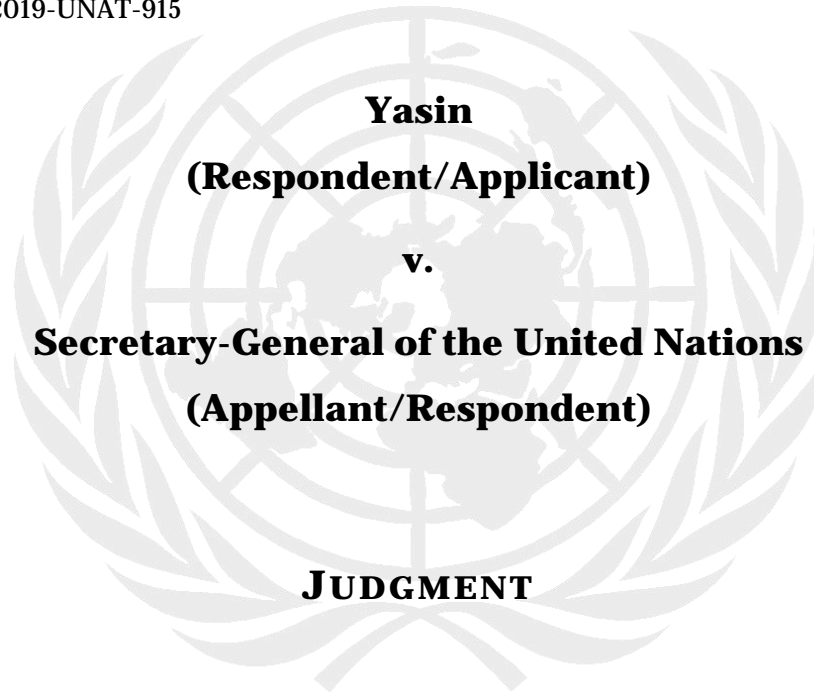




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-915



**Yasin
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge Sabine Knierim
Judge John Raymond Murphy

Case No.: 2018-1209

Date: 29 March 2019

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Daniel Trup, OSLA

Counsel for Appellant/Respondent: Amy Wood

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/087, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 4 September 2018, in the case of *Yasin v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 5 November 2018, and Ms. Haseena Yasin filed her answer on 17 December 2018.

Facts and Procedure

2. For two years from February 2013 to February 2015, Ms. Yasin worked as Chief of Mission Support (CMS) at the United Nations Assistance Mission in Iraq (UNAMI), Baghdad.

3. The Office of Internal Oversight Services (OIOS) has its presence at UNAMI through an Audit Unit headed by a Chief Resident Auditor. A few days after he arrived in Baghdad on assignment in November 2012, the Chief Resident Auditor and the entire Audit Unit were relocated from Baghdad to Kuwait City mainly due to the crisis in Syria and other security concerns as well as a space shortage in Baghdad. However, it was not clear whether the move was temporary or prolonged. It was also not clear how to mitigate the monetary loss that the Chief Resident Auditor and his audit team sustained as a result of the change of duty station from Baghdad to Kuwait City. The daily subsistence allowance (DSA) rate and other financial entitlements for Iraq were higher than those for Kuwait. The Director of the Internal Audit Division (IAD), OIOS, at Headquarters in New York (Director), was the Chief Resident Auditor's direct supervisor, while the Chief of Staff of UNAMI (CoS) acted as the Chief Resident Auditor's supervisor at UNAMI for the purposes of, *inter alia*, approving his movement of personnel (MOP) forms for official travels.

4. On 18 March 2013, while visiting New York, the CoS met the Director and the two discussed the sudden relocation of the Audit Unit to Kuwait City. The Director asked the CoS about whether the Rest and Recuperation (R&R) entitlement and the cycle of four weeks for any staff travelling to Iraq would apply to the auditors now located in Kuwait. In a subsequent interview with a Fact-Finding Panel (FFP) on 26 January 2015, the Director stated that she did not remember discussing any issue other than the R&R entitlements with the CoS during that meeting.

5. The CoS, however, had a different recollection of his conversation with the Director during the 18 March 2013 meeting. According to the CoS, during their meeting, the Director

... went to a great length on how the decision of the Office of the [Special Representative of the Secretary-General (SRSG), UNAMI] had negatively impacted her team. [...] [T]his sudden decision of not basing her staff in Baghdad had negatively affect[ed] them in terms of their entitlements (financial and leave). Then she went on to propose that [UNAMI] consider allowing her team to engage in missions to Iraq of sufficient duration that would allow them to make up for their entitlements.

The CoS recalled that he

... was taken aback by her suggestion and considered this request unprofessional, particularly coming from OIOS management; however, [he] did not say anything. There is an email that attests to the subject of this basic exchange which [he] had supplied in support of [his] assertions. ... The discussion with [the Director] disturbed [him] greatly and [he] shared the basic contents of the exchange with [his] special assistant in the first instance. [He] did not discuss this exchange with [the Chief Resident Auditor] ... [though the CoS] did mention this to the SRSG and the CMS ...

Ms. Yasin recalled the CoS saying to her, upon his return from New York: “guess what, [the Director] told me [meaning the CoS] that we should let the Auditor go to Baghdad to make up for his DSA”. Ms. Yasin did not believe that “[the] CoS would make this up”. In his explanation to the FFP, the CoS stated that “[t]his encounter [with the Director] and her insistence on this matter impacted [his] subsequent assessment of [the Chief Resident Auditor’s] request”.

6. On 12 January 2014, the Director sent an interoffice memorandum titled “Notification of planned OIOS audit” to the SRSG/UNAMI notifying him of a planned OIOS audit of fleet management in UNAMI (fuel, maintenance and spare parts). Ms. Yasin was copied on the memorandum. The memorandum indicated that the plan was to conduct fieldwork in Baghdad, Erbil and Kuwait from January 2014 to March 2014 by an audit team comprising of the Chief Resident Auditor and two others. The Director informed the SRSG/UNAMI that the audit team would contact his Office shortly to arrange an entry conference. The IAD’s internal audit protocol was attached to the memorandum. It listed the audit process as consisting of i) audit notification, ii) entry conference, iii) fieldwork, iv) exit conference, v) final audit report, vi) overall opinion, vii) audit recommendations, and viii) monitoring the implementation of audit recommendations.

7. On 15 January 2014, Ms. Yasin received an e-mail directly from the Chief Resident Auditor. In this e-mail, the Chief Resident Auditor wrote:

As you are aware we have sent out the audit notification letter for the above audit and I intend to come to Baghdad for about a week's planning visit (from Tuesday) before the commencement of the audit. I will be in touch mostly with the Chief of Transport, [to] who[m] I will send a list of requirements today. We will subsequently come in February for the field work at which time we will have the entry conference, so this is essentially a courtesy notification.

I am sure that I will see you when I come, although the entry conference will happen later.

8. On 19 January 2014, Ms. Yasin replied:

Yes, we received the audit notice. Grateful if you could clarify whether it is standard practice for the visit to take place prior to the entry conference. Thank you.

9. On the same day, the Chief Resident Auditor replied to Ms. Yasin:

This is just a planning visit not by the whole team to update our understanding of the system. It is usually standard practice except that we have been involved more with horizontal audits lately and the audit plans are prepared centrally by [Headquarters]. We are not auditing at this time but we will request for information and get a general overview of the systems in place. Please let me know if you will require any further clarification.

10. On 19 January 2014, the Chief Resident Auditor submitted his MOP form for a 12-day trip to Baghdad, departing Kuwait on Tuesday, 21 January 2014 and returning to Kuwait on Sunday, 2 February 2014.¹ The MOP form stated that the purpose of the travel was "audit of fleet management". On the same form, the Chief Resident Auditor stated that "I certify that video conference and audio-conference, online meetings and other remote business practices have been carefully reviewed and found not to be effective for the objective of this travel".

11. On 19 January 2014, the CoS signed the MOP form. On 20 January 2014, the security clearance for the Chief Resident Auditor's travel to Baghdad was approved, and the MOP form was forwarded to Ms. Yasin for final approval. Ms. Yasin reviewed the MOP request and, in a telephone conversation with the CoS, she highlighted her concerns regarding the reasons provided by the Chief Resident Auditor for his "long two week 'pre-audit'", especially when "[t]he entry conference was not yet held and therefore [she] could not understand why the audit field

¹ Normal working days are from Sunday to Thursday in Iraq and Kuwait.

work would precede the entry conference”. Ms. Yasin suggested putting the Chief Resident Auditor’s mission on hold by withdrawing the CoS’ initial security clearance pending obtaining further clarity about the mission.

12. On 20 January 2014, the CoS withdrew his signature from the MOP form. A series of e-mail exchanges and phone calls ensued between the Chief Resident Auditor and the CoS, in which the CoS requested the Chief Resident Auditor, due to the security situation in Iraq, to submit a detailed visit programme outlining more clearly his daily activities to facilitate the MOP clearance. The Chief Resident Auditor objected to that additional requirement, reminding the CoS that the UNAMI Security had already approved his Baghdad travel.

13. The matter was brought to the Director’s attention. The Director asked the CoS to provide a copy of any detailed itinerary submitted by other staff travelling to Baghdad. No such copy was provided. The Director also telephoned Ms. Yasin to discuss the matter. After those telephone calls, the Director advised the Chief Resident Auditor to file a new MOP form clarifying that the audit in question could not be achieved via video-conference.

14. A Senior Management Meeting (SMM) took place on 21 January 2014. The SMM is mandated to review developments, alert the management to emerging trends and operational issues, and provide a forum for ensuring that critical issues that may affect strategic or operational planning, policy coordination, senior level decision-making and information management at the mission level are addressed. A brief summary of the SMM discussions/decision points is circulated after every meeting. The meetings are normally attended by 15 to 18 people including senior managers and section heads. At the SMM on 21 January 2014, which Ms. Yasin and the CoS attended among others, the issue of the Chief Resident Auditor’s request to travel to Baghdad for a pre-planning mission was discussed. Ms. Yasin recalled the CoS relaying his account of the conversation he had had with the Director in New York in March 2013. The SMM minutes of the same date on the issue read:

[I]ssue of the Auditor’s two-week “pre-planning mission” to Baghdad was discussed and rationale for it questioned. It seems that making up for financial loss incurred due to the move to Kuwait features prominently in the decision to visit Baghdad. However, the

mission is strongly backed by the Chief [Resident Auditor]. [Ms. Yasin] has suggested rotating out the auditor because he has been seriously compromised.²

15. On 23 January 2014, the Chief Resident Auditor submitted a revised MOP form; it was approved on the same day. He travelled to Baghdad on 28 January 2014 and stayed there till 9 February 2014.

16. On 3 March 2014, Chief Resident Auditor lodged a complaint of abuse of authority and harassment against the CoS and Ms. Yasin pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). He alleged that Ms. Yasin and the CoS had abused their authority by *inter alia* interfering with his travel thereby preventing him from carrying out his audit duties in a timely manner without reasonable cause, making malicious, unsubstantiated, ill-motivated and derogatory statements against his person at the SMM, allowing those statements to be published in the minutes of the SMM, conspiring to have the Chief Resident Auditor withdrawn from UNAMI, making comments and allowing innuendo to discredit his personal and professional integrity, character and standing among an undetermined number of colleagues, inciting others to form adverse opinions about him, creating a hostile work environment for him, and retaliating against him because of his decision to pursue a matter with the Dispute Tribunal.³

17. On 17 April 2014, the Chief Resident Auditor's complaint against the CoS and Ms. Yasin was referred to the SRSG/UNAMI. On 6 August 2014, the SRSG/UNAMI appointed an FFP to conduct an investigation and establish the facts pursuant to ST/SGB/2008/5.

² In her interview with the FFP, Ms. Yasin recalled stating at the SMM that “[s]ince [the Chief Resident Auditor] was involved in recruitments, DSA problems and threatening people that he would come after them with audit related issues, he was compromised”.

³ On 20 November 2013, the Chief Resident Auditor filed an application with the Dispute Tribunal against the decision to change his duty station from Baghdad to Kuwait. In Judgment No. UNDT/2015/099, the UNDT found the contested decision was lawful and, moreover, the Chief Resident Auditor was entitled to the DSA and hardship allowances applicable to Baghdad only for the days he had actually spent in Baghdad (10 – 19 November 2012). The Chief Resident Auditor appealed, and the Appeals Tribunal affirmed the UNDT Judgment. (See *Awe v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-667.)

18. On 11 August 2014, the FFP panel informed the Chief Resident Auditor, Ms. Yasin and the CoS of the allegations and of the convening of an investigation panel. The FFP went to Kuwait City to conduct the investigation and interview witnesses including the Chief Resident Auditor, Ms. Yasin and the CoS.⁴

19. Under cover of a memorandum dated 18 February 2015, the FFP provided the SRSG/UNAMI with an initial investigation report. After the SRSG/UNAMI sought additional clarifications from the FFP on its findings, the FFP issued an addendum to the report on 24 March 2015.

20. In the report, the FFP noted the account given by the CoS of his conversation with the Director in New York in March 2013, but it also noted the discrepancies between his account and the Director's version. The FFP found, among other things, one allegation by the Chief Resident Auditor substantiated and six allegations partially substantiated. In the view of the FFP, by withdrawing the MOP form for the Chief Resident Auditor on the grounds of security clearance, instead of addressing her concerns in a straightforward manner with either the Chief Resident Auditor or the Director as his supervisor, Ms. Yasin had acted on the basis of unsubstantiated suspicion, resulting in the delay of the Chief Resident Auditor's mission to Baghdad by one week.⁵ The FFP also found that while not "malicious", Ms. Yasin's statements and those of the CoS in respect of the Chief Resident Auditor at the SMM were "unsubstantiated", "ill-motivated" and "derogatory", that she had allowed the SMM minutes containing sensitive statements of a non-operational nature that she and the CoS had made to be circulated to the section chiefs, that she had failed to provide substantiated facts in support of her recommendation to have the Chief Resident Auditor rotated out from UNAMI, that her comments at the SMM had a *de facto* harmful impact on the Chief Resident Auditor in his personal and professional standing, in the sense that they could potentially make it more challenging for the Chief Resident Auditor to perform his official duties at UNAMI.

⁴ The interviews were tape recorded. However, the secretary of the FFP subsequently was unable to operate those tapes because she could not find a compatible device to play and listen to the interview statements recorded. According to OHRM, the device used by the FFP was obsolete and no longer available in other missions. The absence of the recordings of the interviews later became an issue, when Ms. Yasin disputed the accuracy of some of the interviews transcribed.

⁵ In his interview with the FFP, the CoS stated: "I preferred to delay [the Chief Resident Auditor's] mission pending the receipt of complementary information rather than tell him that he was suspected of having put in an ill-founded mission motivated by possible financial gain."

21. By memorandum dated 23 April 2015, the SRSG/UNAMI advised the Under-Secretary-General for the Department of Field Support (USG/DFS) of the outcome of the FFP investigation and his concurrence with the FFP findings. The SRSG/UNAMI also advised the USG/DFS of his decision to issue the CoS a written reprimand, as his conduct “while unacceptable, [did] not warrant disciplinary action”. However, he had to refer the matter of Ms. Yasin to the USG/DFS for appropriate action, as Ms. Yasin had left UNAMI and returned to the Headquarters.

22. On 9 June 2015, the USG/DFS forwarded the SRSG’s report and the FFP report to the Under-Secretary-General for the Department of Peacekeeping Operations (USG/DPKO).

23. In February 2016, the USG/DPKO forwarded both reports to the Assistant Secretary-General for Human Resources Management (ASG/OHRM). In his view, Ms. Yasin’s behavior “seem[ed] to indicate that she me[t] the definitional requirements of harassment in [...] ST/SGB/2008/5”. The USG/DPKO therefore referred the matter of Ms. Yasin for possible disciplinary action in line with Section 5.18(c) of ST/SGB/2008/5.

24. On 3 October 2016, OHRM sent a memorandum dated 28 September 2016 to Ms. Yasin informing her of the allegations of misconduct against her (Charge Letter). Specifically, it was alleged that Ms. Yasin had harassed, and/or abused her authority towards the Chief Resident Auditor, with no reasonable justification or factual basis. According to the memorandum, she made derogatory comments about the Chief Resident Auditor and his purpose of travel to Baghdad at an SMM. Moreover, she allegedly took actions to ensure the MOP request from the Chief Resident Auditor for his official travel to Baghdad would be withheld. In the memorandum, OHRM warned that Ms. Yasin’s conduct, if established, would constitute sexual harassment and abuse of authority within the meaning of Section 1.3 of ST/SGB/2008/5 and a violation of ST/SGB/2008/5, Staff Regulation 1.2(a) and Staff Rule 1.2(f).⁶

25. On 26 October 2016, Ms. Yasin provided her response, in which she rejected the allegations of misconduct. Ms. Yasin maintained that regarding her questioning of the Chief Resident Auditor in respect of his travel plan to Baghdad in January 2014, she felt that the reasoning provided by the Chief Resident Auditor, the failure to undertake an entry conference procedure as stipulated in the audit manual, the travel request for one person rather than for all

⁶ OHRM subsequently clarified that Ms. Yasin was accused of having committed harassment, and not sexual harassment.

of the audit team, the lack of detailed discussions with the Transport Unit which was predominantly based in Kuwait, did not justify the proposed travel. As the CMS for UNAMI having responsibility for the costs of such a visit for a future audit, she had a duty to make queries to ensure compliance with the Organization's rules and procedures. She raised her legitimate concerns following an independent and objective assessment of the facts and provided policy advice to the SRSG/UNAMI at the SMM upon request. She stated that her conduct was "purely professional with the interest of the organisation at the forefront of [her] mind". Ms. Yasin requested that no further action be taken against her.

26. On 17 January 2017, the ASG/OHRM sent a letter (Reprimand Letter) to Ms. Yasin notifying her that, following the investigation into the harassment allegations that the Chief Resident Auditor had lodged against her, she had decided to drop the charge that she had made derogatory comments about the Chief Resident Auditor and his purpose of travel at the SMM for "insufficient evidence". However, her actions in respect of the Chief Resident Auditor's travel request exhibited shortcomings in communication skills. Consequently, the ASG/OHRM decided to close the matter but she also decided to issue Ms. Yasin a letter of written reprimand as an administrative measure to be placed in her official status file. Moreover, she required Ms. Yasin to undertake an on-site training course with a focus on communication and problem-solving skills.

27. On 20 March 2017, Ms. Yasin filed an application with the Dispute Tribunal. In the impugned Judgment, the UNDT found that Ms. Yasin's actions forming the basis of the contested decision to issue her a letter of reprimand "were reasonable and in accordance with her obligation to carefully verify the cost of administrative services, procurement and logistical support, since all the costs were supported by UNAMI, in order to ensure that all the provisions of the OIOS Audit Manual were respected", and those actions were taken "within the margins of her role and responsibilities".⁷ Moreover, they did not cause any delay of the Chief Resident Auditor's travel to UNAMI.⁸ Applying Section 1.2 of ST/SGB/2008/5 to the case, the Dispute Tribunal considered that the different views that Ms. Yasin and the Chief Resident Auditor held about the audit field work reflected disagreement on work performance; they were not harassment. The Dispute Tribunal consequently considered the decision to reprimand Ms. Yasin as "not being justified"⁹ and ordered its rescission. Moreover, the UNDT ordered the

⁷ Impugned Judgment, paras. 67 and 71.

⁸ *Ibid.*, para. 73.

⁹ *Ibid.*, para. 75.

removal of the letter of reprimand from Ms. Yasin's official status file. However, the Dispute Tribunal endorsed the decision to require Ms. Yasin to undertake an on-site training course, as Ms. Yasin did not contest it and the training course was appropriate and sufficient for the purpose of helping her improve her professional communication skills.

Submissions

The Secretary-General's Appeal

28. The contested decision to issue Ms. Yasin a letter of reprimand should be upheld, as it was appropriate and was based on reasonable grounds given the facts of the case. The issuance of a letter of reprimand to Ms. Yasin was not arbitrary; it was based on a thorough and careful investigation and the generally undisputed facts. In the process, Ms. Yasin's right to due process was fully respected.

29. The Dispute Tribunal exceeded its competence and erred in law and fact in ordering rescission of the written reprimand on the grounds that it was not justified. That holding was not consistent with the jurisprudence of the Appeals Tribunal, because the UNDT conducted a merits-based, rather than judicial, review of the contested decision. The UNDT did not find any procedural error in the way the investigation had been conducted. Neither did it find that the reprimand was manifestly disproportionate in relation to the established facts. Rather, the UNDT considered that another course of action would have been more justified. In so ruling, the Dispute Tribunal stepped into the shoes of the Secretary-General. A difference of opinion does not render the contested decision unjustified or otherwise unlawful.

30. The Dispute Tribunal misconstrued the factual basis for the written reprimand. The reprimand was issued to Ms. Yasin, not because she had "acted without a reason with the sole objective to delay the audit visit",¹⁰ but because her actions had caused the Chief Resident Auditor to feel harassed and humiliated, due to her shortcomings in communication skills.

31. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and uphold the contested decision to issue Ms. Yasin a letter of reprimand.

¹⁰ *Ibid.*, para. 71.

Ms. Yasin's Answer

32. The Secretary-General has failed to indicate under which heading of irregularity as enumerated in Article 2(1) of the Appeals Tribunal Statute he has filed the present appeal. Merely stating that the issuance of a written reprimand was appropriate is not sufficient for the purposes of an appeal. On this ground alone, the appeal should be rejected.

33. By suggesting that Ms. Yasin had an opportunity to respond to the allegations of misconduct prior to the UNDT hearing and was therefore not entitled to challenge the subsequent reprimand and that consequently the Dispute Tribunal erred in reviewing such a decision, the Secretary-General is advancing a legal argument that was not raised at trial. That argument may not be introduced at this stage.

34. The Dispute Tribunal did not err in law or in competence in ordering rescission of the contested decision on the grounds that it was not justified. Ms. Yasin as the CMS acted reasonably in the circumstances, and her actions cannot be interpreted as harassing or humiliating the Chief Resident Auditor. Raising inquiries about the Chief Resident Auditor's travel for further information should not be equated with a charge of harassment or a prevention of duties. She was responsible for managing the purse strings for the entire UNAMI and had to ensure that the most stringent of the financial rules were applied across the board. She was carrying out her fiduciary responsibilities and obligatory due diligence pursuant to the existing applicable financial regulations and rules as a representative of the Secretary-General at UNAMI. Therefore, due deference must be given to those obligations. The Dispute Tribunal recognized those commitments by concluding that Ms. Yasin's actions were reasonable in accordance with her obligations. The only logical conclusion was for the UNDT to order the removal of the written reprimand from Ms. Yasin's official status file.

35. Ms. Yasin requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

36. The issue on appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision to issue Ms. Yasin a written reprimand was unlawful.

Applicable law

37. Staff Rule 10.1 on misconduct states that:

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

(b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be willful, reckless or grossly negligent.

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

38. Staff Rule 10.2 on disciplinary measures states, in relevant parts, that:

(a) Disciplinary measures may take one or more of the following forms only:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

...

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

39. Staff Rule 10.3 on due process in the disciplinary process states that:

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

(d) An appeal against a judgment of the United Nations Dispute Tribunal by the staff member or by the Secretary-General may be filed with the United Nations Appeals Tribunal in accordance with chapter XI of the Staff Rules.

40. Sections 9 and 10 of Administrative Instruction ST/AI/371, as revised by ST/AI/371/Amend.1, titled "Revised disciplinary measures and procedures", provide as follows:

... Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:

(a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. The Assistant Secretary-General may, however, decide to impose one or

more of the non-disciplinary measures indicated in staff rule 10.2(b)(i) and (ii), where appropriate; or

(b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General. The Office of Legal Affairs shall review recommendations for dismissal of staff under staff rule 10.2(a)(ix). Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.

III. Application to the United Nations Dispute Tribunal

... A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process is not required to request a management evaluation, and may submit an application to the United Nations Dispute Tribunal in accordance with chapter XI of the Staff Rules. The submission of an application to the United Nations Dispute Tribunal contesting a disciplinary or non-disciplinary measure imposed following the conclusion of the disciplinary process shall be made within 90 calendar days of receiving notification of the decision. The filing of such an application shall not have the effect of suspending the measure.

41. Staff Regulation 1.2 on basic rights and obligations of staff provides as follows:

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

Staff Rule 1.2 under the same title reads, in part:

(g) Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization ... nor shall staff members ... engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions.

42. Under the applicable legislative framework, the Secretary-General is bestowed with the discretionary authority to, *inter alia*, impose a disciplinary or an administrative (non-disciplinary) measure on a staff member, who has failed to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or the relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant.

43. The Appeals Tribunal, however, recalls its jurisprudence that the discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.¹¹

44. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. It may consider whether relevant matters were ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.¹²

45. As a result of the judicial review, the first instance tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process, the first instance tribunal is not conducting a

¹¹ *Abu Leahia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 17, citing, *inter alia*, *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-798, para. 24; *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 40. See also *Pérez-Soto v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-329; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

¹² *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 27; *Abu Leahia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 20; *Verma v Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 13; *Riecan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-802, para. 13.

merit-based review, but a judicial one. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.¹³

46. As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she, by necessary implication, also challenges the validity of the reasons underpinning that decision.¹⁴ In this respect, as applied to this case, the Tribunal may examine the surrounding circumstances to determine whether the impugned decision was tainted by abuse of authority.

47. Further, in compliance with the above stated principles of judicial review, although the reprimand is not a disciplinary measure but an administrative one,¹⁵ because of its adverse impact on the concerned staff member's career, it must be warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of "preponderance of evidence",¹⁶ and be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised.¹⁷

48. As we have stated in *Obdeijn*:¹⁸

¹³ *Abu Leahia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 20; *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-798, para. 24; *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 26, citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 28.

¹⁴ *Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 30.

¹⁵ *Elobaid v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-822, para. 24.

¹⁶ *Ibid.*, para. 35.

¹⁷ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 46, citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 30, and citations therein.

¹⁸ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 36.

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

49. In the case at hand, as per the Reprimand Letter issued on 17 January 2017 by the then ASG/OHRM, the reasoning of the Administration's decision to issue Ms. Yasin a letter of reprimand (and to require her to undertake an on-site training course with a focus on communication and problem-solving skills), as reflected in the relevant facts therein, includes that Ms. Yasin had put the Chief Resident Auditor's MOP request on hold with no reasonable justification or factual basis, and that her actions exhibited shortcomings in communication skills in the context of solving a problem, since her concerns about the MOP form could have been adequately addressed at the time through a constructive and open discussion, the lack of which caused the Chief Resident Auditor to feel that he had been harassed.

50. In the first place, in reviewing the veracity of the factual basis for the impugned written reprimand, the UNDT noted, *inter alia*, that:¹⁹

... at the time of the events (January 2014), the Applicant was the CMS in UNAMI during the period from February 2013 to February 2015, and according to her letter of delegation of authority of 10 April 2013 and, in this capacity, she was responsible for certifying proposed obligations or expenditures on services, facilities, supplies and equipment, as well as those pertaining to personnel. Such certifications were to be, *inter alia*, a) in accord with the Financial Regulations and Rules and related instructions of the United Nations; b) in accord with the purpose(s) for which the relevant appropriation(s) and staffing table(s) were approved and the corresponding allotment(s) made; and c) were reasonable and in accord with the principles of efficiency and effectiveness.

... The then CoS was Mr. MR. The Tribunal notes that as mentioned by the e-Guide to the DPKO and DFS, the CMS is the most senior official within the mission who is authorized to expend the United Nations funds associated with the mission's allocated budget, and his or her work is generally supported by the Chief of Administrative Services and the Chief Integrated Support Services. The then CoS, Mr. MR, was the one who decided to withdraw the first MOP that he signed, due to the necessity to obtain further clarifications.

¹⁹ Impugned Judgment, paras. 57, 58, 60 and 65.

... The Applicant testified that she was responsible for certifying that the proposed obligations and expenditures on services, facilities, supplies and equipment, as well as those pertaining to personnel, were reasonable and accorded with the principles of efficiency and effectiveness and that, in her understanding, it was her obligation to ensure that any proposed travel or any expenditure would be utilized in the best possible way for the Organization, the way that is efficient and effective. The Applicant also testified that she had the responsibility to keep clear records to justify any actions she took, as clearly stated in item a) of the letter of delegation of authority of 10 April 2013, which reads that “any proposed expenditures must accord with the Financial Regulation[s and] Rules and related instructions” and that, in the present case, a related instruction would be the administrative instruction on travel. She further testified that she used this body of information to justify whether she was going to grant the first MOP request and its corresponding cost. During her testimony, the Applicant explained the difference between a pre-analytical visit (or “pre-plan and visit”) and an entry conference. She stated that the previous audits (about seven of them) that the IAD/OIOS team had conducted in UNAMI had always had an entry conference prior to the beginning of the audit itself. She explained that entry conferences had consistently been conducted via VTC since the audit team was based in Kuwait and not in Baghdad. She stated that, in the present case, it was the first time [the Chief Resident Auditor], who had been part of the IAD/OIOS previous audits in UNAMI, had “tried to do something that he termed a ‘pre-plan and visit’ prior to an entry conference”. She added that she was familiar with the IAD/OIOS Audit Manual and that, in her opinion, if this “pre-plan and visit” had been standard practice, it would have been mentioned in the notification letter. For these reasons she was not convinced that this visit was standard practice and that is why she asked [the Chief Resident Auditor] for further clarification.

... The Applicant informed the then CoS, Mr. MR, about her views that there was a need to clarify whether it is standard practice for a visit to take place prior to the entry conference and about the necessity to obtain such further clarifications. Mr. MR then decided in his capacity as CoS, based on his own evaluation of the particular circumstances of the situation, to withdraw his signature from the first MOP on 20 January 2014, which he had previously signed on the same day, in order to obtain further clarifications vis-à-vis the alternative resources available within UNAMI, namely VTC.

51. The UNDT went on to find that Ms. Yasin’s “actions were reasonable and in accordance with her obligation to carefully verify the cost of administrative services, procurement and logistical support, since all the costs were supported by UNAMI, in order to

ensure that all the provisions of the OIOS Audit Manual were respected”.²⁰ Ms. Yasin “and [the Chief Resident Auditor] had different views about the audit field work and the use of existing video and/or audio conference facilities in UNAMI as an alternative tool to a face-to-face meeting, which appears to result from the specificity of the language used in this regard”.²¹ “[T]here was no concrete negative result on the planned audit resulting from the annulment of the first MOP and that [Ms. Yasin’s] actions, which she was taking in her capacity as CMS in UNAMI, consisting in a careful review of the alternative means to a face-to-face visit which could have resulted in a lower level of the costs, appear to have been conducted within the margins of her role and responsibilities. There is no convincing evidence that [Ms. Yasin] exceeded her competence and that she acted without a reason with the sole objective to delay the audit visit.”²² And Ms. Yasin “acted within the limit of her responsibility while asking for clarifications from [the Chief Resident Auditor] regarding the first MOP request and informing the then CoS, Mr. MR, about her concerns and/or the possibility to use alternative means, like [video teleconference] facilities. Even though the first MOP was withdrawn by the then CoS on 20 January 2014, all the aspects were clarified on the same day and [the Chief Resident Auditor], as advised by his supervisor, Ms. EB, submitted the second MOP for approval on 23 January 2014. The travel dates were changed by [the Chief Resident Auditor] himself and there was no delay of his travel to UNAMI resulting from [Ms. Yasin’s] actions.”²³

52. Finally, the UNDT, having regard to these findings, determined, *inter alia*, that the contested administrative measure of a written reprimand was not justified, since Ms. Yasin did not withhold or delay the Chief Resident Auditor’s travel to UNAMI, and therefore was to be rescinded as unlawful.

53. The Secretary-General contends in his appeal that the UNDT erred in law and fact by making these findings, in that the record in the case demonstrates that the Chief Resident Auditor’s complaint had been carefully investigated, and the findings and conclusions had been taken fully into consideration prior to the issuance of the contested decision. Moreover, the Secretary-General claims that the evidence produced before the UNDT demonstrated that the reprimand was based on reasonable grounds, sufficient to establish the facts to the

²⁰ *Ibid.*, para. 67.

²¹ *Ibid.*, para. 69.

²² *Ibid.*, para. 71.

²³ *Ibid.*, para. 73.

applicable standard of proof, and that the undisputed facts forming the basis for the decision to issue Ms. Yasin a written reprimand were accurately laid out in the Charge Letter and the Reprimand Letter.

54. We do not find these arguments persuasive for the following reasons.

55. First, the UNDT properly reviewed the contested decision in accordance with the applicable law and established the critical facts of the case. It was cognizant of the Appeals Tribunal's relevant jurisprudence governing the exercise of discretionary authority by the Administration and applied correctly the right test that the latter had to pass, without substituting its own assessment for that of the Administration. Specifically, the UNDT embarked on an analytical fact-finding exercise by thoroughly examining the documents on file and witnesses,²⁴ and assessing the ensuing evidence. Based on these findings, as replicated earlier in this Judgment, the UNDT proceeded to the conclusion, challenged by the Secretary-General on appeal, that the impugned administrative decision was unlawful.

56. Secondly, the Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. This Tribunal is mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before it.²⁵ We hold that the UNDT's conclusion is consistent with the evidence. The Secretary-General has not put forward any persuasive grounds to warrant interference by this Tribunal.

57. Finally, we are satisfied with the UNDT's conclusion that the impugned administrative decision was unlawful, although with different reasoning. In particular, given the factual circumstances of the case at hand, as correctly and thoroughly established by the

²⁴ *Ibid.*, para. 5ff. and paras. 57 to 70.

²⁵ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 59; *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 29, citing *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37; *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582, para. 25, citing *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35 and citation therein.

UNDT, the Appeals Tribunal holds that the facts underpinning the administrative decision to issue Ms. Yasin a written reprimand cannot uphold its reasoning, which is therefore flawed.

58. Indeed, the Secretary-General submits that the UNDT misconstrued the factual basis for the written reprimand, in that Ms. Yasin had shown shortcomings in her communication skills, since she had submitted no evidence to support her suspicion that the Chief Resident Auditor's travel was ill-motivated and, furthermore, that after receiving the Chief Resident Auditor's first MOP form, she did not contact him for further discussion, but asked the CoS to withdraw his approval on the MOP, and finally that the record showed no indication that she undertook due diligence to verify and/or address her concerns before or after she had raised a suspicion with the CoS over the Chief Resident Auditor's motives. Therefore, as alleged by the Secretary-General, the record in the case unequivocally demonstrates that Ms. Yasin was issued a written reprimand because, due to "shortcomings in [her] communication skills", her actions had caused the Chief Resident Auditor to feel "harassed" and "humiliate[ed]".

59. However, contrary to the Secretary-General's submissions, the UNDT's factual findings and conclusions, with which we agree and uphold, point to the opposite evidentiary assessment, weakening, thus, the reasoning of the impugned administrative measure, which, therefore, is not predicated on reliable facts, established to the requisite standard of proof, to the effect that Ms. Yasin had "put [the Chief Resident Auditor's] MOP on hold with no reasonable justification or factual basis", and that her "actions exhibited shortcomings in communication skills in the context of solving a problem", since her concerns about the MOP form "could have been adequately addressed at the time through a constructive and open discussion", the lack of which caused the Chief Resident Auditor to feel that he had been harassed.

60. Moreover, we do not find merit in the Secretary-General's assertion that the issuance of a written reprimand was appropriate—and therefore lawful—in the present case, just because it was based on a thorough investigation, the facts of which were generally undisputed, and that the facts "forming the basis for the decision to issue [Ms. Yasin] a written reprimand were accurately laid out in the Charge Letter and the Reprimand Letter". This argument seems to disregard that the critical facts in the present case, underlying the issuance of the impugned administrative decision, went through the lens of the judicial scrutiny by the UNDT Judge and found to be insufficient to appropriately support its

reasoning that Ms. Yasin showed shortcomings in her communication skills, and her actions caused the Chief Resident Auditor to feel harassed and humiliated.

61. In conclusion, the Appeals Tribunal affirms the UNDT's findings and conclusions that the impugned decision was unlawful. The UNDT conducted a thorough judicial review of the contested administrative decision. It did not erroneously substitute itself for the Administration, as argued by the Secretary-General. It simply examined the facts and their interpretation led to the correct conclusion that the decision-maker had not exercised his discretionary power properly, in that the factual basis of the impugned decision, indicating its reasoning, was not sufficient to establish them to the required standard of proof, so as to warrant the challenged written reprimand.

62. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.²⁶

63. It is obvious that the Secretary-General was not satisfied with the UNDT's decision. He has failed, however, to demonstrate any error in the UNDT's finding that the Administration's decision to issue Ms. Yasin a written reprimand was unlawful. The Secretary-General merely voices his disagreement with the UNDT's findings and repeats his submissions to the Appeals Tribunal. He has not met the burden of proof for demonstrating an error in the impugned Judgment such as to warrant its reversal.

²⁶ *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30, citing *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15 and citations therein; *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

64. In view of the foregoing, we consider that the issuance of the reprimand was not, as correctly found by the UNDT, a proper exercise of the discretion vested in the Administration.

65. Accordingly, the appeal fails.

Judgment

66. The appeal is dismissed and Judgment No. UNDT/2018/087 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Murphy

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar