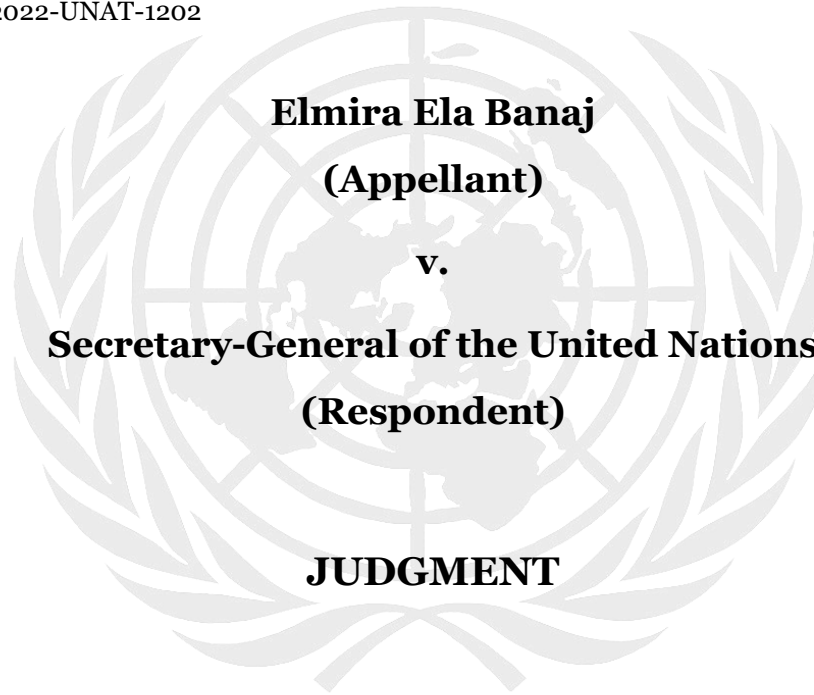




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2022-UNAT-1202



**Elmira Ela Banaj  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before: Judge Graeme Colgan, Presiding  
Judge Kanwaldeep Sandhu  
Judge John Raymond Murphy

Case No.: 2021-1560

Date: 18 March 2022

Registrar: Weicheng Lin

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Counsel for Appellant: Christopher Bollen

Counsel for Respondent: André Luiz Pereira de Oliveira

**JUDGE GRAEME COLGAN, PRESIDING.**

1. Elmira Ela Banaj (the Appellant) appeals against the Judgment of the United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) dismissing her claims. These were that the temporary removal from her, and reassignment to others, of certain of her functions as Head of the United Nations Office on Drugs and Crime (UNODC) in Albania was an unlawful exercise of administrative power. For the reasons set out below, we allow the Appellant's appeal and remand the case to the UNDT to determine remedies in conjunction with its decision on Ms. Banaj's substantive challenge to the Agency's conclusion of misconduct by her and the sanctions imposed on her for this.

**Facts and Procedure**

2. Ms. Banaj is a staff member holding a permanent appointment with the United Nations Development Programme (UNDP), her service being limited to the UNODC as a National Programme Officer and Head of the UNODC Programme Office in Tirana, Albania. There is a division of functions relating to Ms. Banaj between the two agencies. Stated generally, the UNDP holds and administers her contract and the UNODC manages the day-to-day performance of her work. This had been the position for almost the last 20 years.

*Report of possible misconduct against the Appellant*

3. On 18 July 2018, the Regional Representative of the UNODC for South Eastern Europe (RR) reported Ms. Banaj to the Office of Audit and Investigations (OAI) of the UNDP for possible misconduct. The RR requested the OAI's support for his proposal to i) initiate an investigation into Ms. Banaj's possible misconduct; and ii) place her on administrative leave with immediate effect. According to the RR, Ms. Banaj had allegedly been leading an active campaign lobbying (including by providing misinformation to) senior Albanian government officials against the recruitment of an international expert at the P-4 level to expand the capacity of the UNODC Programme Office in Albania. Also, according to the RR, her efforts had led the Albanian government authorities to question, and object to, the establishment of such a position, although Albania had previously endorsed such a course of action at Steering Committee level. The RR clarified that his proposal in respect of Ms. Banaj had the approval and full support of the UNODC's Director for Operations, and that her administrative leave proposal was meant to "avoid [Ms. Banaj's] continued access to internal information and

updates on developments including in regard to the P4 recruitment, ongoing funding negotiations, [and] consultations with the Albanian authorities for the programme and office expansion”.

4. On 3 August 2018, the OAI/UNDP informed the RR that his report had been assessed, that a decision had been made to commence an investigation into the allegations, and that his request to place Ms. Banaj on administrative leave was also being considered by UNDP’s Legal Office. By letter dated 25 October 2018, OAI/UNDP informed Ms. Banaj that she was the subject of an investigation. It appears, however, that there was no advice or recommendation, either from the UNDP or the UNODC, about whether Ms. Banaj was to be placed on administrative leave.

5. On 29 October 2018, the RR informed Ms. Banaj that “it has been decided to effect a temporary reassignment of [her] functions”. This temporary measure was said to have been “reviewed and endorsed by senior management, notably the UNODC Director for Operations”. The RR instructed Ms. Banaj as follows:

With immediate effect you shall focus your work exclusively on ongoing approved technical project activities linked to the Container Control Programme segment for Albania. You shall not engage [or] commit UNODC in any other matter. You shall limit your consultations with national project partners at technical level and refrain [from] representing UNODC at senior level including with Embassies and international counterparts based in Albania. Functions linked to the representation of UNODC and management of our wider portfolio for Albania will fall under my direct responsibility. A message informing of these interim measures will be addressed accordingly to our national and international counterparts, including Embassies, in Tirana and Heads of UNODC Global Programmes in Vienna.

6. This appeal relates to that administrative decision conveyed by the RR to Ms. Banaj on 29 October 2018.

7. On 30 November 2018, Ms. Banaj sought a management evaluation of the decision to temporarily reassign the functions previously performed by her. On 15 February 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance informed Ms. Banaj of the decision to uphold the reassignment decision based on the findings and recommendations of the Management Evaluation Unit.

8. The investigation into the RR's complaint against Ms. Banaj concluded that the allegations were substantiated, and that Ms. Banaj had engaged in actions amounting to misconduct. On 22 October 2020, the UNDP imposed on her the disciplinary sanction of demotion by one grade, with deferment for one year of eligibility for consideration for promotion. Ms. Banaj has appealed to the Dispute Tribunal against these disciplinary measures. That case is pending before the UNDT and nothing said in this Judgment should be seen as affecting its outcome.

*Report of possible misconduct against the RR*

9. The RR's was not the only complaint of misconduct attaching to this matter. On 4 October 2018, Ms. Banaj filed a report with the Office of Internal Oversight Services (OIOS) of possible misconduct against the RR and the Programme Officer for South Eastern Europe.

10. On 16 October 2018, the OIOS referred Ms. Banaj's report to the UNODC. Upon preliminary review by the Director of Administration of the UNODC in his capacity as responsible official, the UNODC decided to review Ms. Banaj's report of possible misconduct against the RR under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

11. On 12 November 2018, the Director of Administration, UNODC, wrote to Ms. Banaj assuring her that complaints of abuse of authority and harassment were taken seriously, advised her to consider informal resolution of the dispute, and invited her to resubmit her complaint to comply with ST/SGB/2008/5, should she decide to pursue the matter formally.

12. On 3 December 2018, Ms. Banaj submitted a formal complaint under ST/SGB/2008/5. She explained that the ongoing investigation into the RR's allegations of misconduct against her had made any "amicable resolution" impossible.

13. On 16 April 2019, the UNODC informed Ms. Banaj that a fact-finding panel was going to be established to investigate her allegations.

14. By inter-office memorandum dated 29 April 2020, the Director, Division for Management, UNODC, advised Ms. Banaj of the outcome of the investigation by an investigation panel into her allegations of harassment and abuse of authority against the RR and the Programme Officer for South Eastern Europe. The Director had decided to close the

case against the Programme Officer with no further action, because the investigation panel did not establish a factual basis for Ms. Banaj's allegations. However, he decided to address, by managerial action, the matter raised by Ms. Banaj against the RR. That was because, although it did not find evidence to support her other allegations against the RR, the investigation panel had reported that there was information showing that the RR had contributed to a disharmonious work environment.

15. Returning to Ms. Banaj's challenge to the administrative action now on appeal, the UNDT, in Judgment No. UNDT/2021/030 dated 26 March 2021, rejected the Respondent's preliminary receivability challenge, finding that Ms. Banaj's appeal against her temporary reassignment was receivable. However, the Dispute Tribunal dismissed her application on its merits. It concluded that Ms. Banaj had not met her burden of proof to demonstrate that any improper motive had tainted the reassignment decision. In its view, "the decision to reassign her rather than place her on administrative leave, was taken balancing her best interests with those of the Organization. These reasons are supported by the evidence."<sup>1</sup>

16. On 25 May 2021, Ms. Banaj appealed the foregoing UNDT Judgment to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal). The Secretary-General filed his answer on 27 July 2021.

17. On 17 August 2021, Ms. Banaj submitted a motion seeking leave to file additional documentary evidence, in the form of the new Terms of Reference (ToRs) that she had received from the UNDP on 19 July 2021, which she said supported her position that the reassignment decision by the UNODC was unlawful. The new ToRs set her grade at the NO-B level, reflecting, she contended, the 22 October 2020 disciplinary sanction of demotion against her. Moreover, she said that the new ToRs reflected her reduced functions as initially conveyed by the RR on 29 October 2018.<sup>2</sup>

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<sup>1</sup> Impugned Judgment, para. 45.

<sup>2</sup> According to the Secretary-General, on 17 September 2021, Ms. Banaj filed a request for management evaluation of the decision of 19 July 2021 to reclassify her post at the NO-B level. She had been at the NO-C level, before her demotion effective 20 October 2020.

18. By Order No. 424 (2021) dated 20 September 2021, the Appeals Tribunal granted her motion. The Appeals Tribunal also directed the parties to file any additional submissions they might wish to make regarding the new evidence. Ms. Banaj filed additional submissions on 24 September 2021, and the Secretary-General filed his additional submissions on 4 October 2021.

19. In doing so, Ms Banaj filed a document that, interpreted strictly as the UNAT's Order should be in such circumstances, was outside the description allowed by Order No. 424. This is a document titled "Working Arrangement between the United Nations Development Programme (UNDP) and the United Nations Office on Drugs and Crime (UNODC)" effective since 1 January 2004 (the Working Arrangement document). The Secretary-General took exception to this and sought to have the document excluded from consideration. The Respondent did, however, also seek to rely upon its contents to support his case.

20. By Order No. 444 (2022) dated 9 February 2022 and in these particular circumstances, the Working Arrangement document was admitted but the parties were allowed, under a tight timetable, to make further submissions about its contents and their effects on the questions at issue. These, and the document itself, have assisted us to decide this appeal.

### **Submissions**

#### **Ms. Banaj's Appeal**

21. Ms. Banaj requests that the Appeals Tribunal vacate the UNDT Judgment, rescind the temporary reassignment decision and award her USD 50,000 as damages.

22. She submits that the UNDT erred in law in concluding that the decision of 29 October 2018 to temporarily reassign her was lawful. The UNDT's reasoning that the RR's consultations with the OAI and the Legal Office of UNDP were sufficient to cure his lack of authority has no basis in either the text of Staff Regulations and Rules or UNDP's Legal Framework for Addressing Non-Compliance with UN Standards of Conduct. Neither the OAI nor the Legal Office of UNDP had the requisite authority to place her unilaterally on administrative leave, and their dealings with the RR could not ratify or otherwise approve the latter's decision, which had been taken *ultra vires*.

23. Ms. Banaj maintains that her new ToRs highlight the disciplinary nature of the temporary reassignment decision that the RR took on 29 October 2018, as they informed the UNDP's subsequent decision to demote her and reduce her functions.

24. Ms. Banaj submits that the Working Arrangement document confirms that only the UNDP is competent to decide on, manage and make amendments to, her contract. This is said to include her appointment, grade and length of service. She says that the Working Arrangement document confirms that only the UNDP, and not the UNODC, is competent to alter her functions to implement the disciplinary decision to demote her. Consequently, she says, the UNDT's finding to the contrary is flawed.

25. Ms. Banaj also submits that the RR's decision significantly impacted her professional standing and wellbeing to the extent that she had to resort to psychiatric treatment, and that the damage to her caused by the contested decision were proven.

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

26. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

27. He submits that the UNDT concluded correctly that the RR's decision of 29 October 2018 was lawfully taken in the proper exercise of his discretion. Consistent with Staff Regulation 1.2(c), the Administration (UNODC) was well within its right to reassign Ms. Banaj to duties during the pendency of the investigation to ensure that she could not take actions in performing her duties as a staff member that might undermine the investigation. The RR took the decision following lengthy consultations with the UNDP Legal Office. It did not result in a reduction of her employment from full-time to part-time, as she continued to receive payment in full and at the same level and step as before. It was adjusted to the circumstances of the case and necessary to protect the Organization's interests and reputation.

28. The Secretary-General also submits that Ms. Banaj has failed to demonstrate that the RR's reassignment decision was unlawful or tainted by improper motives. Under the applicable legal framework, the Administration is not required to discuss a reassignment decision with the concerned staff member. In the present case, Ms. Banaj was made aware of the reasons behind the RR's decision to reassign her. As her supervisor, the RR was allowed to take all appropriate managerial measures to avoid any risk to the Organization's reputation and protect the sanctity of the investigation.

29. The Secretary-General further submits that Ms. Banaj's claim that she was placed on administrative leave is meritless, because she was never so placed.

30. The Secretary-General maintains that the UNDT concluded correctly that there were no grounds to rescind the reassignment decision and award compensation. He notes the medical certificate that Ms. Banaj attaches to her appeal, but submits it is not reliable evidence demonstrating the alleged losses or harm resulting from the contested decision, because it does not refer to the reassignment decision, or even mention that her alleged symptoms were aggravated after that. On the contrary, the medical certificate states that Ms. Banaj started to experience anxiety and panic disorders in September 2018, i.e., before the RR issued the reassignment decision on 29 October 2018.

31. In response to Order No. 424 (2021), the Secretary-General additionally submits that the new ToRs and their cover e-mail are irrelevant to the case as they do not undermine the correctness of the UNDT Judgment. There is no merit in Ms. Banaj's argument that the UNDP logo on the new ToRs confirms that only the UNDP has the competence to alter her functions. The UNDP neither prepared the content of, nor disseminated, the ToRs, and thus did not "issue" them; the UNODC did so. The UNDP classified Ms. Banaj's position, in accordance with the terms of reference as determined by the UNODC, and provided the UNODC with the classification produced by the UNDP Classification Unit. The UNDP's classification role results from the fact that the UNDP administers Ms. Banaj's appointment. The fact that the ToRs were disseminated to Ms. Banaj by the UNODC enclosing a document with the UNDP logo has no bearing on, or otherwise calls into question, the UNODC's competence to take the reassignment decision. Decisions as to Ms. Banaj's duties and responsibilities rested with the UNODC.



32. The Secretary-General requests that the Appeals Tribunal disregard Ms. Banaj's additional submissions that the similarity between the ToRs and her demotion demonstrates that the RR's decision was an interim measure but of a disciplinary nature or character. They exceed the parameters of the UNAT's direction in Order No. 424 (2021) limiting submissions to the question of the RR's authority. These submissions constitute additional pleadings beyond the scope of her appeal. They also constitute impermissible attempts to reply to the Respondent's Answer. In any event, these additional arguments are speculative and unsubstantiated.

33. The Secretary-General maintains that Ms. Banaj has filed the Working Arrangement document as an attachment to her additional submissions without explaining why she submits this evidence now for the first time, noting that this document predates the RR's decision. Nonetheless, he has no objection to its admission should the Appeals Tribunal consider that to be in the interest of justice and the efficient and expeditious resolution of the proceedings. Should the UNAT decide to admit this document into the record (as it did), we record that the Secretary-General sought and was allowed an opportunity to more fully address it and Ms. Banaj's submissions in reliance thereon.

34. Pursuant to Order No. 444 (2022) granting him an opportunity to comment on the Working Arrangement document, the Secretary-General states that the document, in paragraphs 14, 20 and 24, demonstrates that the UNODC Regional Representative had the authority to take the decision to temporarily change Ms. Banaj's functions pending the completion of the investigative process, and that the document confirms the correctness of the UNDT Judgment upholding the legality of the contested decision. In his submission, however, the Appeals Tribunal does not need this document in order to affirm the UNDT Judgment.

### **Considerations**

35. Ms. Banaj's appeal succeeds on some grounds, but other grounds she has advanced fail. We will deal with the latter (and the Respondent's successful defences to them) before turning to the issues on which we consider the UNDT erred in law.

36. It does not necessarily follow that because the sanctions ultimately imposed against Ms. Banaj for misconduct (the amendments to her ToRs) reflect those temporary measures imposed pending the completion of the investigation of the misconduct, that the interim

measures were thereby disciplinary and so were therefore wrongfully pre-determinative of the outcome of the investigation. If there is a case of sufficient seriousness that warrants interim measures which reduce or preclude misconduct from happening (irrespective of the outcome of the investigation to determine whether such misconduct has occurred), that the sanctions imposed (where severance of service is not effected) may similarly prevent future misconduct is not itself indicative of predetermination of these. Each such case must be examined closely on its merits. We reiterate that the foregoing is not an expression of view about whether Ms. Banaj did commit misconduct as the Agency found and the UNDT is yet to determine.

37. Next, we agree with the Respondent that Ms. Banaj's argument that she was placed on administrative leave but in breach of the rules and regulations of this interim measure is wrong. It is clear that administrative leave was considered by the UNDP but rejected by it as an option, whereupon the UNODC purported to re-assign many of her duties for it as the interim measure pending completion of the investigation and any decision on its findings. We do not agree with the Appellant that she was placed on administrative leave, even *de facto*. The evidence clearly shows that this option was proposed to the UNDP but not accepted by it, and alternative temporary measures were then applied by the UNODC.

38. We now turn to the grounds of appeal on which Ms. Banaj nevertheless succeeds. These are decided by reference to several relevant documents including the Staff Regulations and Rules, the the UNDP's Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (the Framework), and the Working Arrangement document.

39. Regulation 1.2(c) of the Staff Regulations and Rules, upon which the UNDT relied in approving this as the regulatory basis for the temporary re-assignment decision affecting Ms. Banaj, is as follows:

... Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them[.]

40. Chapter X of the Staff Rules is a code for dealing with alleged misconduct by staff members. It contains procedures to be followed and measures that protect fair process rights of staff subjected to such investigations. The investigation of the complaints made

against Ms. Banaj purported to follow the Chapter X process and in particular under Rules 10.3 and 10.4. That latter rule describes the nature of interim measures that may be imposed by the Respondent. Rule 10.4 titled “Administrative leave pending investigation and the disciplinary process” reads as follows:<sup>3</sup>

- (a) A staff member *may* be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the completion of a disciplinary process. Administrative leave may continue until the completion of the disciplinary process.
- (b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration.
- (c) Administrative leave shall be with full pay except (i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, or (ii) when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.
- (d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.
- (e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

41. The UNDT was correct that the use of the word “may” (emphasised by us in the foregoing passage) is permissive, that is, the Secretary-General has a discretion to place a staff member on administrative leave from as early as receipt of an allegation of misconduct and for a period potentially as long as the duration of a disciplinary process. However, we consider that the UNDT’s broader conclusion that this allows administrative leave as a choice among alternatives (including to reassign duties under Staff Rule 1.2(c)) as to how to treat a staff member in these circumstances was wrong. The Secretary-General’s choice in these circumstances is between administrative leave (whether with or without pay and on conditions over which the Secretary-General exercises further discretion) and a continuation of the staff member’s service as previously, pending the outcome of an investigation. Had the

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<sup>3</sup> Staff Regulations and Rules of the United Nations, ST/SGB/2018/1 (emphasis added).

relevant Rules contemplated the potentially very broad suite of options available to the Secretary-General as he now claims, we consider these would have been specified in Rule 10.4, but they were not.

42. The Framework is subject to the Staff Rules and Regulations. It must conform to these and cannot contradict them. The Framework specifies that defined persons perform specified roles and make decisions affecting staff members as permitted by the Framework. Although the Framework also addresses administrative leave which was not resorted to in this case, its provisions nevertheless are instructive in determining whether the Secretary-General's general power of duties' allocation is available as an intertim measure in alleged misconduct investigations.

43. Significant in this closely regulated Framework scheme is Section 1.3, paragraph 47, which provides for an interim measure of change of functions (as occurred here) as an element of prolonged administrative leave. It does not conflict with the Staff Regulations and Rules but rather expands on them but not inconsistently with them. It reads:<sup>4</sup>

Placement of a staff member on administrative leave will not exceed three months at a time. Subject to the justification provided by the Director, LO/BMS to support an extension of the administrative leave, the Assistant Administrator and Director, BMS may extend the administrative leave for a further defined period not exceeding three months. There is no limit to the cumulative time a staff member may be on administrative leave, but *the Assistant Administrator and Director, BMS will try to limit the time on administrative leave as much as possible and to this extent, alternatives to administrative leave such as a change in functions, reporting, training or a detail assignment, may be decided.* The Assistant Administrator and Director, BMS may consult with the Director, OHR/BMS and/or Director, LO/BMS on the application of such measures.

44. The significance of this provision is its confirmation that recourse to Section 1.3, paragraph 47 (above) was not intended to be available as an interim remedial power during a period of investigation of alleged misconduct. Although Section 1.3, paragraph 47 of the Framework refers to a change in functions, which is what was determined to be applicable to Ms. Banaj and her temporary re-assignment of functions, this is an alternative to extended or unduly lengthy administrative leave where the initial maximum period of such leave

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<sup>4</sup> UNDP's Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (emphasis added).

(three months) needs to be exceeded. That is where a limited and defined period of administrative leave may be insufficient to conclude the investigation of the alleged misconduct. That was not the position with Ms. Banaj, however. Administrative leave was requested by the UNODC but rejected by the UNDP at the outset and re-assignment of duties (or change of functions) was imposed by the UNODC from the outset of the investigation without apparent assessment of the investigation's probable duration.

45. This analysis of the Framework which was applicable and was otherwise applied to the investigation of the complaints of misconduct against the Appellant confirms that the option of temporarily changing her functions which was taken in respect of Ms. Banaj did not meet the Framework's preconditions relating to the adequacy or inadequacy of an initial period of administrative leave. It follows that the function change was imposed erroneously and without regulatory authority. It also strengthens the conclusion that purporting to re-assign her functions pursuant to Staff Rule 10.4 was an impermissible mechanism to avoid the requirements of the Framework and so an administrative decision made without authority and at least arguably also with wrong motivation.

46. A reallocation of duties pending the outcome of an investigation as occurred in Ms. Banaj's case is permissible as an interim measure in such circumstances, but not as the exercise of the general power of assignments available to the Secretary-General in Staff Regulation 1.2(c) upon which the Respondent relies. Where there is a specific power that addresses the same issue as a general power, application of the latter must yield to the application of the former. The power relied on by the Respondent and the UNDT is a general power. But, under Staff Rule 10.4 and the Framework relating to interim measures pending an investigation and disciplinary process, there is an alternative measure of reallocation of duties available in such cases where the investigation is, or is likely to be, unduly prolonged. In such cases, a staff member's duties can be reallocated to obviate or mitigate the effects of administrative leave which would see staff members, whether on pay or unpaid, performing no duties for the duration of the period of a lengthy investigative process.

47. There is no evidence whether, in Ms. Banaj's case, the investigation was anticipated to be unduly long running, so it is not possible to say whether the reallocation of duties might have been available as an alternative to prolonged administrative leave under Staff Rule 10.4.

48. The Agency's general power to assign duties to staff members set out in Staff Regulation 1.2(c) is, while broadly discretionary, not an unlimited power able to be resorted to irrespective of the circumstances. Among limitations on its exercise, it must be used for proper purposes and its application must not be wrongly motivated. In view of the existence of express powers (placement on administrative leave and, in certain circumstances, reassignment of duties) to deal with the interim position pending an investigation and decision-making if misconduct is alleged, this applicable specific power cannot be overridden or ignored and a more general power to reassign duties used instead, if the conditions for the particular power's use are not met. The UNDT wrongly concluded that the reassignment of duties imposed as an interim or temporary measure during the substantive investigation of the misconduct allegations was a permissible interim measure authorised by Staff Regulation 1.2(c).

49. Finally, in respect of the foundation documents affecting the issues in appeal, we turn to the Working Arrangement document. This provides materially:

**Working arrangement between the United Nations Development Programme (UNDP) and the United Nations Office on Drugs and Crime (UNODC), effective 1 January 2004**

...

14. The UNODC Representative has responsibility for all UNODC drug and crime control activities in the designated country or countries and exercises management control over UNODC representation, policy, programme and projects, finances, staff and office administration.

...

21. All personnel contracts will be administered by UNDP pursuant to the UNDP policies and procedures and Personnel Manual/User Guide provisions applicable to locally recruited personnel<sup>3</sup>.

22. All personnel contracts shall state that they are limited to service with UNODC at a specified duty station ...

...

24. UNODC will manage all personnel contracted by UNDP for service in UNODC, according to UNDP's standards and procedures. Practical arrangements will be worked out between UNDP and UNODC at the field level to enable UNODC to discharge this obligation including by, but not confined to, the sharing of guidelines and formats and joint Career Review Groups wherever feasible.

25. Rebuttals, appeals and disciplinary proceedings involving locally recruited personnel will be handled by UNDP in accordance with UNDP rules. UNODC will provide all necessary input. The direct costs of any legal proceedings undertaken by UNDP on behalf of or against UNODC personnel will be reimbursed by UNODC.

...

**[Footnotes]**

...

3. All personnel contracts will be administered by UNDP pursuant to:
- UN Staff rules and regulations
  - UNDP prescriptive content pertaining to National Staff;
  - the ALD User Guide
  - The SSA User guide
  - The Service Contract User Guide.

50. The foregoing Working Arrangement provisions make it clear that the UNDP retained control of the matters at issue in the proceeding and in particular, of the investigative process which resulted from the complaint of misconduct against Ms. Banaj. Put simply, the UNDP held the responsibility for determining whether interim measures should be taken pending the outcome of the investigation and, if so, what measures should be engaged. The UNDP declined to impose a period of administrative leave (including, potentially if the conditions for this were fulfilled, re-assignment of duties) on Ms. Banaj. Decisions on these issues made by the UNODC were made without authority.

51. The Respondent makes much, as did the UNDT, of their assessments that the re-assignment of duties was less onerous for, and less stigmatising of, Ms. Banaj and thus she cannot really complain about her treatment in these circumstances. In other words, we infer the Respondent to be saying that even if there were defects in the process employed, Ms. Banaj cannot really complain because the process did not disadvantage her as much as if another (potentially the correct) process had been followed. That is not, however, a justification permitted by the relevant Rules and processes provided for such situations and would be an unprincipled approach to such questions, both in this case and, as a precedent, for others. Further, the practical differences between the two interim measures are not explained either in the impugned Judgment or in the Respondent's submissions on the appeal. On its face, to deprive the Appellant of all her public and high-level governmental functions (and to so advise those with whom she dealt) leaving her with narrowly prescribed duties in relation to container inspections would seem arguably to be as significant for her as putting her on administrative

leave (presumably on pay) for that same period and having to advise those she dealt with that she was on leave from her job.

52. For the foregoing reasons, we conclude that the power purportedly invoked by the UNODC to re-assign Ms. Banaj's duties was neither the specific, conditional and limited power available under the Framework, nor a proper exercise of the general power under Staff Regulation 1.2(c) of the Staff Rules and Regulations. The decision effecting that re-assignment of duties must be set aside as having been made without jurisdiction to do so.

53. We turn now to the next ground of appeal on which the Appellant also succeeds. This is the question of the UNODC's competence to impose temporary reassignments of Ms. Banaj's duties. The evidence and the conclusions of the UNDT point to the UNDP as being the Appellant's employer, that is the party with whom she had her primary employment relationship, although not a line-reporting one. As with all United Nations staff, the Secretary-General was her employer in law, but in practice employment rights and obligations are devolved from the Secretary-General to various UN agencies, of which the UNDP is one. Although on a long-term and exclusive basis, the Appellant was in effect seconded to the UNODC where she was the UNDP's sole representative in Albania. While her day-to-day work was for the UNODC, her underlying employment relationship was with the UNDP, including the setting of and amendments to, the Terms of Reference or contents of her job description and similar fundamental incidents of her employment.

54. It was, however, the UNODC that purported to re-assign significantly her duties as a temporary measure pending the conclusion of the UNDP's investigation into her alleged misconduct. The UNDT found, as a matter of fact, that this decision was made and conveyed to the Appellant by the UNODC, in the person of the RR, *albeit* after consultation with the UNDP about what to do and how to do it. There is, however, no evidence or suggestion in submissions of the lawful delegation of that power by the UNDP to the UNODC, whether generally or in Ms. Banaj's case. The UNDT relied upon what it categorised as the intensive consultation by the UNODC with the UNDP before the former made this impugned decision.

55. Consultation with another agency does not, however, convert an *ultra vires* decision into an *intra vires* one by that other agency. Unless there had been a lawful delegation of the UNDP's power to make such decisions in respect of Ms. Banaj, the decision made by the UNODC to re-assign significant elements of her duties was one beyond its competence.



56. Just as it was the UNDP's decision whether to place Ms. Banaj on administrative leave pending the investigation and to consider the alternative measure of duties' reallocation, decisions relating to what was to happen pending the investigation undertaken remained with the UNDP. While the UNDP could (and probably should) have consulted with the UNODC before it (UNDP) made such a decision, what happened in practice was the reverse of this: the UNODC consulted with the UNDP before it (UNODC) purported to re-assign Ms. Banaj's duties.

57. Even if, therefore, the decision taken to reduce and reassign Ms. Banaj's duties had been supportable under Staff Rule 10.4 and the Framework, it was not made by a person or body authorised to make it and so was, for this reason also, an unlawful administrative act. The UNDT's Judgment that this was lawful was also erroneous in law for this reason.

58. It follows that the Respondent's administrative decision, purportedly taken by the UNODC reducing and reassigning Ms. Banaj's duties must be set aside for these reasons also.

59. As to remedies, however, the position is complicated by the pending decision by the UNDT on the substantive justification for the Respondent's conclusion of misconduct by Ms. Banaj and the sanctions imposed upon her for that. Ms. Banaj may or may not be successful in that case. This question before us now of remedies for the wrongful imposition of the interim measures is closely linked to any remedies to which she may be entitled if she is successful in the substantive proceedings. We consider that the most just course is to remand the matter of remedies to be decided by the UNDT in light of its substantive decision on the sanctions for misconduct.

60. Because the decision of the appeal does not turn on this question, we make the following as an observation only. There is a further feature of the UNDT's approach to the case which, although not relied on by the Appellant, causes us to express our concern. The UNDT apparently agreed to consider evidence provided, as it described it, "*ex parte*" by the Secretary-General.<sup>5</sup> That is, while relevant documentary evidence was made available to the Dispute Tribunal by the Respondent, Ms. Banaj was not able to see or know of its contents. The UNDT relied upon that evidence, to a significant degree, in making its decision in the Secretary-General's favour. That evidence is now part of the record before us and consists of a number of e-mail exchanges between the UNDP legal advisers and the UNODC. As we infer from the UNDT's Judgment, much, if not all, of that may well be information covered by

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<sup>5</sup> Impugned Judgment, para. 35.

legal professional (or attorney-client) privilege which may be either asserted by the client (the Agency), or waived so that it may be disclosed. But to purport to waive privilege in part in litigation so that while the Dispute Tribunal sees the documents the other party does not is wrong in principle and abhorant to ideals of transparent and even-handed justice between parties. Either privilege was asserted by the Secretary-General (in which case the privileged evidence should not have been seen or considered by the UNDT or by Ms. Banaj) or, if waived by the Secretary-General as it must have been to have allowed its *ex parte* release to the UNDT, it should have been disclosed to Ms. Banaj as well as to the UNDT. In those circumstances, the Appellant should have had an opportunity to address it in that forum.

61. The admission and consideration of this *ex parte* evidence also breaches the fundamental legal principle of natural justice known as *audi alteram partem*, the obligation on a decision-maker, literally, to ‘hear the other party’ and includes the right of each party to a fair hearing and to respond to evidence against them.

62. We consider that the UNDT was not empowered either to so admit evidence or then to rely upon it in deciding the case before it. Article 18(4) of the UNDT’s Rules of Procedure is the only provision of the UNDT’s Statute or those Rules of Procedure that appears to touch on questions of such evidence. It provides:

... The Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

63. That is a rule that allows for the preservation of the confidentiality of evidence beyond the Tribunal and the parties to the case before it. It does not permit one party to adduce evidence to the Tribunal but to withhold that evidence from the other party. Further, the conditions for its exercise are set out and limited to instances of security or other exceptional circumstances. There is no suggestion that communications between the UNODC and the UNDP involved security issues warranting their secrecy from others. Privileged communications about legal advice and whether these should be disclosed are not exceptional circumstances, as they probably exist in most, if not all, such cases, and can be dealt with under the provisions in the UNDT’s Rules of Procedure relating to directions for the production of documents.<sup>6</sup>

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<sup>6</sup> Article 18(2) & (3) the UNDT Rules of Procedure.

64. Despite our conclusion that the UNDT's decision that communication between the UNDP and the UNODC justified the latter in making the decision to re-assign the Appellant's duties was erroneous in law, the UNDT should not have relied upon this "*ex parte*" evidence in reaching the decision it did in these circumstances. If, as we consider it may be justifiably, this is described as the UNDT accepting and acting upon "secret evidence", the wrongfulness of its admission and of the UNDT's reliance on it is clear.

**Judgment**

65. The appeal is allowed and Judgment No. UNDT/2021/030 is set aside. As to remedies for the unlawful re-assignment of the Appellant's duties, we remand these to the UNDT for consideration by it in conjunction with its judgment to be issued in relation to Ms. Banaj's substantive appeal against the finding of misconduct against her.

Original and Authoritative Version: English

Dated this 18<sup>th</sup> day of March 2022.

*(Signed)*

Judge Colgan, Presiding  
Auckland, New Zealand

*(Signed)*

Judge Sandhu  
Vancouver, Canada

*(Signed)*

Judge Murphy  
Cape Town, South Africa

Entered in the Register on this 25<sup>th</sup> day of April 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar