



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

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Judgment No. 2017-UNAT-761

**Michaud  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge John Murphy, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2016-1038
Date:	14 July 2017
Registrar:	Weicheng Lin

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Counsel for Mr. Michaud:	François Lorient
Counsel for Secretary-General:	Rupa Mitra

**JUDGE JOHN MURPHY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/184, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 12 October 2016, in the case of *Michaud v. Secretary-General of the United Nations*. Mr. Michel Michaud filed his appeal on 9 December 2016, and the Secretary-General filed an answer on 10 March 2017.

**Facts and Procedure**

2. Mr. Michaud was employed as an Investigations Specialist at the P-4 level by the Office of Audit and Investigations (OAI) of the United Nations Development Programme (UNDP). In September 2012, he was the leader of a team mission in Afghanistan. A consultant (the complainant) had been hired to work on the team and Mr. Michaud was her supervisor.

3. On 20 August 2013, Mr. Michaud sent a memorandum to the Deputy Director, Head of Investigations of the OAI in which he reported negatively on the work performance of the complainant. This resulted in the complainant's contract being terminated for non-performance on 21 August 2013.

4. On 14 October 2013, the complainant's legal representatives wrote to the Director, OAI on behalf of the complainant alleging that she had been unlawfully dismissed in August 2013 and further alleging that Mr. Michaud had engaged in inappropriate conduct towards the complainant, including harassment, bullying, and abuse of authority.

5. Given that Mr. Michaud was an investigator at the OAI (the office normally mandated to investigate such allegations), the Director, OAI referred the complaint to the Director, Division for Oversight Services (DOS), United Nations Population Fund (UNFPA) requesting her to carry out an independent assessment. In his letter of 25 October 2013, the Director, OAI stated that given that the subject of the complaint was a UNDP staff member, the assessment and investigation needed to be carried out in accordance with UNDP's Human Resources User Guide on Workplace Harassment and Abuse of Authority, the UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct (the UNDP Legal Framework) and the OAI Investigation Guidelines.

6. By letter dated 10 January 2014, Mr. Michaud was informed by the Chief, Investigations Branch, DOS, UNFPA, that DOS had been tasked by OAI to conduct a preliminary assessment and investigation into allegations that on various occasions between September 2012 and August 2013 he had engaged in improper and unwelcome conduct that caused offense and humiliation to the complainant, including: sexual advances to and inappropriate comments about the complainant during the mission to Afghanistan in September/October 2012; repeated sexually inappropriate comments in the context of salary payments to the complainant; and the use of offensive statements relating to ethnicity and religion during a second mission to Afghanistan in April 2013.

7. The letter informed Mr. Michaud that his conduct could be construed as sexual harassment and abuse of authority within the meaning of UNDP User Guide on Workplace Harassment and Abuse of Authority and that accordingly an investigation was to be conducted in accordance with the UNDP Legal Framework, the UNDP User Guide on Workplace Harassment and Abuse of Authority and OAI Investigation Guidelines. He was further informed of his right to be interviewed and to provide documentation, statements or other evidence in support of any explanation he might want to give. He was invited to identify any witnesses that might have knowledge of the facts at issue. He was further informed that in the event of the investigation producing adequate evidence that misconduct had occurred, DOS would issue an investigation report to which he would be given an opportunity to respond.

8. The Office of Audit and Investigation Services (OAIS) of the UNFPA conducted its investigation between January and July 2014. The scope of its investigation went beyond the harassment allegations and examined also alleged breaches of standards by Mr. Michaud in conducting investigations. The findings in relation to the latter conduct are not relevant to this appeal which is concerned exclusively with the allegations of harassment.

9. The OAIS conducted 16 interviews with various witnesses. Mr. Michaud was interviewed on 16 January 2014. On 1 April 2014, Mr. Michaud was provided with the draft investigation report. He submitted an extensive response to the draft report on 24 June 2014.

10. The OAIS issued its final report on 24 July 2014. It found *inter alia* that: i) there was conclusive evidence that Mr. Michaud had engaged in sexual harassment towards the complainant on three occasions during the OAI mission to Afghanistan between 5 and 21 September 2012; ii) there was a high likelihood that Mr. Michaud engaged in

harassment towards the complainant on a number of occasions between October 2012 and June 2013; and, iii) there was insufficient evidence that Mr. Michaud engaged in harassment based on the complainant's religion during a second mission to Afghanistan in April 2013. It accordingly recommended that "appropriate administrative and/or disciplinary action be considered" against Mr. Michaud.

11. Although there were several allegations of inappropriate conduct and comments made against Mr. Michaud by the complainant, two e-mails have assumed central importance in this appeal.

12. It is common cause that on 5 September 2012, while in Afghanistan with the complainant, Mr. Michaud wrote an e-mail to the complainant stating: "Here's the report in the attachment. As I said, if you get bored with it, stop reading ... No worries. See you tonight." The complainant responded as follows:<sup>1</sup> "Thanks ..... no worries, I definitely have the time. Will take a look at this. Dinner? I want a full on spa treatment if it is a dry read!☺" Mr. Michaud wrote back saying: "As long as I can join you!" The complainant responded to this message with the comment: "Ha!"

13. On 21 September 2012, Mr. Michaud wrote to three members of his team, including the complainant, stating: "I'll be out of touch for an hour. I need to go down to gym to decrease the blubber!!!!" Another member of the team replied to all, stating: "An hour? You'll need a bigger window than that!" Mr. Michaud responded: "Aren't we hilarious!!!!" Another member of the team replied to all, stating: "Was that an earthquake or did [Mr. Michaud] step onto the treadmill?" Mr. Michaud responded: "[The complainant] won't have any difficulty choosing her date for tonight now that I am much slimmer!!!!"

14. On the same day, the complainant sent an e-mail to a colleague in which she stated: "My work is going well – I think we are cracking something really big and that makes me feel good. My boss is turning out to be a bit of a pig – makes the most inappropriate comments but he is a former cop and I am the only woman on mission."

15. The OAIS report records that Mr. Michaud admitted writing the e-mails. In his interview with the OAIS investigators, he denied any intent to harass, claimed the complainant had never indicated that she took offence and essentially maintained that the exchange

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<sup>1</sup> The smiley emoji at the end of the response was included in the message.

amounted to light-hearted, harmless banter in the context of a close working relationship during a mission conducted under stressful circumstances. He has persisted with this defence throughout all subsequent proceedings. The investigation took account of his explanation, but it is evident from the report that the e-mail correspondence influenced its finding that harassment had occurred during the first mission to Afghanistan in September 2012.

16. Some seven months after the OAI issued its final report, the Assistant Administrator and Director, Bureau of Management, UNDP (the Assistant Administrator), addressed a letter dated 6 March 2015 to Mr. Michaud informing him that after reviewing the documentation relating to the investigation, he had concluded that Mr. Michaud's conduct did not rise to the level of misconduct and he "should be exonerated of allegations of misconduct". He, however, declared that Mr. Michaud's conduct had fallen short of the standards of professionalism expected of a manager and supervisor. He had therefore decided to address the issue "from an administrative perspective, rather than a disciplinary one". The letter concluded by stating that a written reprimand would be issued separately.

17. The Assistant Administrator then issued a written reprimand in a second letter also dated 6 March 2015. It reads:<sup>2</sup>

I am writing in regard to two emails you sent to [the complainant].....on 5 and 21 September 2012.....In your capacity as team leader of the Afghanistan mission, you held a senior supervisory role to [the complainant].

In the email of 5 September 2012, [the complainant] wrote to you stating that she wanted a "*full on spa treatment*" for reviewing a lengthy assignment to which you replied: "*[a]s long as I can join you!*" On 21 September 2012, you wrote an email addressed to [the complainant] and two other members of OAI on mission, stating: "*[The complainant] won't have any difficulty choosing her date for tonight, now that I am much slimmer!!!*" You do not dispute sending the emails and explain that your comments were intended as "*jokes*" to build team morale and that you had no intention to offend or embarrass [the complainant].

The timing of your emails bears noting in that you made the personal comment in the first email to [the complainant] nine days after she joined OAI and, thus, had limited basis to know whether your comments could be offensive or distressing to her. In addition, you sent the email of 21 September 2012 to two other OAI members of the mission and colleagues of [the complainant].

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<sup>2</sup> Italics in original.

The undisputed evidence shows that you made inappropriate comments of a personal nature in emails exchanged with [the complainant] on 5 and 21 September 2012. It is clear from the contemporary email [the complainant] sent to her friend on 21 September 2012 that she did not find your comments appropriate, writing: “[m]y boss is turning out to be a bit of a pig – makes the most inappropriate comments [...]”. As the team leader of the mission, it was your responsibility to set the tone and standard of behaviour on the mission, which includes the email correspondence among team members. While it is recognised that you were attempting to foster a relaxed team environment during the course of a complex investigation at a difficult duty station, you should be particularly careful to respect personal boundaries and maintain a level of professionalism in your discourse at all times. Moreover, as a senior member of OAI, the office mandated to carry out investigations of allegations of misconduct for UNDP, you are expected to act as a role model by upholding the highest standards of conduct.

Accordingly, I have decided to issue this written reprimand pursuant to UN Staff Rule 10.2(b)(i). This letter serves to remind you of the standard of performance expected of you and why your performance in this incident did not meet this standard. As a manager and supervisor, you are expected not only to exercise your responsibilities with due care, but also adhere to the highest standards of conduct at all times.

In the future, I expect that this type of behaviour not to be repeated [sic]. Continued failure to uphold the standards expected of you may lead to the initiation of administrative or disciplinary proceedings against you. Should such proceedings occur again, your prior conduct, including this reprimand, may be taken into consideration.

A copy of this letter will be placed in your official status file, and will form part of your accumulated record of service. You may provide a written response within 15 calendar days of receipt of this letter and it will be included with the reprimand. In addition, the OAI Director may require you to undertake an appropriate training course within the current performance cycle.

Please note that a letter of reprimand does not constitute a disciplinary measure.

18. The Assistant Administrator appears to have been guided by Paragraph 80 of Chapter III of the UNDP Legal Framework. It provides that if the Director, Legal Support Office, Bureau of Management, considers that allegations made in an investigation are not substantiated or the facts do not warrant disciplinary action, he or she shall recommend to the Assistant Administrator that the staff member be notified in writing of his exoneration from the allegations of wrongdoing, and that the “matter be closed”. The provision goes on to provide in paragraph 82 that while the Director may recommend exoneration, he or she may determine

that the conduct depicted in the final investigation report and the circumstances of the case have shown unsatisfactory performance and/or poor judgment not amounting to misconduct on the part of the staff member. In which event, the Director may recommend that a letter of reprimand be issued. It is an administrative measure for poor judgment or unsatisfactory performance not amounting to misconduct.

19. Mr. Michaud responded to the two letters dated 6 March 2015 in a letter addressed to the Assistant Administrator, dated 19 March 2015. He raised a number of concerns regarding the process leading to the two letters and concluded by requesting the Assistant Administrator to exclude from the exoneration letter any reference or allusion to a potential reprimand concerning performance issues, until the due process and procedures related to such performance matters took place and were completed; and to replace “the proposed letter of reprimand” with “a full and fair independent gender-balanced review on any remaining specific and contentious performance allegations, which would be timely notified to me in the first place, and on which I will be allowed to defend myself with the due process rules applicable at UNDP”. As an alternative, he asked for the specific performance allegations to be referred to the usual Performance Plan Assessment process and guidelines, as suggested in the UNDP Legal Framework, including rebuttal and for the complainant to be made available in any review processes for her deposition under oath, for cross-examination and for “an independent forensic evaluation” of her evidence.

20. By letter dated 1 May 2015, the Assistant Administrator responded to Mr. Michaud’s letter of 19 March 2015. Mr. Michaud was informed that the letter of reprimand and his comments dated 19 March 2015 had been placed in his official status file. The letter further stated:<sup>3</sup>

Allow me to also address certain points you raised in your letter of 19 March 2015. First, I note that you repeatedly refer to the written reprimand you were issued on 6 March 2015 as a “*proposed letter of reprimand*”. This reference is not correct. As explained in the written reprimand and in the separate letter I wrote to you on 6 March 2015, you were issued a written reprimand pursuant to UN Staff Rule 10.2 (b)(i) following my review of UNFPA’s (...) OAI final investigation report into the allegations of harassment levelled against you by [the complainant], former Investigations Consultant, (...) OAI and consistent with the procedures as outlined in UNDP’s Legal Framework for Addressing Non-Compliance with UN Standards of Conduct.

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<sup>3</sup> Italics in original.

With respect to your claims of due process violations by OAIS, I would like to highlight that, as explained in my letter to you on 6 March 2015, you were exonerated of allegations of misconduct. The decision to issue you a written reprimand was taken on the basis of the emails you exchanged with [the complainant] on 5 and 21 September 2012. You do not dispute sending the emails or making the statements contained therein.

21. On 4 May 2015, Mr. Michaud submitted to the Assistant Administrator a request for management evaluation, submitting that the investigation into the complaint against him was seriously flawed. He stated: "I cannot accept to have inserted in my Official Status File a corrupted OAIS report which does not meet any of the most basic standards of fairness, probity and professionalism, including in particular a reprimand which is based on such an unfair and inaccurate OAIS report."

22. Mr. Michaud requested an independent and impartial management review, preferably conducted by an independent body outside of the United Nations system in order to hold a complete audit of the OAIS investigators' alleged misconduct, lack of professionalism, questionable behaviour with witnesses, tampering with evidence, due process violations and their biased and groundless findings. He asked further that the 6 March 2015 reprimand, together with the OAIS investigation report on which it was based, be expunged from his official status file and that an apology be issued to him and his family for the harm and hardship suffered as a result of the protracted investigation and its false findings.

23. By letter dated 1 June 2015, the Associate Administrator, UNDP, responded to Mr. Michaud's request for management evaluation, stating that there was no factual or legal basis for acceding to his requests. It was pointed out that Mr. Michaud was proceeding on a false premise. It was reiterated that Mr. Michaud had been exonerated from the allegations of misconduct as depicted in the OAIS report. The decision to issue the written reprimand was not based on the OAIS report, as Mr. Michaud maintained in his referral to management evaluation. The letter stated:

... The decision to issue you with a written reprimand was taken on the basis of the two emails you sent to [the complainant] on 5 and 21 September 2012 respectively. Throughout the investigative process, as well as in your comments on the reprimand and your request, you have not contested sending the emails or in making the comments contained therein. Although you have levelled serious allegations concerning the conduct of the investigation, you have never challenged this email evidence. As the facts with respect to the emails were not in dispute, the



Assistant Administrator assessed your conduct and found that the evidence did not amount to misconduct but that your conduct fell short of proper managerial conduct, for which an administrative measure such as a reprimand was appropriate ... .

... Notwithstanding this explanation, as detailed above, the decision to issue you with a reprimand is not based on a finding of harassment under the UNDP policy or premised on the OAIS investigation but based on facts which came to light – to which you have admitted – that were considered to fall below the required standard of conduct for a senior level manager like yourself.

Further, contrary to your assertion, the OAIS investigation report will not be placed in your official status file. As indicated ... only the reprimand and your comments on the reprimand were placed in your official status file. It is noted that the reprimand issued to you on 6 March 2015 does [not] make any reference to the OAIS investigation. ...

24. The letter further pointed out that the Organisation has a broad discretion in determining whether a staff member's conduct has met the required standard and what measure is warranted. It emphasised that the reprimand in this instance was intended as an administrative measure and not a disciplinary measure, and Mr. Michaud had availed himself of a full opportunity to deal with all the issues in his extensive submissions to the OAIS investigation. Consequently, the Assistant Administrator was satisfied that Mr. Michaud's due process rights had been respected and there was no basis for expunging the reprimand from his official status file.

25. On 3 August 2015, Mr. Michaud filed an application with the UNDT. In his application he described the contested decisions as being the:<sup>4</sup>

... a) decision to allow the conduct of an unlawful investigation in violation of UN/UNDP procedures and of due process; b) decision to issue a reprimand based on such illegal investigation and its highly disputed evidence; c) decision, in spite of the above irregularities, to prolong and compound the harm caused to the reputation, health and contractual rights of Applicant and of his family, by denying him due process under the UNDP *Performance Plan Assessment* procedures and UN Staff Rule 1.3, with a threat to use the unlawful OAIS investigation report in the future.

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<sup>4</sup> Italics in original.

26. It is not clear from the application whether Mr. Michaud challenged the referral of the investigation to the OAI or whether his grievance was limited to the conduct of the investigation. Suffice it to say that he alleged conflicts of interest, questioned the impartiality of some of the role players and challenged the substantive reasonableness of some of the findings.

27. The UNDT declined to hold an oral hearing as requested by Mr. Michaud on the grounds that the application was not a disciplinary case but an application against an administrative decision imposing an administrative measure and that “nothing would be gained by adducing oral evidence”.<sup>5</sup>

28. After various interlocutory proceedings and attempts to settle the matter, the UNDT rendered its Judgment on 12 October 2016 dismissing the application in its entirety. It held that the application was not receivable *ratione materiae* for two reasons. Firstly, as the investigation did not affect Mr. Michaud’s terms of employment it was immaterial to the issuance of the reprimand. The referral of the investigation to the OAI did not have direct legal consequences in that the decision to refer the matter and the findings of the investigation would not be directly determinative of whether Mr. Michaud was to be sanctioned for misconduct. Secondly, Mr. Michaud did not file a request for management evaluation of the referral of the investigation to OAI, meaning that it was not receivable in terms of Article 8(1)(c) of the Statute of the UNDT which provides that an application is only receivable if the applicant has previously submitted the contested administrative decision for management evaluation.

29. The UNDT held further that the decision to issue the written reprimand was a lawful exercise of managerial discretion in that the action was in compliance with Rule 10.2(b)(i) of the Staff Rules and paragraph 82 of the UNDP Legal Framework and Mr. Michaud’s due process rights had been fully observed. Given the senior position of responsibility of Mr. Michaud, the mandate of the OAI as the investigator of harassment, the limited duration of the complainant’s employment and the self-evident problematic nature of the e-mails, the decision to issue the reprimand was reasonable and proportional in the circumstances.

30. Mr. Michaud appealed the Judgment on 9 December 2016. Together with his appeal, he filed a motion to adduce additional evidence. The Secretary-General filed his response to the motion on 19 January 2017 and his answer to the appeal on 10 March 2017.

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<sup>5</sup> Impugned Judgment, para. 41.

### **Submissions**

#### **Mr. Michaud's Appeal**

31. Mr. Michaud first challenges several UNDT case management decisions. He claims that the UNDT erred in deciding the case on the papers without holding an oral hearing and without ordering the parties to produce an agreed statement of facts. This, he contends, led to the UNDT being subject to misleading and erroneous assertions based on unproved assertions made on papers. He added that the UNDT's case management decisions generally gave the perception that the Judge of the UNDT had already made up his mind before considering the evidence.

32. He further submits that the written reprimand was unlawfully issued because his due process rights were violated during the OAIIS investigation. He alleges, *inter alia*, that his right to assistance under the UNDP Legal Framework by denying him the right to have a legal representative present when interacting with the investigators and his right to be informed of the allegations and to obtain prior access to charges and evidence and early disclosure were all violated during his interview. He maintains that, based on established jurisprudence, he should have received notification of the charges and evidence earlier than he did and that no risks were identified justifying the disclosure after the opening of the investigations. Accordingly, he submits that the UNDT erred in finding that the rules on issuance of a reprimand as contained in Staff Rule 10.2(c) were respected.

33. Mr. Michaud alleged, furthermore, that there was a conflict of interest at UNFPA/DOS resulting from the complainant's previous employment with UNFPA and the previous working relationship between her counsel and one of the investigators at the World Bank.

34. Mr. Michaud maintains that the investigations, in violation of his due process rights, did not comply with "the existing jurisprudence on [Secretary-General's bulletin] ST/SGB/2008/5 [(Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)]" and the requirements of the UNDP Legal Framework on "preliminary assessments" in several respects including by failing to submit a preliminary assessment report. In addition, the harassment complaint was time-barred and the UNDT failed to "weigh the motives, good faith and credibility of [the complainant's] unsworn assertions, which are not established evidence".

35. Based on the foregoing, Mr. Michaud requests 24 months' net base salary for harm to his career and contractual rights; and an additional 12 months' net base salary for anxiety, stress and moral suffering, considering, in particular, that the 6 March 2015 "exoneration letter" did not rectify the damages caused by the investigation. He further asks for all documents and references to the investigation and the 6 March 2015 letters of reprimand to be expunged from his official status file and requests an award of costs for "abusive procedures".

### **The Secretary-General's Answer**

36. The Secretary-General submits that the UNDT correctly determined that the investigation had been conducted, and the reprimand issued, in accordance with Mr. Michaud's due process rights. Mr. Michaud's submissions on appeal merely repeat the arguments made before the UNDT and do not point to a specific ground of appeal in the form of an error of law, procedure or fact resulting in a manifestly unreasonable decision. The decision to reprimand Mr. Michaud was not taken on the basis of the investigation report; instead it was based solely on Mr. Michaud's own e-mails which he admitted having sent to the complainant.

37. Even assuming, *arguendo*, that the investigation and the ensuing report are material to determining the lawfulness of the reprimand, Mr. Michaud's claims of due process violations are in any event unfounded. Firstly, Mr. Michaud does not have a right to a legal representative in terms of the UNDP Legal Framework. Moreover, the allegations against him and the evidence supporting those allegations were fully disclosed in accordance with the UNDP Legal Framework. He was properly informed of the allegations after the opening of the investigation because disclosure at an earlier stage could have jeopardized the investigation.

38. Regarding the alleged conflicts of interest at UNFPA/DOS, the UNDT correctly held that Mr. Michaud had failed to demonstrate any ulterior motives in the investigation. Mr. Michaud did not raise any concerns about the employment histories of the complainant and her counsel in his 19 March 2015 response letter to the reprimand or in his request for management evaluation. Even if the allegations of conflict of interest were receivable, the mere assertion of a previous working relationship is insufficient to demonstrate any conflict of interest or prejudice.

39. The investigation generally complied with the requirements set out in the UNDP Legal Framework. Furthermore, the time limit for filing the harassment complaint and the complainant's credibility were not at issue since the reprimand letter was not based on a

finding of harassment but rather on the finding that he had admitted to have sent the 5 and 21 September 2012 e-mails containing comments which were considered to be inconsistent with the required level of professionalism. Moreover, the UNDT correctly found that the rules on issuance of reprimands set out in Staff Rule 10.2(c) were respected, given that Mr. Michaud was provided with many opportunities to comment on the facts and circumstances of the two September 2012 e-mails.

40. Moreover, Mr. Michaud has not demonstrated any impropriety in the UNDT's case management, especially in light of the Appeals Tribunal's consistent jurisprudence that it will not interfere lightly with the UNDT's broad discretion in the management of its cases. In particular, the UNDT could reasonably decide not to hold an oral hearing because it was not obligatory in a case of a non-disciplinary nature.

41. Lastly, the Secretary-General maintains that Mr. Michaud has failed to establish any basis for compensation and that he merely repeats arguments that did not succeed before the UNDT instead of demonstrating a reversible error. In addition, there is no support for his allegation of abusive procedures, so that costs are not warranted.

### **Considerations**

#### *Preliminary matters - request for an oral hearing and motion to adduce additional evidence*

42. Mr. Michaud requests an oral hearing. We do not find that an oral hearing would assist in the expeditious and fair disposal of the case within the meaning of Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure. The factual and legal issues are straightforward and have been fully ventilated on the papers. For those reasons, the request for an oral hearing is denied.

43. Mr. Michaud also requests the Appeals Tribunal to accept additional evidence (in terms of Article 2(5) of the Appeals Tribunal Statute) in the form of an affidavit by him aimed at clarifying the facts and circumstances related to the reprimand. The relevant e-mails he claims do not constitute established evidence supported by sworn testimony. The evidence he seeks to lead relates to the context in which the e-mails were made in the hope of showing that the complainant was not offended.

44. Article 2(5) of the Appeals Tribunal Statute provides:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. ... The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

45. The Secretary-General maintains that Mr. Michaud has not provided any argument establishing exceptional circumstances. Moreover, the averments contained in the affidavit were clearly known to Mr. Michaud at the time of the UNDT hearing and therefore should have been presented at that Tribunal. Mr. Michaud offers no explanation for his failure to do so. The Secretary-General asks for the motion to be dismissed, or, if the motion is granted, to be given sufficient time to respond to the additional evidence and pleadings.

46. The Secretary-General is correct. The evidence sought to be admitted in the appeal proceedings is merely an elaboration of the context in which the e-mails were sent. Mr. Michaud was aware of the significance attached by the Administration to the e-mails long before the UNDT hearing and in any event presented similar evidence and argument as that contained in his affidavit. For reasons which will become apparent in the ensuing discussion, the evidence sought to be admitted does not take the matter further and would add nothing of consequence. It is accordingly not in the interest of justice to receive it.

47. The motion to adduce additional evidence is therefore dismissed.

### *Appeal*

48. In terms of Article 2 of the Statute of the UNDT, insofar as it is relevant to this appeal, the UNDT is competent to hear and pass judgment on an application to appeal: i) an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment of a staff member; or ii) an administrative decision imposing a disciplinary measure.

49. The UNDT, it will be recalled, held that all of Mr. Michaud's complaints regarding the referral of the investigation to the OAI and the conduct of the investigation were not receivable *ratione materiae* since the investigation did not affect Mr. Michaud's terms of employment, was

immaterial to the issuance of the reprimand, and did not have direct legal consequences; and, furthermore, Mr. Michaud did not file a request for management evaluation of the referral of the investigation to OAIS, meaning that it was not receivable in terms of Article 8(1)(c) of the Statute of the UNDT.

50. Before an administrative decision can be held to be in non-compliance with the contract of employment of a staff member it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect.<sup>6</sup> A decision to initiate an investigation, in itself, ordinarily, will not immediately affect the rights of a staff member nor be of direct legal effect. Judicial review is concentrated pragmatically on the more important administrative decisions and thus avoids allowing challenges to preliminary or intermediate decisions. Where a decision requires several steps to be taken by different authorities, but only the last of which is directed at the staff member, the earlier decisions or actions lack direct effect, and only the last decision may be taken to the Dispute Tribunal for review.<sup>7</sup> Preparatory decisions, therefore, are normally not reviewable by administrative tribunals. This accords with the general principle that tribunals should not interfere with purely internal matters of departmental administration or organisation, or processes that have not reached finality.<sup>8</sup>

51. Mr. Michaud has not shown that the decision to refer the complainant's grievance to the OAIS or the conduct of the investigation adversely affected his rights in any way. The purpose of the investigation was to examine the facts and evidence and to make a recommendation to UNDP. As the recommendation it made was not acted upon, no decision of final effect adversely affecting the rights of Mr. Michaud was made pursuant to the investigation. In so far as there might have been procedural shortcomings in the conduct of the investigation, they are of no practical consequence. The right to due process or procedural fairness only arises in relation to administrative decisions which materially and adversely affect the rights or legitimate expectations of staff members. And, as just stated, OAIS took no decision that materially, adversely or directly impacted on the rights of Mr. Michaud. It merely made a non-binding recommendation to the UNDP. That recommendation is not an administrative decision subject

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<sup>6</sup> *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 28, citing *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481 (and citations therein).

<sup>7</sup> *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, para. 33, citing *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313 and *Ishak v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152.

<sup>8</sup> *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, para. 33.

to review under Article 2(1) of the UNDT Statute and the UNDT was therefore correct to hold the appeal in relation to the investigation not receivable *ratione materiae*.

52. It is common cause that Mr. Michaud did not file a request for management evaluation of the referral of the investigation to OAIS. The UNDT accordingly also did not err in its finding that the appeal was not receivable in terms of Article 8(1)(c) of the Statute of the UNDT.

53. In consequence, the only substantive issue for appeal is whether the administrative decision to impose a disciplinary or administrative measure in the form of a written reprimand was lawful, reasonable and in accordance with due process.

54. Both Staff Rule 10.2(b)(i) and Paragraph 82 of Chapter III of the UNDP Legal Framework are empowering provisions authorising the imposition of a written reprimand in circumstances where the staff member is guilty of poor judgment. There is therefore no question about the strict legality of the decision to issue a reprimand.

55. Mr. Michaud complained though that he was not afforded due process before the decision to issue a reprimand was taken. The issue of the reprimand materially and adversely affected his rights and was of direct legal effect in that the letter of reprimand explicitly states that it may be referred to in the future. The reprimand is a potential impediment to his career advancement. In the circumstances, Mr. Michaud was entitled to a procedurally fair decision. The Secretary-General submitted that Mr. Michaud had many opportunities to comment on the facts and circumstances of the two e-mails. It is common cause that as part of the OAIS investigation, he was interviewed at length about the e-mails, he was provided a transcript of his interview and made detailed representations. That, the Secretary-General maintained, was sufficient, and the UNDT agreed.

56. Procedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him. In this case, the Administration avoided further disciplinary proceedings but acted in a limited way on the undisputed evidence of the e-mails, which it knew had been canvassed with Mr. Michaud. The e-mails speak for themselves.



57. The only questions for determination by the Administration, therefore, were whether the e-mails constituted poor judgment by a senior manager tasked with responsibility in the UNDP for investigating misconduct, and, if so, a reprimand should follow. Mr. Michaud knew that the Administration regarded the e-mails as constituting bad judgment or misconduct and what the possible consequences might be. He had ample opportunity to respond, and did so. The defence he has consistently advanced is a denial of any intent to harass and a claim that the complainant did not take offence to the exchange which was intended as light-hearted, harmless banter in the context of a close working relationship.

58. Thus, Mr. Michaud was fully apprised of the allegations and had an opportunity to make representations putting forward his defence. His various accounts and elaborations of his defence at different stages of the proceedings have added little to its essential nature. He has struggled, however, to accept the conclusion that it might not be adequate to exculpate him. The UNDT was accordingly correct in finding that there had been no due process violation.

59. As regards the question of legal representation, paragraph 66 of the UNDP Legal Framework expressly provides that persons subject to investigation have no right to legal counsel during interviews but may be assisted by a staff or family member.

60. This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct. As said, in this case the e-mails speak for themselves and invite admonition, if not censure, without further ado.

61. The remaining question is whether the issue of the reprimand was reasonable. Tribunals are required to act with restraint and deference in balancing the considerations at play in discipline of this kind and with appreciation for the peculiar context in which it was taken. The OAI has a broad discretion to implement its preferred standards. The e-mails authored by Mr. Michaud are inappropriately suggestive. The comments were intended to signal sexual interest. Admittedly, they are low on the bar of sexual harassment and legitimately may be seen as flirtatious and relatively innocent. They assume greater impropriety, however, because they

emanate from a senior investigator with specific responsibility under his job description to investigate the misconduct of others. A higher level of sensitivity is justifiably expected. Mr. Michaud has failed consistently to see that. The evidence suggests that the complainant did indeed find the advances and comments inappropriate. But the precise degree of offence she took is inconsequential. Regardless of how the comments were received, an employer such as the OAI might reasonably expect that such comments should not be made at all to a recently employed subordinate by a senior misconduct investigator. The decision to impose a written reprimand falls within the range of reasonable responses and, as the UNDT correctly held, the measure was accordingly proportional in the circumstances.

62. Mr. Michaud's criticism of the UNDT's failure to hold an oral hearing is without merit. While it is correct that Article 16(2) of the Rules of Procedure of the UNDT provide that a hearing shall normally be held by it following an appeal against an administrative decision imposing a disciplinary measure, the allowance by the rule for exceptional cases means the requirement is not absolute or obligatory. The UNDT's finding recognised, exceptionally, that the limited factual and legal issues in relation to the reprimand did not require it to hold an oral hearing. No further evidence or argument would have altered the outcome. In any event, the written reprimand did not constitute a disciplinary measure. The Dispute Tribunal accordingly committed no appealable error of procedure affecting the decision of the case.

**Judgment**

63. The appeal is dismissed and Judgment No. UNDT/2016/184 is hereby affirmed.

Original and Authoritative Version: English

Dated this 14<sup>th</sup> day of July 2017 in Vienna, Austria.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Halfeld

Entered in the Register on this 5<sup>th</sup> day of September 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar