 15.

¹⁴ *Bastet v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-423, para. 15.

¹⁵ *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 18; *Abu Ghali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-366, paras. 24 and 46.

¹⁶ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518, para. 31, citing *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

¹⁷ *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 38; *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Statute of the Appeals Tribunal.¹⁸ We take this opportunity to clarify that the discretion of the Administration 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. This follows directly from ST/SGB/2008/5 and ST/AI/371 which reads in relevant parts as follows:

Secretary-General's bulletin, ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)

Formal procedures

...

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.

Administrative Instruction ST/AI/371 (Revised Disciplinary Measures and Procedures), as amended by ST/AI/371/Amend. 1 of 11 May 2010, Article II.2

II. Investigation and fact-finding

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation. Staff rule 10.1 provides that "Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of the disciplinary process and the imposition of disciplinary measures for misconduct." ...

34. Under these provisions, a fact-finding investigation may only be undertaken if there are "sufficient grounds" or, respectively, "reason[s] to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". Consequently, if there

¹⁸ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 40.

are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 or ST/AI/371 can have a negative impact on the staff member concerned.

35. In the present case, we find that the UNDT correctly held that Mr. Nadeau's requests for investigations against the OiC, MEU were lawfully denied by the USG, DM. In our view, there was no discretion as to whether or not to undertake a fact-finding investigation; Mr. Nadeau's request had to be denied by the USG, DM. The MEU 4 March 2015 letter is not phrased in any way that could be regarded as harassment or any other form of misconduct against Mr. Nadeau under ST/SGB/2008/5. In his note, the OiC, MEU merely informed Mr. Nadeau that his request for management evaluation was irreceivable because of the 9 January 2014 e-mail which constituted the relevant notification of an administrative decision (not to initiate an investigation against his First Reporting Officer, Ms. B.) to trigger the time limits for a request for management evaluation. The same line of reasoning applies to the request under ST/AI/371. In the present case, there is no reason to believe that the OiC, MEU has engaged in unsatisfactory conduct. The fact that the OiC, MEU "did not conduct an independent and impartial management evaluation", as claimed by Mr. Nadeau in his appeal, does not amount to such unsatisfactory conduct because Mr. Nadeau's request for management evaluation was irreceivable as correctly stated by the UNDT in Geneva.¹⁹

36. Mr. Nadeau's submissions with regard to the 26 January 2016 MEU decision are not relevant on appeal. Only the USG, DM's decisions to reject Mr. Nadeau's requests to undertake fact-finding investigations against the OiC, MEU under ST/SGB/2008/5 and ST/AI/371 are subject to judicial review on appeal. Management evaluation is a mere condition of receivability of an application before the UNDT and does not form part of the contested administrative decision.²⁰

Judgment

37. The appeal is dismissed and Judgment No. UNDT/2016/116 is hereby affirmed.

¹⁹ *Nadeau v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/097.

²⁰ *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, para. 29.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar