UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-873

Belkhabbaz (formerly Oummih)

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Dimitrios Raikos Judge Deborah Thomas-Felix
Case No.:	2018-1165
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Ms. Belkhabbaz:	Natalie Dyjakon, OSLA
Counsel for Secretary-General:	Wambui Mwangi

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/016, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 5 February 2018, in the case of *Belkhabbaz v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 6 April 2018, and Ms. Amal Belkhabbaz filed her answer on 8 June 2018.

Facts and Procedure

2. The facts and background to this appeal are comprehensively dealt with in the Judgment of the UNDT. The UNDT Judgment refers to a number of disputes between Ms. Belkhabbaz and the Administration regarding her employment which have been the subject of litigation before the UNDT over the last six or seven years. In the interests of avoiding prolixity in this Judgment, we do not intend to recount all that has gone before and shall endeavour to stick to the facts which are relevant for the resolution of the issues in relation to the contested decision challenged in this appeal.

3. As part of an ongoing saga regarding her performance and the renewal of her contract, on 27 April 2012, Ms. Belkhabbaz filed a complaint with the Deputy Secretary-General, pursuant to Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), against the former Chief of the Office of Staff Legal Assistance (OSLA), Office of Administration of Justice (OAJ), United Nations Secretariat, and one of her former colleagues at OSLA. The complaint alleged improper deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, defamation, and preferential treatment of another staff member. As set out more fully later, the complaint was investigated by two separate fact-finding panels resulting ultimately in a finding of the Officer-in-Charge, Assistant Secretary-General, OHRM (OiC ASG/OHRM) on 25 October 2016 that no prohibited conduct took place and a decision to close the matter without further action. This decision is the contested decision which is the subject of this appeal.

4. On 1 September 2009, Ms. Belkhabbaz commenced a two-year fixed-term appointment as a Legal Officer at the P-3 level in OSLA. She was initially assigned to Beirut and transferred to Geneva in June 2010. By memorandum of 22 August 2011, the former Chief of OSLA

recommended that Ms. Belkhabbaz's contract, which was due to expire on 31 August 2011, not be renewed in light of her performance appraisal for 2009-2010. Her contract was initially extended to 11 November 2011 and again on various occasions for various reasons until her separation from service on 5 April 2014. She was on sick leave from 26 March 2013 until her separation.

5. Upon her return from an earlier period of sick leave on 18 October 2011, Ms. Belkhabbaz learned through an e-mail from the former Chief of OSLA that she had been replaced during her absence by another staff member in a case pending before the Appeals Tribunal to which she had been assigned. By e-mail of 19 October 2011, addressed to the former Executive Director of OAJ and to the former Chief of OSLA, Ms. Belkhabbaz complained that another case to which she had been assigned had been transferred to another staff member during her absence, without informing her. The former Chief of OSLA responded to her on the same day via e-mail as follows:

> In light of your extended absence from [OSLA] and general unprofessional behaviour, I had to reassign your cases to other counsel. You have complained that you should have been informed. Consider yourself so informed. Note that you specifically communicated you did not wish to be disturbed [with] work-related issues while on sick leave. This was respected apart from the matter of your performance evaluation (...)
>
> Further, what I have seen from our own research (as you have not provided an updated case list) is that you do not have many active files, so the workload can be managed by others.
>
> Given your continued unprofessional and provocative behaviour towards myself as your supervisor as well as other colleagues ... you cannot be trusted as fellow counsel in [OSLA]. Your actions, or lack thereof, have been extremely disruptive to the Office. I have never experienced such a difficult personnel situation in my almost twenty years in the UN system.
>
> I will discuss your situation again [with the Executive Director of OAJ] and whoever else is required .... In the meantime please refrain from calling or sending unhelpful, angry emails to colleagues, including myself.
>
> The fact you are pursuing a formal complaint against [OAJ/OSLA] and are intent on litigating against the Organization is a further consideration. I cannot imagine how [OSLA] can have a colleague handling files and accessing confidential information in that circumstance.

6. By another e-mail of 19 October 2011, the former Chief of OSLA informed Ms. Belkhabbaz that he would contact two staff members whom she had previously represented to advise them that she was no longer in charge of their cases and that another counsel would be appointed to represent them. He further mentioned that he would inform the UNDT of that fact and instructed Ms. Belkhabbaz not to contact the Registry of the UNDT nor the two concerned applicants.

7. On 25 October 2011, Ms. Belkhabbaz wrote to the Information Systems Assistant at OAJ noting that she had been deprived of her access to the internal system of data sharing (eRoom) upon instruction from the former Chief of OSLA. She also wrote to the former Executive Director of OAJ, later that day, to inform him of the matter and to request his assistance.

8. On 28 October 2011, Ms. Belkhabbaz enquired whether she could take back the cases reassigned to her colleague in Geneva, whose secondment was coming to an end. The former Chief of OSLA informed Ms. Belkhabbaz that the cases in question would be reassigned to other staff members at OSLA.

9. On 31 October 2011, Ms. Belkhabbaz requested a management evaluation of the decision to deprive her of her functions and to *de facto* evict her from the Office. On 1 November 2011, Ms. Belkhabbaz sought suspension of action of the said decision before the UNDT. On 4 November 2011, the UNDT granted the request for suspension of action, pending the outcome of the management evaluation. That same day, Ms. Belkhabbaz was notified that her contract would be renewed until the completion of the rebuttal procedure she initiated in respect of her performance appraisal for 2009-2010.

10. On 6 November 2011, the former Chief of OSLA informed Ms. Belkhabbaz that he had decided to restore her access to the eRoom and to give her back a file that he had previously removed from her.

11. In the relevant period, Ms. Belkhabbaz was subjected to four performance appraisals for 2009-2010, 2010-2011, 2011-2012 and 2012-2013. In the first two, her first and second reporting officers recorded that she did not meet performance expectations. After a rebuttal process these ratings were changed by the panel to a rating of "successfully meets performance expectations". In her rating for 2011-2012, she was initially rated as "partially

meeting expectations" and this rating was upheld by the rebuttal panel which noted that the relationship between Ms. Belkhabbaz and the former Chief of OSLA had at that stage deteriorated dramatically. Her 2012-2013 appraisal rated her again as "partially meeting expectations".

12. On 17 April 2012, the former Chief of OSLA issued a letter of reprimand to Ms. Belkhabbaz, which was subsequently withdrawn following a request for management evaluation.

13. On 27 April 2012, Ms. Belkhabbaz filed her complaint against the former Chief of OSLA and one of her former colleagues at OSLA alleging deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, defamation, and preferential treatment of another staff member. On 9 May 2012, the Deputy Secretary-General requested the former Executive Director of OAJ to review Ms. Belkhabbaz's complaint.

14. On 21 September 2012, the former Executive Director of OAJ informed Ms. Belkhabbaz of her decision to appoint a panel to conduct a formal fact-finding investigation into three of Ms. Belkhabbaz's allegations against the former Chief of OSLA that were found to warrant such investigation, namely, the decision to reassign cases to other staff members at OSLA, the copying of others on confidential communications between Ms. Belkhabbaz and the former Chief of OSLA, and the allegation that the former Chief of OSLA had created a hostile work environment for Ms. Belkhabbaz.

15. On 8 October 2012, the former Executive Director of OAJ informed Ms. Belkhabbaz and the former Chief of OSLA that the fact-finding investigation would be conducted by two former staff members on the roster maintained by the Office of Human Resources Management (OHRM). That decision was reversed on 9 October 2012 following an objection by the former Chief of OSLA, on the grounds of conflict of interest. On 14 November 2012, the former Executive Director of OAJ informed Ms. Belkhabbaz that two independent consultants would be engaged to conduct the fact-finding investigation. On 10 December 2012, the former Executive Director of OAJ, in her response to Ms. Belkhabbaz's request for further information about the consultants, informed Ms. Belkhabbaz that the two consultants were not on the OHRM roster and that they had not received the OIOS training on investigating complaints filed under ST/SGB/2008/5.

16. The investigators presented their final report on 9 April 2013. On 26 April 2013, the former Executive Director of OAJ, having reviewed the investigation report, decided that no further action should be taken on Ms. Belkhabbaz's complaint against the former Chief of OSLA. Ms. Belkhabbaz requested management evaluation of that decision and later filed an application with the UNDT on 11 September 2013. In January 2014, the UNDT found that the decision not to take further action on Ms. Belkhabbaz's complaint against the former Chief of OSLA was unlawful and further found that the fact-finding panel had not been constituted in accordance with Section 5.14 of ST/SGB/2008/5. It found that the two fact-finding investigation panel members were not authorized to carry out such investigation as they were not on the OHRM roster and had not received the internal investigation training provided by OIOS, as required under Section 5.14 of ST/SGB/2008/5. The Secretary-General appealed that UNDT judgment to the Appeals Tribunal. In February 2015, the Appeals Tribunal upheld the UNDT's judgment in part and remanded the case to the former Executive Director of OAJ to establish a new fact-finding panel in accordance with ST/SGB/2008/05.[1]

17. Prior to this litigation, on 10 May 2013 the then Executive Director of OAJ had informed Ms. Belkhabbaz of the intention not to renew her contract. In an e-mail dated 15 May 2013, she informed Ms. Belkhabbaz that the reasons for that decision were as follows:

> You have been unable to maintain professional working relationships with your colleagues.
>
> You have required an inordinate amount of supervisory attention.
>
> Your performance has only partially met performance expectations for two consecutive years.
>
> You have lost the confidence of the First Reporting Officer and Second Reporting Officer.
>
> Renewal of your appointment would be inconsistent with the operational requirements of [OSLA] and [OAJ].

18. On 5 May 2015, Ms. Belkhabbaz expressed concern that the former Executive Director of OAJ had a conflict of interest as the responsible official in relation to the complaint, given that she had decided not to renew Ms. Belkhabbaz's appointment. She therefore formally requested the former Executive Director of OAJ to recuse herself. On 7 May 2015, the former

[1] *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr. 1.

Executive Director of OAJ informed Ms. Belkhabbaz that she intended to appoint a panel in accordance with the Appeals Tribunal's order.

19. On 19 May 2015, the former Executive Director of OAJ appointed two retired staff members from the roster maintained by OHRM as members of the panel to investigate Ms. Belkhabbaz's complaint. The investigators reviewed the documents provided by Ms. Belkhabbaz and the former Chief of OSLA and interviewed 17 witnesses, in addition to Ms. Belkhabbaz. The former Chief of OSLA responded in writing to the questions posed by the panel but refused to be interviewed. On 6 September 2016, the panel submitted its report to the OiC ASG/OHRM. The report stated that there was no evidence that: a) the reassignment of Ms. Belkhabbaz's cases was of a retaliatory nature; b) the copying of others on e-mails dealing with confidential issues concerning Ms. Belkhabbaz, such as performance issues and a reprimand, was done maliciously or with an intent to harm; and c) there was a pattern of hostile, harassing or threatening treatment by the Chief of OSLA towards Ms. Belkhabbaz.

20. Accordingly, on 25 October 2016, the OiC ASG/OHRM informed Ms. Belkhabbaz that he had concluded that no prohibited conduct took place and, therefore, that he had decided to close the case. His decision was founded upon the following findings set out in his letter to Ms. Belkhabbaz:

> While [the former Chief, OSLA] reassigned [Ms. Belkhabbaz's] cases in October 2011, he acted as a reasonable manager would have acted in light of circumstances that he then faced.
>
> While [the former Chief, OSLA] communicated certain confidential information for [Ms. Belkhabbaz] to a wider audience than was necessary, this appears to have been the result of a lapse of managerial judgment in that he did not devise a different approach to ensure the confidentiality of this information. However, there is no indication that he was ill-motivated when he did so.
>
> [The former Chief, OSLA's] communication style was considered at times, to be aggressive and abrasive; however, neither this trait nor his other actions seem to have been the source of tension that existed between [Ms. Belkhabbaz] and him. The Panel indicated that at the heart of the tension was [Ms. Belkhabbaz's] own behaviour that adversely impacted [her] colleagues, including [the former Chief, OSLA].

21. On 27 April 2017, Ms. Belkhabbaz filed an application with the UNDT. The UNDT rendered its Judgment on 5 February 2018.

The UNDT Judgment

22. The UNDT concluded that the contested decision to take no further action on Ms. Belkhabbaz's complaint was unjustifiable and unlawful. Its conclusion was based on various findings of procedural unfairness and unreasonableness.

23. Firstly, it held that the former Executive Director of the OAJ should have recused herself from appointing the second panel, essentially because she had taken a prejudicial view of Ms. Belkhabbaz as evident in her e-mail of 13 May 2013 setting out her reasons for non-renewal of the contract. The former Executive Director of the OAJ eventually did recuse herself on 13 July 2015 for reasons that remain unknown, but only after she had appointed the panel, defined its terms of reference and met with its members. The UNDT considered that the act of recusal itself was an admission of a conflict of interests on the part of the former Executive Director of the OAJ and such gave rise to a reasonable apprehension of bias in contravention of Section 3.2 ST/SGB/2008/5 (which requires complaints about prohibited conduct to be investigated in a fair and impartial manner) with the further consequence that the panel was not constituted in accordance with Section 5.14 of ST/SGB/2008/5. The appointment of the panel was therefore illegal and void *ab initio*.

24. Secondly, the UNDT held that the panel had not been appointed in accordance with the prescripts of Section 5.14 of ST/SGB/2008/5 which requires the appointment of a fact-finding 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". The UNDT took the view that this provision mandates the responsible appointing official to consider first appointing trained staff members working in the department, office or mission before appointing individuals from the roster. In its opinion, the use of the expression "if necessary" makes it clear that use of persons on the roster is only permissible if it is not possible to appoint individuals from the department, etc.

25. The UNDT relied in this regard on a statement by the Appeals Tribunal in its earlier decision regarding Ms. Belkhabbaz in which it said that the fact-finding investigation must be done by a panel of two persons from the department but "should this not be possible" individuals may be selected from the roster. This, the UNDT reasoned, made it incumbent on the Organization to establish that it was "impossible" to find individuals in the department

etc. before resorting to the roster. As there was no evidence indicating that attempts had been made to identify and appoint individuals in the department etc., the UNDT concluded that there had been no compliance with Section 5.14 of ST/SGB/2008/5.

26. The UNDT went on to find that although the procedural irregularity was not so material as to warrant invalidity, in light of the Appeals Tribunal judgment, it was reasonable to expect strict adherence with the requirements of Section 5.14 of ST/SGB/2008/5. The disregard of these constituted "an additional factor giving rise to a reasonable apprehension of bias" on the part of the former Executive Director of OAJ.

27. The third ground of review sustained by the UNDT was that the former Executive Director of OAJ improperly limited the scope of the investigation. The original scope of the investigation was set out in an e-mail of 21 September 2012 from the then Executive Director of OAJ. It formulated the complaint as being whether the former Chief of OSLA engaged in prohibited conduct within the meaning of ST/SGB/2008/5 by: i) reassigning Ms. Belkhabbaz's cases; ii) copying others on confidential communications to Ms. Belkhabbaz; and iii) creating hostile working conditions for Ms. Belkhabbaz within OSLA through his direct e-mail and verbal communications with her. Ms. Belkhabbaz challenged this limitation of the scope of the investigation before the UNDT, but ultimately the Appeals Tribunal upheld it. However, when the former Executive Director of OAJ appointed the second panel pursuant to the order of the Appeals Tribunal, she altered the scope of the investigation in two respects: firstly, by requiring the panel to determine whether the reassignment had been done in retaliation for Ms. Belkhabbaz seeking recourse in the formal system of justice in order to constitute prohibited conduct; and secondly by requiring it be established that the conduct of copying others on confidential communications effectively embarrassed Ms. Belkhabbaz. The implication of the qualification was to the effect that the conduct would only amount to prohibited misconduct if the additional factual elements were established.

28. The UNDT held that by setting specific criteria for the facts to qualify as prohibited conduct, the former Executive Director of OAJ orientated the investigation in a specific direction and implicitly excluded alternative avenues of investigation in determining prohibited conduct. Moreover, the alteration was in violation of the Appeals Tribunal judgment and order. The formulation was accordingly unlawful. The UNDT did not state precisely why the alteration was unlawful, but it may be assumed that it also considered the conduct procedurally unfair and unreasonable. By effectively amending the order of the

Appeals Tribunal, the former Executive Director of OAJ, in the apparent opinion of the UNDT, exceeded her authority in that she had no authority to do such and unfairly and unreasonably narrowed the scope of investigation.

29. The fourth allegation of irregularity upheld by the UNDT was that the panel failed to interview the former Chief of OSLA, in contravention of Section 5.16 of ST/SGB/2005/8, and such failure amounted to a violation of the basic requirements of procedural fairness as it allowed him to testify in writing without having his evidence tested and challenged. Section 5.16 of ST/SGB/2005/8 explicitly provides that a fact-finding investigation "shall include interviews" *inter alia* with the alleged offender. The panel attempted to interview the former Chief of OSLA but he refused to submit himself to an interview on various legal grounds. He did so despite his obligation to co-operate with the investigation in terms of Section 6.4 of ST/SGB/2005/8. This, the UNDT held, was another instance of procedural unfairness. The panel ought to have sought action against the former Chief of OSLA to ensure his co-operation and in order to fulfil its legal duty to conduct a proper investigation. This lapse, according to the UNDT, "vitiated and tainted the whole investigation" as the former Chief of OSLA was allowed to participate in and influence the investigation while refusing to allow the panel to test his evidence.

30. In addition, the UNDT held that in considering the statement made by the former Chief of OSLA to the first fact-finding panel, the panel took into consideration irrelevant material. It held further that the panel's finding that the reassignment of the cases could be justified on operational grounds was in contradiction of an earlier finding of the UNDT to the contrary and thus meant that it had not considered relevant material, and more importantly meant the panel had misconstrued the enquiry before it. Furthermore, the panel committed an irregularity by limiting Ms. Belkhabbaz to calling only two of her five proposed witnesses. By not assessing the relevance of the proposed witnesses and imposing a quantitative limitation, the panel acted irrationally and did not comply with Section 5.16 of ST/SGB/2005/8 which obliges the panel to interview "any other individuals who may have relevant information about the conduct alleged". This meant that the panel had failed to comply with a mandatory and material procedure prescribed by Section 5.16 of ST/SGB/2005/8, and in addition acted unfairly.

31. The UNDT also held that the OiC ASG/OHRM applied the wrong standard for determining whether the facts established by the panel amounted to harassment and failed to consider whether they could amount to abuse of authority. The second conclusion of the OiC ASG/OHRM set out in the letter of 25 October 2016 that the former Chief of OSLA was not "ill-motivated" incorrectly applied a subjective test for establishing harassment. Section 1.2 of ST/SGB/2005/8 imposes an objective test for establishing harassment by stating that "the conduct might *reasonably be expected or be perceived* to cause offence or humiliation". In relation to the OiC ASG/OHRM's third conclusion that Ms. Belkhabbaz's conduct was blameworthy, that was irrelevant to the determination of whether objectively the conduct of the alleged offender could reasonably be perceived as causing offence or humiliation. Although the UNDT made no express finding on the consequences of these perceived irregularities, we understand it to have considered that they impacted on the rationality of the decision. The decision was not rationally connected to the information before the decision-maker or the purpose of the empowering provisions of ST/SGB/2005/8.

32. Finally, the UNDT held that the panel failed to conduct the investigation in a timely manner, in violation of Section 5.17 of ST/SGB/2005/8 which requires the fact-finding report to be submitted normally no later than three months from the submission of the complaint. While the complexity of the dispute justified some delay, a 16-month delay was unreasonable and procedurally unfair.

33. On the basis of these findings, the UNDT concluded that the contested decision to take no further action on Ms. Belkhabbaz's complaint was "unjustifiable and unlawful". It accordingly reviewed it and set it aside. Having so decided, it went on to consider and pronounce on the merits of the complaint about whether the former Chief of OSLA had in fact and in law committed prohibited conduct as contemplated in ST/SGB/2005/8. In its comprehensive and insightful analysis of these issues, the UNDT made three key findings on the evidence.

34. Firstly, the UNDT held that the former Chief of OSLA had sought to punish and retaliate against Ms. Belkhabbaz for her work-related conduct and for seeking recourse in the internal justice system. As such, he unlawfully used his position of authority to improperly influence her work conditions. This finding was premised on findings made in earlier UNDT judgments that he had unreasonably reassigned all Ms. Belkhabbaz's cases to other counsel while she was on sick leave, refused to give them back on her return and had cut her access to

the eRoom so that she could no longer have access to OSLA files.[2] He essentially evicted her from her functions preventing her from carrying out her duties. As such, he acted disproportionately beyond what was necessary for the operational requirements of OSLA. The UNDT was particularly concerned by a comment by the former Chief of OSLA in his e-mail to Ms. Belkhabbaz of 19 October 2011 which confirmed that her seeking recourse from the UNDT was a consideration in the decision to remove her from her files. The comment reads:

> The fact you are pursuing a formal complaint against the [OAJ/OSLA] and are intent on litigating against the Organization is a further consideration. I cannot imagine how [the OSLA] can have a colleague handling files and accessing confidential office information in that circumstance.

35. Secondly, the UNDT held that the former Chief of OSLA had unreasonably copied other uninterested persons in personal and confidential communications concerning Ms. Belkhabbaz's performance issues. It is undisputed that this in fact happened. In particular, he copied e-mails dealing with her performance and reprimand to the OSLA New York and Geneva generic accounts, which are accessible to all OSLA Administrative Assistants and Legal Officers, and on one occasion he copied an e-mail to an Executive Assistant in the Office of the Secretary-General. There were no legitimate operational reasons for his doing this. The persons copied had no interest in or responsibility for any matter related to the performance of Ms. Belkhabbaz. Despite repeated requests from Ms. Belkhabbaz to the former Chief of OSLA to desist from this unacceptable conduct, he persisted. The UNDT in effect held that in the absence of any compelling evidence from the former Chief of OSLA justifying his behaviour, and having regard to the extent of the copying, the conduct of the former Chief of OSLA gives rise to an inference, as the most probable and plausible inference, that he intended to humiliate and embarrass Ms. Belkhabbaz, and as such his conduct constituted harassment as defined in Section 1.2 of ST/SGB/2008/5.

36. Thirdly, the UNDT held that the former Chief of OSLA adopted an aggressive and abrasive tone towards Ms. Belkhabbaz and made demeaning remarks in his written and oral communications to her and thereby created a hostile and offensive work environment and this conduct too constituted harassment in terms of Section 1.2 of ST/SGB/2008/5. In

[2] *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/187 and *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/111.

this regard, the UNDT again placed particular emphasis on the tone of the e-mail of 19 October 2011 cited in paragraph 5 of this Judgment, but also other e-mails in which he described her as: "mess[ing] up another colleague"; "mean-spirited and malicious"; "difficult to work with"; and "unethical and untrustworthy". He also accused her of barking at her colleagues. The UNDT considered the remarks to be unjustified and tending to demean or belittle Ms. Belkhabbaz. A number of witnesses testified to the panel that the former Chief of OSLA could at times be aggressive, abrasive, hot-blooded and came across too strongly. The tone of his correspondence bears that out. The UNDT accepted that Ms. Belkhabbaz had probably contributed to the fractious nature of the relationship. However, all considered, the former Chief of OSLA had quite evidently crossed the line.

37. On this basis, the UNDT concluded that the conduct amounted to harassment and abuse of authority, constituting prohibited conduct in terms of Section 1.2 and 1.4 of ST/SGB/2008/5.[3]

38. The UNDT's finding that the conduct was prohibited obviously contradicted the finding of the OiC ASG/OHRM that no prohibited conduct took place. However, the UNDT did not explicitly substitute its finding for that of the contested decision. Nonetheless, it is clear that it regarded the contested decision as either wrong or unreasonable. The approach followed by the UNDT in first declaring the finding invalid before embarking upon an enquiry into the merits of the contested decision, suggests that it believed that its finding of invalidity on the other grounds of review permitted it to remedy the invalidity by substituting its finding on the merits for the contested decision for the purpose of ordering specific performance.

[3] The relevant part of Section 1.2 reads: "Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words... or actions which tend to ... demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment (...)." The relevant part of Section 1.4 reads: "Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another (...). Abuse of authority may also include conduct that creates a hostile or offensive work environment (...)."

39. Accordingly, the UNDT rescinded the contested decision to take no further action and remanded the case to the ASG/OHRM to institute disciplinary procedures against the former Chief of OSLA in accordance with Section 5.18(c) of ST/SGB/2008/5, which provides that if the report indicates that the allegations of prohibited conduct are well founded, the responsible official shall refer the matter to the ASG/OHRM for disciplinary action. The UNDT seemed to reason that Section 5.18(c) of ST/SGB/2008/5 formed part of Ms. Belkhabbaz's terms of appointment and thus it had jurisdiction to order the ASG/OHRM to institute disciplinary action. Although, the UNDT made no reference to the provisions of the UNDT Statute conferring such remedial powers, we assume it exercised the power to order specific performance under Article 10(5)(a).[4] Additionally, without referring to the provision of the UNDT Statute upon which it relied to do so, the UNDT issued an order declaring that the former Chief of OSLA committed prohibited conduct under ST/SGB/2008/5.

40. The UNDT also ordered that Ms. Belkhabbaz be paid moral damages in the amount of USD 20,000 for the psychological harm she suffered as supported by medical evidence, as well as compensation in the amount of USD 10,000 for the harm of a loss of opportunity to have her complaint fully and properly investigated, as a result of the impossibility to conduct a third investigation after the first two had been vitiated as irregular.

41. On 7 June 2018, Ms. Belkhabbaz filed a motion seeking interim relief allowing the execution of that part of the Judgment ordering the remand of the case to the ASG/OHRM for institution of disciplinary proceedings, or, in the alternative, requesting the Appeals Tribunal to expedite its review of her appeal on the basis of exceptional circumstances. On 19 June 2018, the Secretary-General filed his response to the motion. By Order No. 326 dated 29 June 2018, the Appeals Tribunal granted Ms. Belkhabbaz's alternative relief sought in the motion and directed the Registrar to set down the appeal in October 2018.

[4] It referred also to *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, in which this Tribunal intimated that if the Staff Regulations and Rules, or by extension other issuances, conferred a right to compel an investigation or disciplinary enquiry, then the UNDT after review could order the Administration to take disciplinary action.

Submissions

The Secretary-General's appeal

42. The Secretary-General submits that the UNDT erred in law and fact by finding that the panel was not constituted in accordance with Section 5.14 of ST/SGB/2008/5 and thus illegal and *void ab initio*. In particular, the UNDT erred by concluding that the former Executive Director of OAJ had a conflict of interest when she appointed the panel because she had been the decision-maker in the decision not to renew Ms. Belkhabbaz's contract beyond 11 June 2013. The Appeals Tribunal had remanded the case to the former Executive Director of OAJ to establish a new fact-finding panel in accordance with ST/SGB/2008/5 and she accordingly appointed two retired staff members from the roster maintained by OHRM as members of the panel to investigate Ms. Belkhabbaz's complaint, in compliance with that judicial order. The responsible official is not involved in the investigation or how the panel conducts its investigation.

43. The Secretary-General contends that the UNDT erred in findings that the former Executive Director of OAJ did not comply with ST/SGB/2008/5 and created a reasonable apprehension of bias when she appointed two retired staff members on the OHRM roster. The UNDT erred in law in its application of Section 5.14 of ST/SGB/2008/5 and misinterpreted the jurisprudence of the Appeals Tribunal. Panel members can be appointed, if necessary, from the OHRM roster. Appointing staff members of OAJ to the panel risked the perception of bias or conflict since both Ms. Belkhabbaz and the former Chief of OSLA were part of OAJ. Therefore, it was necessary to venture outside OAJ to find an impartial panel.

44. The UNDT erred by finding that the former Executive Director of OAJ unjustifiably limited the scope of the investigation. The Administration has a degree of discretion in dealing with a complaint and may decide whether to undertake an investigation regarding all or some of the allegations. The Appeals Tribunal did not specify the terms of reference that the former Executive Director of OAJ should apply in establishing the panel and conducting the investigation *de novo*. Accordingly, the former Executive Director of OAJ did not violate Judgment No. 2015-UNAT-518/Corr.1.

45. The UNDT erred in finding that the panel had violated Section 5.16 of ST/SGB/2008/5 by failing to interview the former Chief of OSLA in person. He responded to the panel's questions in writing. Section 5.16 does not prescribe that "interviews" must be done face-to-face. All that is required is that interviews take place. The panel posed questions in writing to both the former Chief of OSLA and Ms. Belkhabbaz, to which they were asked to respond in writing. There is no evidence to support the UNDT's finding that the former Chief of OSLA was not "interviewed" by the panel or that the evidence he provided was not capable of being tested or challenged by the panel.

46. The Secretary-General further submits that the UNDT exceeded its jurisdiction by substituting its own judgment for that of the panel and the Administration. Specifically, the UNDT erred when it concluded that the Panel had failed to consider relevant material in its investigation, i.e. the UNDT Judgment No. UNDT/2012/111 (*Applicant*).[5] While the UNDT in *Applicant* found the reassignment of Ms. Belkhabbaz's cases unlawful because it had deprived her of the right to perform the work for which she had been recruited, it did not rule on whether such action was retaliatory. The UNDT further erred when it made its own finding that the actions of the former Chief of OSLA had amounted to prohibited conduct under ST/SGB/2008/5 and, based on its conclusions, remanded the case to the ASG/OHRM to institute disciplinary procedures against the former Chief of OSLA. The Appeals Tribunal has held that it is not the role of the Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it nor is it the role of the Tribunal to substitute its own decision for that of the Administration. It was the responsibility of the Panel to establish the facts and of the responsible official to determine if the facts as established amounted to prohibited conduct. Accordingly, the UNDT exceeded its jurisdiction by substituting its own judgment for that of the panel and the ASG/OHRM.

47. Finally, the UNDT erred in law and fact in awarding Ms. Belkhabbaz compensation. First, the UNDT erred by failing to appreciate that Ms. Belkhabbaz contributed to several months of delay, by not making herself available for interview for over four months from the date the panel was established. Moreover, the panel interviewed 17 witnesses in different parts of the world. In view of the complexity of the case and the delays attributable to both Ms. Belkhabbaz and the former Chief of OSLA, there was no unjustified or undue delay in the present case amounting to a breach of Ms. Belkhabbaz's rights warranting the award of

[5] *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/111.

compensation. Second, Ms. Belkhabbaz did not lose an opportunity to have her complaint properly investigated. In fact, Ms. Belkhabbaz was provided with every opportunity to give the panel all the information that she considered to be relevant. In addition, the panel had found that Ms. Belkhabbaz was not subjected to harassment. In the absence of a breach of rights, Ms. Belkhabbaz was not entitled to any compensation for moral damage.

48. In view of the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

Ms. Belkhabbaz's Answer

49. Ms. Belkhabbaz submits that the Secretary-General has failed to demonstrate that the UNDT erred in concluding that the decision to close her complaint against the former Chief of OSLA for prohibited conduct under ST/SGB/2008/5 was unlawful.

50. The UNDT correctly held that the former Executive Director of OAJ had a conflict of interest when she appointed the panel. Her non-renewal decision preceded her establishing the panel. This gave rise to a reasonable apprehension of bias. Her subsequent resignation as the responsible official without giving reasons and without revoking her decision constituting the panel denied the new responsible official the opportunity to influence the composition of the panel.

51. The Secretary-General's explanation for the alleged impossibility of appointing a panel from OAJ, without a perception of bias or conflict, is hypothetical and unsubstantiated by evidence. The UNDT did not err when interpreting the meaning of "department, office or mission" pursuant to Section 5.14 of ST/SGB/2008/5. The obligation in Section 5.14 relating to the "department, office or mission concerned" is not limited to OAJ and the UNDT did not err in finding that there was no evidence that any consideration was given to appointing current staff members in OAJ or any other department or office before resorting to the roster.

52. The UNDT did not err in law and in fact by finding that the former Executive Director of OAJ unjustifiably limited the scope of the investigation by adding the requirement that "such conduct was retaliatory for seeking recourse in the formal system of justice" and that copying the e-mails embarrassed her in order to constitute prohibited conduct. Therefore, the UNDT correctly determined that the former Executive Director of OAJ had "set

conditions for the alleged facts to constitute prohibited conduct" and "oriented the investigation in a specific direction".

53. The UNDT did not err on a question of law and fact in concluding that the panel had a clear legal duty to interview the former Chief of OSLA and failed to discharge this duty. Section 5.16 of ST/SGB/2008/5 is clear and unambiguous in its requirement that the fact-finding investigation shall include interviews with the alleged offender. In *Nikwigize*,[6] the UNDT found that Section 5.16 was a mandatory provision. There can be no doubt as to what an "interview" actually means and a number of dictionary definitions of the term clearly indicate that an interview is a face-to-face meeting. Even in the UN context of job applications, an interview always involves a meeting involving a live discussion whether it is in person or by phone or Skype or other electronic means. The written questions that were sent to the former Chief of OSLA cannot logically be classified as an interview. This is particularly pertinent in circumstances in which the person being interviewed is the subject of a complaint. It is commonly known that the interview method is a useful investigative tool in determining the credibility of a witness. The credibility of the former Chief of OSLA's statements could not be assessed as he was not interviewed.

54. The UNDT did not err in concluding that the panel had failed to consider relevant material. The Secretary-General presented no evidence that the panel considered the two *Applicant* judgments which addressed the issue of deprivation of Ms. Belkhabbaz's functions. While the *Applicant* judgments did not determine whether the actions of the former Chief of OSLA were retaliatory, the judgments were relevant to the fact-finding investigation as they related to the fundamental issue regarding the reassignment of her cases and indicated that the reassignment of her cases was unlawful.

55. Ms. Belkhabbaz furthers submits that the UNDT did not exceed its jurisdiction by a) making its own finding that the actions of the former Chief of OSLA had amounted to prohibited conduct under ST/SGB/2008/5; b) by ordering the institution of disciplinary measures; and c) by finding that the OiC ASG/OHRM misunderstood or incorrectly applied the test in Section 1.2 of ST/SGB/2008/5. The UNDT was well aware of its jurisdictional limitations and merely identified the obvious conclusions based on the facts established by the panel, in accordance with the established jurisprudence of the Appeals Tribunal. Further,

[6] *Nikwigize v. Secretary-General of the United Nations*, Judgment No. 2016/UNDT/199, para. 40.

it was within the UNDT's discretion to remand the case to the ASG/OHRM to institute disciplinary procedures, after having drawn its own conclusions from the panel's report.

56. Finally, the UNDT did not err in awarding compensation. The Secretary-General's contention that the UNDT erred by failing to appreciate that Ms. Belkhabbaz had contributed to several months of delay is factually incorrect as the UNDT considered any delays possibly attributed to Ms. Belkhabbaz and concluded that it had a limited impact on the overall length of the investigation. Ms. Belkhabbaz maintains that considering that the first fact-finding investigation was flawed and then it took more than 16 months for the second fact-finding panel to submit its report, such an amount of time cannot be viewed as anything other than inordinate delay. Ms. Belkhabbaz submits that she did lose an opportunity to have her complaint properly investigated as a result of the impossibility of having a third investigation. Further, Ms. Belkhabbaz maintains that she has provided sufficient evidence of harm and therefore the UNDT did not err in awarding moral damages, particularly in relation to her psychological injury evidenced through the production of medical certification.

57. In light of the foregoing, Ms. Belkhabbaz requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety. Ms. Belkhabbaz, separate from Counsel, also seeks additional compensation in the amount of USD 50,000 in the event that the UNDT decision is upheld and disciplinary proceedings cannot be instituted against the former Chief of OSLA on the basis that he is retired or will be retiring shortly to compensate for additional harm not previously considered by the UNDT in its Judgment.

Considerations

58. The submissions made by the parties in this appeal raise questions about the UNDT's subject-matter jurisdiction and the nature and extent of its remedial powers. Moreover, the UNDT upheld the application on various review grounds impugning the legality, reasonableness and procedural fairness of the contested decision. It might be helpful then to reflect briefly upon the relevant provisions of the UNDT Statute and the basic doctrine of judicial review.

59. Article 2(1) confers jurisdiction on the UNDT to hear and pass judgment in applications: a) to appeal an administrative decision allegedly not in compliance with an applicant's terms of appointment or contract of employment; b) to appeal an administrative decision imposing a disciplinary measure; and c) to enforce a mediation agreement.

60. This case involves an application to appeal an administrative decision as contemplated in Article 2(1)*(a)* of the UNDT Statute.

61. The word "appeal" when used in a statute can mean one of three things. It can refer to: i) an ordinary appeal (in the narrow sense) which involves a rehearing and redetermination of the merits but limited to the record of evidence on which the decision was originally given; ii) an appeal in the wide sense being a rehearing and redetermination of the merits *de novo*, with or without additional evidence or information; or iii) a judicial review of the legality, reasonableness or procedural fairness of the decision and the manner in which it was reached.

62. An appeal and a review are both ways of reconsidering a decision where the affected party is dissatisfied with the result. However, appeals and reviews perform different functions. An appeal is appropriate where it is thought that the decision-maker came to a wrong conclusion on the facts and the law. It is concerned with the merits of the case, meaning that the appellate body may declare the decision right or wrong.[7] A review, by contrast, is not concerned primarily with the merits of the decision but whether it was arrived at in an acceptable fashion. The enquiry here is whether the decision was lawful, reasonable and procedurally fair. All review grounds fall into one of the three categories: i) legality; ii) reasonableness; or iii) procedural fairness or due process.

63. This Tribunal has confirmed in several judgments that the appeal contemplated in Article 2(1)*(a)* of the UNDT Statute is a judicial review. However, an appeal against an administrative decision imposing a disciplinary measure in terms of Article 2(1)*(b)* potentially may involve both a rehearing and redetermination of the merits of the finding of misconduct *de novo* and a judicial review of the proportionality of the disciplinary sanction.[8]

[7] For example, the appeal court will rule that the lower court's finding that the facts proved murder was wrong in fact if the appeal court finds the accused was in fact not at the scene of the crime, or wrong in law if he did not have the requisite intention to kill.

[8] *Mbaigolmem v. Secretary-General of the United Nations,* Judgment No. 2018-UNAT-818. The appeal in a disciplinary case requires consideration of whether the facts on which the sanction is based

64. The appeal under Article 2(1)*(a),* being a judicial review, involves a determination of the validity of the administrative decision on grounds of legality, reasonableness or procedural fairness. As just mentioned, all review grounds fall within one or other of these three categories. In municipal legal systems, the review grounds have evolved either casuistically or are codified in statutes. However, there is little variance in the scope and purpose of the grounds of review in different legal systems.

65. The grounds of review falling under the rubric of legality include: i) lack of or exceeding authority; ii) improper delegation of authority; iii) unlawful dictation or referral; iv) discretion distorting or jurisdictional errors of law or fact; v) ulterior motive; vi) *mala fides*; vii) failure to take account of relevant considerations; viii) reliance on irrelevant considerations; xi) unlawful fettering of discretion; and x) arbitrary and capricious decision-making.

66. Review on the grounds of reasonableness examines the substantive rationality of a decision and occasionally may involve consideration of the merits of the decision and can thus look like an appeal. However, a review on grounds of reasonableness, unlike an appeal, does not ask whether the decision is right or wrong. It asks whether the decision is one which

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have been established, whether the established facts qualify as misconduct under the Staff Regulations and Rules, and whether the sanction is proportionate to the offence – see *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 17 and 19-21. In *Ricks v. Secretary-General of the United Nations*, Judgment No. UNDT/2018/090, the UNDT, relying on *Mbaigolmem*, correctly held that a *de novo* hearing into findings on misconduct might not always be necessary. Much will depend on the available evidence and the circumstances of the case. However, the UNDT expressed the mistaken view that the decision of this Tribunal in *Mbaigolmem* represented a departure from established precedent supposedly to the effect that it was not the role of the UNDT to conduct a *de novo* hearing. The statement is not quite correct and misconstrues the precedents in question. The UNDT judgment refers to several judgments of this Tribunal, none of which is authority for the proposition. *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302 was concerned merely with whether an applicant has an inviolable right to cross-examine adverse witnesses; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123 relates to the review of a failure to exercise jurisdiction to investigate a complaint; *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-364 found that a *de novo* hearing was necessary; *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407 related only to the review of the proportionality of a sanction; *Jahnsen Lecca v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-408 concerned the lack of particularity in a charge sheet; *Majut v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-862 held that the factual findings *in casu* were speculative; *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537 held that the facts *in casu* had been adequately established; and *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084 was concerned only with the proportionality of a disciplinary sanction. In the premises, the proposition that *Mbaigolmem* introduces a new requirement is not right. A failure by the UNDT to fully determine the facts in appropriate cases, if needs be by a *de novo* hearing, may well (but not invariably) constitute a procedural error or lead to factual errors resulting in a manifestly unreasonable decision permitting the setting aside of the UNDT judgment on appeal.

a reasonable person might have reached. The difference is subtle and it is here that the reviewing tribunal must observe a measure of deference or restraint. In assessing reasonableness, a court does not substitute its own view about what is right or wrong, but defers to an administrator's decision provided it is reasonable, rational or proportional.

67. The first element of reasonableness is rationality which means in essence that a decision must be supported by the evidence and information before the decision-maker and the reasons given for it. The decision must also objectively further the purpose for which the power was given and for which the decision was purportedly taken. There must be a rational objective connection between the material properly available and the conclusion the decision-maker eventually arrived at. Put in another way, there must be a rational connection between the premises and conclusion; between the information (evidence and argument) before the decision-maker and the decision it reached. The second component of reasonable administrative action is proportionality which requires a decision-maker to avoid an imbalance between the adverse and beneficial effects of a decision by using less intrusive or oppressive means to achieve a desired policy end.

68. Review on the grounds of procedural fairness examines whether there has been compliance with the principles and proscriptions of *audi alteram partem* (a fair hearing) and *nemo iudex in sua causa* (bias). The right to a fair hearing is context specific. The content of fairness is not static but must be tailored to the circumstances of each case. The purpose of a fair hearing is to give affected persons an opportunity to participate in the decisions that may adversely affect them and a chance of influencing the ultimate outcome. The aim is to guarantee the dignity of the affected persons and to improve the quality and rationality of decision-making in order to enhance its legitimacy. The rule against bias recognises that decisions are more likely to be sound if they are taken by persons who are unbiased.

69. In this case, the UNDT sustained the review of the contested decision on various grounds of legality, reasonableness and procedural fairness. Its conclusions that the panel relied on irrelevant material, ignored relevant information and was not properly appointed amounted to review on the grounds of illegality. Its findings regarding the failure to interview the former Chief of OSLA, the alleged bias and the inordinate delay in submitting the investigative report pertain to procedural unfairness. The failure to interview the former Chief of OSLA bears also upon the rationality of the contested decision.

70. Two key findings in the Judgment relate specifically to the rationality of the contested decision, but were not consciously perceived as such by the UNDT in its reasoning. The first of these was the finding that the responsible official did not apply the correct test to determine if the established facts amounted to harassment or abuse of authority. This alleged irregularity has both a procedural and substantive dimension potentially impacting on the rationality of the contested decision.

71. The second finding of the UNDT linked to the rationality of the contested decision was its determination that the conduct of the former Chief of OSLA in fact and law constituted prohibited conduct under ST/SGB/2008/5. The UNDT considered the merits of this issue only when considering an appropriate remedy. Instead of entering upon the merits with a view to assessing the rationality of the contested decision, the UNDT pronounced on the prohibited nature of the conduct once it had rescinded the contested decision on the basis of the other review grounds. It therefore examined the issue exclusively as part of its exercise of the remedial powers to order rescission and specific performance.

72. The UNDT rather should have examined the merits of the finding on prohibited conduct as part of a rationality review. Instead, it engaged in an appeal on the merits aimed at substituting its decision for that of the ASG/OHRM. Its approach was erroneous. Nonetheless, it would have been permissible for the UNDT to have weighed the evidence with a view to determining whether there was a rational connection between the information before the responsible official and the contested decision that there was no prohibited conduct requiring further action. Was the contested decision a decision which a reasonable decision-maker could make on the information before it? Despite its erroneous approach, close examination of the UNDT's reasoning indicates that it considered there to be no rational connection between the evidence, the contested decision, the reasons given for it and the purpose of ST/SGB/2008/5 (being to prevent and discipline prohibited conduct). In any event, an appeal is not against the reasoning of the lower tribunal; it is against the order.

73. The UNDT's finding that the former Chief of OSLA may have retaliated against Ms. Belkhabbaz for her work-related conduct and for seeking recourse in the internal justice system and used his position of authority to improperly influence her work conditions is supported by the available evidence. The proven facts reveal that he evicted her from her functions preventing her from carrying out her duties and acted disproportionately beyond what was necessary for the operational requirements of OSLA. It is also undisputed that

he copied uninterested persons in personal and confidential communications concerning Ms. Belkhabbaz's performance issues. There were no immediately apparent legitimate operational reasons for his doing this and he did so despite repeated requests to desist. The UNDT was accordingly correct to hold that in the absence of any countervailing evidence from the former Chief of OSLA justifying his behaviour, and having regard to the extent of the copying, the most plausible inference, at least *prima facie*, is that he intended to humiliate and embarrass Ms. Belkhabbaz, and as such his actions may well constitute possible misconduct or harassment as defined in Section 1.2 of ST/SGB/2008/5.

74. Additionally, the correspondence speaks for itself and discloses that the former Chief of OSLA adopted an aggressive and abrasive tone, made demeaning remarks in his communications to her and thereby created a hostile and offensive work environment and this conduct too possibly constituted harassment in terms of Section 1.2 of ST/SGB/2008/5.

75. Despite these proven facts, the contested decision held that the former Chief of OSLA acted as a reasonable manager and categorized his wide disclosure of confidential information as a "lapse of managerial judgment" without ill-motive. It justified his aggressive and abrasive tone on the basis that Ms. Belkhabbaz's conduct contributed to the tension. As the UNDT pointed out, any reprehensible conduct of a victim should be separately evaluated and should have a limited bearing upon what might be reasonably expected from a senior manager.

76. Moreover, the UNDT did not err in its conclusion that the panel and the responsible official applied the wrong test in determining whether the established facts amounted to prohibited conduct. The panel limited itself to establishing the facts about the allegations made by Ms. Belkhabbaz, while the OiC ASG/OHRM took the next step in deciding if the proven facts amounted to harassment or abuse of authority. The contested decision indicates indisputably that the OiC ASG/OHRM applied a subjective test for determining harassment. The motive of the former Chief of OSLA does not remove his conduct beyond the scope of harassment. In terms of Section 1.2 of ST/SGB/2008/5, harassment includes conduct "that might reasonably be expected or perceived to cause offence or humiliation to another person". As the UNDT stated, the test focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person. It is not necessary to establish that the alleged offender was ill-intended. Both the panel and the responsible official therefore misconceived the nature of the enquiry they were required to conduct – even on the terms of reference inappropriately modified by the

former Executive Director of OAJ.[9] In the result, they unreasonably failed to investigate and determine the relevant issues and thus did not give proper effect to the purpose and prescripts of ST/SGB/2008/5.

77. That finding is fortified by the fact that the panel did not comply with its duty to interview relevant witnesses in terms of Section 5.16 of ST/SGB/2008/5. The blanket limitation it imposed on the number of witnesses called by Ms. Belkhabbaz was arbitrary and inconsistent with its duty to interview *relevant* witnesses. A panel may opt to limit the testimony it hears, but it must do so on reasonable and proper grounds. Moreover, its failure to draw an adverse inference from the un-cooperative attitude of the former Chief of OSLA impacted on the ultimate rationality of the contested decision. The limitation it imposed on the number of Ms. Belkhabbaz's witnesses and its failure to take reasonable steps to interview the former Chief of OSLA contravened Section 5.16 of ST/SGB/2008/5 and contributed to the unreasonableness of the contested decision.

78. It follows that there was no rational connection between the evidence, the contested decision, the reasons for it and the purpose of the empowering provision to prevent and discipline harassment. The contested decision was therefore irrational and not one that a reasonable decision-maker could reach. It falls to be set aside on review on that ground alone.

79. The Secretary-General submits that the UNDT exceeded its jurisdiction by substituting its own judgment for that of the panel and the Administration. He contends that it is not the role of the UNDT to consider the correctness of the choice made by the Administration amongst the various courses of action open to it nor is it the role of the Tribunal to substitute its own decision for that of the Administration. It was the responsibility of the panel to establish the facts and of the responsible official to determine if the facts as established amounted to prohibited conduct. Once that is done, even if it is done incorrectly, unreasonably and irrationally, the Secretary-General would have us hold that there is no scope for review.

[9] The UNDT did not err in concluding that it was inappropriate for the former Executive Director of OAJ to modify the terms of reference. The matter was remanded by this Tribunal on terms of reference which had been judicially confirmed. The conduct added to the overall unreasonableness of the contested decision. We accept also that the panel ignored the relevant findings of the UNDT in earlier decisions and that this too contributed to the unreasonableness of the contested decision in that this resulted in a lack of rational connection between the evidence, properly available, and the contested decision. We, however, see no difficulty in the panel having had regard to earlier written statements by the former Chief of OSLA.

80. The submission in a certain respect misconstrues the nature of the deference or restraint to be observed by, and the remedial powers of, the UNDT in a rationality review. It is true that the UNDT has no power to conduct a *de novo* appeal on the correctness of the panel's findings of prohibited conduct or to substitute beyond its power to order specific performance.[10] However, the Administration must not act irrationally or unreasonably, and, if it does, the UNDT is required to strike down its decisions. When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision. In determining whether a contested administrative decision is reasonable or justifiable in terms of the reasons given for it, usually value judgments will have to be made which will, almost inevitably, involve the consideration of the merits of the contested decision in some way or another. And, by the same token, a finding of unreasonableness, and consequent invalidity, will give rise to the discretion to award specific performance – an order directing the Administration to act as it is contractually and lawfully obliged to act. In the final analysis, the UNDT in this case did no more than that, and it did so insightfully, correctly and after a full consideration of the evidence and arguments before it. The rescission of the contested decision by the UNDT was therefore correct and within its remedial powers under Article 10(5) of the UNDT Statute.

81. However, it is important to record that the former Chief of OSLA was not joined as a party in the proceedings before the UNDT and was not interviewed by the panel. Consequently, our finding that the contested decision was irrational should not be construed as a final determination of misconduct on his part. It is no more than a finding that the evidence rationally justifies a referral for disciplinary action under Section 5.18(c) of ST/SGB/2008/5. For that reason, paragraph (b) of the order of the UNDT declaring that the former Chief of OSLA committed prohibited misconduct under ST/SGB/2008/5 is not competent and falls to be set aside.

82. Although strictly speaking not necessary, there may be profit in commenting briefly on the other allegations of illegality and procedural unfairness.

83. The contention that the panel was improperly constituted is unpersuasive. It is submitted by Ms. Belkhabbaz that Section 5.14 of ST/SGB/2008/5 introduces a peremptory or mandatory and material pre-condition (a jurisdictional fact) that the panel be constituted

[10] *Assale v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-534, para. 41.

by individuals from the department, office or mission and only exceptionally from the OHRM roster. The provision does not introduce a mandatory condition. It is directory; and merely professes a preference, as a matter of policy and practice, that individuals from within the department etc. should be sought first before resorting, if necessary, to the roster. Non-compliance with that preference will not lead to the nullity of any appointment from the roster provided the selection is not unreasonable. There is no evidence supporting any claim that the selection from the roster was unreasonable in this case. The responsible official reasonably believed that appointment from the roster was necessary and justified on account of the two actors involved being within the OAJ.

84. As for the alleged bias of the former Executive Director of OAJ, it might have been wiser for her to have recused herself earlier. Her non-renewal of the contract of employment, amending the terms of reference, constituting the panel from the roster, not giving reasons for recusing herself and not setting aside the appointment of the panel before recusing herself, cumulatively gave rise to a reasonable perception of prejudice against Ms. Belkhabbaz. However, the former Executive Director of OAJ was not the decision-maker of the contested decision. She was responsible for appointing the panel, and her role was administrative and preliminary to the contested decision. The rule against bias applies only to the relevant decision-maker and there was no challenge to the decision appointing the panel. The evidence does not support a reasonable perception or inference that the ASG/OHRM, when taking the decision, was biased against Ms. Belkhabbaz.

85. Finally, the Secretary-General challenges the relief ordered by the UNDT, most importantly the decision of the UNDT to remand the matter to the ASG/OHRM to institute disciplinary procedures against the former Chief of OSLA in accordance with Section 5.18(c) of ST/SGB/2008/5, arguing, once more, that the UNDT may not substitute its decision for that of the ASG/OHRM.

86. Section 5.18(c) of ST/SGB/2008/5 reads:

> If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance

> with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

87. This provision imposes a duty on the responsible official to refer well-founded allegations to the ASG/OHRM for disciplinary action. If the allegations of harassment or abuse of authority are well-founded and disclose possible misconduct, the responsible official *shall* refer the matter to the ASG/OHRM for disciplinary proceedings who *will* proceed in accordance with applicable disciplinary procedures. The failure to act may be remedied by an order of specific performance in terms of Article 10(5) of the UNDT Statute. The order of specific performance does not involve the UNDT substituting its decision for that of the Administration. It is an order enforcing the obligation to act. Consequently, the order of the UNDT remanding the matter to the ASG/OHRM to proceed with discipline is within the competence of the UNDT. However, the directive in paragraph (c) of the UNDT's order directing the ASG/OHRM to "institute" disciplinary proceedings impinges upon the discretion of the ASG/OHRM. The appropriate order is one directing the ASG/OHRM to act in terms of Section 5.18(c) of ST/SGB/2008/5 in accordance with the findings of this judgment. The order of the UNDT must accordingly be modified to that extent.

88. Ms. Belkhabbaz produced medical certificates and reports showing that she sought psychological support from 23 June 2011 to deal with the situation of harassment. She underwent psychological treatments and received medication to deal with her stress. She was diagnosed with post-traumatic stress and a severe depressive episode mainly linked to a conflict at work and the negative outcome of the investigation. Because she was going through a high-risk pregnancy, she was prevented from taking anti-depressive medication. On 3 April 2014, she again consulted a psychiatrist in the United States after she left Geneva as she continued to suffer from depression and anxiety. At various times she was declared unfit for work as a result of the ongoing conflict with her superior.

89. Based on this evidence, the UNDT held Ms. Belkhabbaz was entitled to compensation for the psychological harm caused by the inordinate delays in handling her complaint and the several procedural errors which had caused her to, *inter alia*, undergo two successive investigations and lose her employment without her complaint being resolved. Given the severe gravity of the moral harm over a period of approximately three years, the UNDT awarded moral damages in the amount of USD 20,000. It also awarded compensation for

the loss of opportunity to have her complaint fully and properly investigated as a result of the impossibility to conduct a third investigation at this stage in the amount of USD 10,000.

90. Compensation must be determined following a principled approach and on a case by case basis. The medical evidence convincingly establishes that Ms. Belkhabbaz suffered psychological harm from the harassment and the manner of the investigation of her complaints. However, Ms. Belkhabbaz contributed to several months of delay, by not making herself available for interview for over four months from the date the panel was established. Moreover, Ms. Belkhabbaz did not lose an opportunity to have her complaint properly investigated. She was provided with ample opportunity to give the panel all the information that she considered to be relevant. An award of moral damages in the amount of USD 30,000 is excessive in the circumstances and should be reduced to USD 10,000.

91. In the premises, the appeal partly succeeds and the order of the UNDT must accordingly be modified.

Judgment

92. The appeal is partly upheld and the order of the UNDT is modified and substituted as follows:

a) The contested decision to take no further action into Ms. Belkhabbaz's complaint of harassment and abuse of authority against the former Chief of OSLA is rescinded.

b) The ASG/OHRM is directed to proceed in relation to this matter in accordance with the provisions of Section 5.18(c) of ST/SGB/2008/5.

c) Ms. Belkhabbaz shall be paid moral damages in the amount of USD 10,000.

d) The compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment. An additional five percent shall be applied to the prime rate 60 days from the date this Judgment becomes executable.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Raikos	Judge Thomas-Felix

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar