



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

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Judgment No. 2022-UNAT-1291

**Korkut Yavuz**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge Martha Halfeld
Case No.:	2021-1645
Date of Decision:	28 October 2022
Date of Publication:	16 December 2022
Registrar:	Juliet Johnson

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Counsel for Appellant: Robbie Leighton, OSLA

Counsel for Secretary-General: Rupa Mitra

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal by Mr. Korkut Yavuz, a former staff member who served as an Economic Affairs Officer at the P-3 level with the United Nations Economic Commission for Europe (UNECE) on a fixed-term appointment. Mr. Yavuz contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision not to investigate his complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). By Judgment No. UNDT/2021/129, the UNDT dismissed Mr. Yavuz's application.
2. Mr. Yavuz has appealed the UNDT Judgment.
3. For the reasons given below, we affirm the UNDT Judgment.

**Facts and Procedure**

4. On 4 May 2017, Mr. Yavuz was appointed as Economic Affairs Officer (P-3), Agricultural Quality Standards Unit, Market Access Section, Division of Economic Cooperation and Trade (DECT), UNECE, on a one-year fixed-term appointment. The Unit where he worked was composed of a GS-5 Assistant, a P-4 who acted as Mr. Yavuz's first reporting officer (FRO), and a P-5 who acted as Mr. Yavuz's second reporting officer (SRO).
5. According to Mr. Yavuz's submissions, on 18 May 2017, when his FRO saw him speaking with a colleague at a celebration in the Division, she called him over and told him not to speak to the colleague, using derogatory language towards that colleague. A few weeks later, Mr. Yavuz was invited for lunch by this same colleague but, when he mentioned it to his FRO, she slammed her hand heavily on the table several times and shouted "No Korkut! No Korkut! I need your loyalty! I need your loyalty!". She then went on to describe how the concerned colleague and another colleague, again using derogatory language when she referred to the latter, were trying to take their jobs.
6. Still according to Mr. Yavuz's submissions, in early August 2017, when he was discussing with his FRO the formulation of several e-mails he had prepared, she told him to "use [his] brain". Mr. Yavuz took issue with such language being used against him and the FRO's response was allegedly to tell him that this was "a stupid remark". This was followed a

couple of days later by a meeting in which Mr. Yavuz's FRO and SRO criticized his teamwork and skills and accused him of having bad feelings towards his FRO. Mr. Yavuz raised the fact that he found his FRO's attitude and insulting behaviour problematic. In response, he was informed that he should be grateful to his FRO who had been instrumental in the decision to select him for the position.

7. This allegedly marked the beginning of a pattern of aggressive criticism and demeaning language used towards Mr. Yavuz by his FRO, which continued throughout his time in the Unit. On 9 October 2017, he allegedly met with his SRO to discuss the harassment he believed he had been subject of. His SRO suggested that the perceived insults were the result of a cultural clash and that this was normal in the United Nations. On 16 October 2017, Mr. Yavuz met with the then Executive Officer at UNECE to discuss the situation. He expressed his opinion that his FRO and SRO had already decided to try to end his employment. The then Executive Officer advised Mr. Yavuz to contact the Staff Coordinating Council, the Ombudsman, the Deputy Executive Secretary (DES), UNECE, and the Executive Secretary, UNECE. Mr. Yavuz subsequently contacted the Staff Coordinating Council, the Ombudsman and the DES.

8. Mr. Yavuz's mid-term review, on 9 November 2017, was conducted in an allegedly hostile environment with Mr. Yavuz being informed by his FRO that he had completed only 20 per cent of the tasks assigned to him, that he did not deserve his salary, and that he would be placed on a performance improvement plan (PIP). On 21 December 2017, 17 January 2018, and 8 February 2018, Mr. Yavuz met with his FRO and SRO to discuss his progress in meeting his PIP targets. On 22 December 2017, Mr. Yavuz allegedly met with the DES, UNECE, to inform him of the situation. The DES allegedly told Mr. Yavuz that he was following the situation closely, and later indicated that Mr. Yavuz would be given the opportunity to work for a different supervisor to ensure an objective assessment of his performance.

9. On 19 February 2018, Mr. Yavuz requested a guarantee from his FRO that his contract would cover the period of the French language class he sought to enroll in, but his FRO declined to provide him with such a commitment. As a result, he forwarded the exchange between him and his FRO to the Staff Coordinating Council, who then forwarded it to the DES. By e-mail of 2 March 2018, the DES, UNECE, advised a representative of the Staff Coordinating Council that Mr. Yavuz would be given a chance to work under another supervisor.

10. The DES continued to monitor the situation and indicated in an e-mail of 7 March 2018 to the Staff Coordinating Council that he understood that Mr. Yavuz's supervisors were "maltreating" him. In a further e-mail of 8 March 2018, he stated that there was no intention to terminate Mr. Yavuz's contract but to give him an opportunity under another supervisor.

11. On 21 March 2018, Mr. Yavuz was informed that he had not met the goals stated in his PIP.

12. By e-mail of 11 April 2018, the Director, DECT, UNECE, informed Mr. Yavuz that she would act as his FRO and SRO from that date. Mr. Yavuz was asked to carry out two tasks for another section, for which he received a positive evaluation. He was allegedly told that this was an attempt to secure an independent view of his performance. The Director, DECT, UNECE remained his FRO and SRO until her departure from UNECE on 30 November 2018.

13. On 28 May 2018, Mr. Yavuz received his 2017-2018 performance appraisal with an overall rating of "partially meets expectations" signed by his initial FRO and SRO. On 6 June 2018, Mr. Yavuz initiated a rebuttal process against his 2017-2018 e-PAS. A Rebuttal Panel was set up and provided with case-specific documents, the legal framework, and guidelines. The Panel interviewed Mr. Yavuz, the FRO, the SRO, and another team member who was also under the FRO's supervision.

14. As of June 2018, Mr. Yavuz's appointment was extended on a monthly basis pursuant to the provisions of ST/AI/2010/5 (Performance Management and Development System) for the purpose of the completion of the rebuttal process.

15. On 17 December 2018, the Director, DECT, UNECE, who had left UNECE since 30 November 2018, provided her appraisal of Mr. Yavuz's performance through an e-mail addressed to the Executive Officer, UNECE. She stated that Mr. Yavuz was eager to carry out the assignment and had a pleasant disposition towards work but needed more guidance and direction than would normally be required from a P-3 staff member and that, when given an opportunity to work with another section, he finally produced a satisfactory output. On 19 December 2018, the Rebuttal Panel released its report upholding the performance appraisal rating of "partially meets expectation".

16. On 26 December 2018, Mr. Yavuz filed a complaint of harassment and abuse of authority under ST/SGB/2008/5 against his initial FRO and SRO as well as “all UNECE senior managers who were aware of the harassment and abuse ... but failed to observe their responsibilities under said bulletin” and “all relevant UNECE and [United Nations Office at Geneva (UNOG)] Human Resources staff who rejected, or played a role in the rejection of [his] applications to receive a Carte de Legitimation”.

17. By memorandum dated 23 January 2019, the Chief, Human Resources Management Service, UNOG, informed Mr. Yavuz of the decision not to extend his fixed-term appointment beyond 31 January 2019 for performance reasons. On 30 January 2019, Mr. Yavuz requested management evaluation (ME) of the decision. By Order No. 4 (GVA/2019) of 6 February 2019, the UNDT ordered that the decision of 23 January 2019 not to renew Mr. Yavuz’s fixed-term appointment beyond 31 January 2019 be suspended pending the outcome of the ME. By letter dated 9 May 2019, Mr. Yavuz was informed of the outcome of his request for ME, which upheld the decision not to renew his fixed-term appointment beyond 31 January 2019. Mr. Yavuz’s contract was subsequently extended to allow him to exhaust his sick leave entitlements after his placement on sick leave. On 31 May 2019, Mr. Yavuz was separated from service, as further sick leave could not be approved by the Medical Service, UNOG, in the absence of a valid medical report.

18. On 15 July 2019, Mr. Yavuz received a memo from the Assistant Secretary-General for Human Resources informing him of the decision not to investigate his complaint of harassment and abuse of authority under ST/SGB/2008/5.

19. On 19 July 2019, Mr. Yavuz filed before the UNDT an application, challenging the decision not to renew his fixed-term appointment for performance reasons.

20. On 13 September 2019, Mr. Yavuz requested ME of the decision not to investigate his FRO and SRO. By letter dated 31 October 2019, Mr. Yavuz was informed of the outcome of his request for management evaluation, which upheld the contested decision. On 30 January 2020, Mr. Yavuz filed an application before the UNDT, challenging the decision not to investigate his complaint of harassment and abuse of authority.

21. On 31 May 2021, the UNDT issued Judgment No. UNDT/2021/062, adjudicating Mr. Yavuz's challenge of the decision not to renew his fixed-term appointment for performance reasons. The UNDT held that Mr. Yavuz's performance had not been managed or evaluated in a fair and objective manner and that Mr. Yavuz's most recent improvement in performance was wrongly overlooked. The UNDT concluded that the decision not to renew Mr. Yavuz's fixed-term appointment was unlawful and ordered rescission of the non-renewal decision and reinstatement of Mr. Yavuz in the same position he had previously encumbered, or payment of three months' net base salary as compensation in lieu of specific performance. The UNDT rejected Mr. Yavuz's claim for damages for moral harm.

22. Mr. Yavuz appealed. By Judgment No. 2022-UNAT-1266, UNAT partially granted Mr. Yavuz's appeal and additionally awarded moral damages in the amount of USD 2,000.

23. On 8 November 2021, the UNDT issued Judgment No. UNDT/2021/129. The UNDT found that the record of conduct alleged by Mr. Yavuz did not justify initiating an investigation and that there was no basis on which to hold that the contested decision was unlawful. The UNDT thus rejected Mr. Yavuz's application in its entirety.

24. Mr. Yavuz filed an appeal on 7 January 2022, and the Secretary-General filed an answer on 8 March 2022.

## Submissions

### Mr. Yavuz's Appeal

25. The UNDT erred in law by failing to adjudicate Mr. Yavuz's arguments regarding the ME response. Responding to his ME request, OHR stated that the matter was not investigated because the communications were insufficient to provide a basis to establish a claim that there was a pattern of demeaning language against him. The Management Evaluation Unit (MEU) approved this as a basis for the contested decision. Before the UNDT, Mr. Yavuz argued that this was an inappropriate standard to apply to decide whether to investigate his complaint since it required him to prove facts in that regard before an investigation might be convened. Applying *Nwuke*,<sup>1</sup> the UNDT found it could not address Mr. Yavuz's submissions regarding the contents of the ME decisions which it considered not reviewable. However, in *Nwuke*, the actions of the MEU were

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<sup>1</sup> *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-697.

contested, specifically their decision not to compensate, more than 60 days after it was released. Thus, in *Nwuke*, the issue was one of receivability *ratione temporis* not one relating to scope of review or relevance. Mr. Yavuz has never sought review of the MEU decision as prohibited by *Nwuke*. He argued that the justification provided for the decision to and by the MEU demonstrated the decision maker had applied an incorrect burden of proof to his complaint.

26. The UNDT erred in fact and law in finding the actions complained of did not meet the definition of harassment or abuse of authority. The definition of harassment provides for any unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. The second part of this test is purely subjective, requiring that the action be perceived to cause offence or humiliation without enquiry as to the reasonableness of such. It is plain that Mr. Yavuz found the conduct of his FRO and SRO unwelcome and that he was offended and humiliated by such. The UNDT applied a definition of harassment other than that contained in the rule.

27. The UNDT had already found the FRO and SRO's assessment of his performance had not been fair and objective and that this was as a result of "interpersonal issues" meaning the FRO and SRO could not "objectively evaluate his performance". The Secretary-General accepted that Mr. Yavuz's supervisors "did not maintain an appropriate tone" and the UNDT found they were "harsh and impolite" when communicating the unfair appraisal that secured his unlawful separation. It was demonstrated that the behaviour of Mr. Yavuz's supervisors had led to him becoming ill and taking significant sick leave. The D-2 Deputy Executive Secretary to the UNECE expressed his contemporaneous opinion that the FRO and SRO were "maltreating" Mr. Yavuz.

28. Despite these established facts which clearly indicate possible conduct consistent with the definition of harassment and abuse of authority, the UNDT found Mr. Yavuz showed no trace of discrimination, harassment or abuse of authority. This is an error in fact and law resulting in a manifestly unreasonable decision. The UNDT based this finding on the decision in *Benfield-LaPorte*.<sup>2</sup> However, the case is misapplied in an error of law. *Benfield-LaPorte* related to a single act complained of, a transfer with insufficient notice considered to have been disrespectful. There was no suggestion of improper motive, harsh tone, insulting language or an intention to negatively impact the individual's career due to a personal dislike.

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<sup>2</sup> *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/162.

29. The UNDT erred in law by not applying existing interpretations of harassment and misconduct or by applying established examples of misconduct in performance evaluations which correspond exactly to what Mr. Yavuz alleged. By the time of the appealed Judgment, the UNDT had found that “interpersonal issues” impacted on Mr. Yavuz’s evaluation which was delivered in a “harsh and impolite” manner and resulted in his unlawful separation. Such circumstances must reflect a “trace” of harassment or abuse of authority. Mr. Yavuz’s allegation was one of a protracted campaign of belittling and humiliation, deliberately unfair criticism with a view to securing his separation. This meets the definition of misconduct. Mr. Yavuz alleged his supervisors unfairly assessed his performance to ensure his removal from the organization because they did not like him. The UNDT erred in law by finding that this did not fall under any of the examples of “abuse of authority” under Section 1.4 of ST/SGB/2008/5, while the latter specifically references performance management as a potential source of abuse of authority.

30. The UNDT further erred in law by finding that the subject of a complaint must have awareness of harm, damage or unfairness in order to have committed harassment or abuse of authority, that such behavior must be “deliberately harmful”. No such awareness on the part of the perpetrator is contained in the definition of harassment. The definition requires that the conduct be “improper and unwelcome” that it “might reasonably be expected or be perceived to cause offence or humiliation to another person”. The only subjective element relates to the victim’s perception not the perpetrator’s intent. Further, Mr. Yavuz’s complaint was that his FRO and SRO were fully aware of the harm they were causing and that they acted with intent. Mr. Yavuz’s complaint included numerous allegations regarding the conduct of his supervisors which very clearly indicated possible harassment or abuse of authority.<sup>3</sup> Mr. Yavuz would have been able to provide evidence about the manner in which his performance was evaluated and could provide other witnesses who might have corroborated elements of his account had an investigation been ordered. The finding of the UNDT that the facts alleged in Mr. Yavuz’s complaint did not amount to possible misconduct is an error in law and fact resulting in a manifestly unreasonable decision.

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<sup>3</sup> These included witnesses to corroborate that his supervisor was informing individuals behind his back that he was a sexist and could not accept instructions from a female supervisor, he provided e-mails of obviously mocking tone containing a sarcastic inversion of the hierarchy between supervisor and supervisee while providing criticism of work conducted, unilateral post facto altering of deadlines to “close of business” in order to manufacture criticism on punctuality, exaggerated criticism for use of a term as used on the UNECE website, criticism for consulting on tasks, then immediately after criticism for failure to consult, and many more examples.



31. The UNDT erred in fact, law and exceeded its jurisdiction by making findings regarding the motivations of Mr. Yavuz's supervisors. The matter at issue in this case was whether Mr. Yavuz's complaint was appropriately handled and if it should have triggered an investigation. The UNDT correctly identified that it was not competent to investigate the facts of the complaint. Mr. Yavuz argued that the justification contained in the OHR memo to Mr. Yavuz showed that the approach adopted was unlawful. OHR had expressly relied on the opinion of UNECE that "the central issue is disagreement on work performance". The UNDT failed to address OHR's express account as to how Mr. Yavuz's complaint was processed, and instead proceeded to determine whether misconduct had occurred, despite accurately identifying that its role was not to do so. The UNDT indicated it would not "attribute improper motives to the FRO and the SRO" absent "evidence of bias or collusion or sheer neglect of duty". The error of law here is two-fold: Mr. Yavuz was required by the UNDT to prove his complaint to secure an investigation, and the UNDT expanded its scope of review to include determining the merits of the complaint.

32. The UNDT's finding that no evidence existed to suggest the possibility of harassment or abuse of authority requiring an investigation is also an error in fact leading to a manifestly unreasonable decision. The UNDT appears to have relied on its review of the separation challenge mounted by Mr. Yavuz to draw its own conclusions as to whether prohibited conduct had taken place. This is an inappropriate test, as the role of the UNDT was not to consider if prohibited conduct had occurred but instead to consider the complaint to determine if there was a reasonable chance that the allegation might amount to misconduct. The appropriate test was whether "the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct". This indicates that the complaint and not "established facts" should be considered. The circumstances of this case were sufficient to merit further investigation of the complaint.

33. Mr. Yavuz requests that the decision be rescinded and that an investigation be ordered into his complaint. Mr. Yavuz's mental health has been seriously impacted by the course of conduct pursued by his supervisors, by the decision to separate him from the Organization, by the delay in treating his harassment and abuse of authority complaint and the refusal to investigate. Mr. Yavuz provides a series of medical reports which demonstrate his health problems which began only after he had joined UNECE. He seeks moral damages for the contribution to these health conditions caused by the decision not to investigate his complaint.

**The Secretary-General's Answer**

34. The UNDT correctly held, relying on the UNAT's holding in *Nwuke*, that it did not have jurisdiction to consider appeals against the MEU's responses to a request for ME. Mr. Yavuz attempts to distinguish *Nwuke* from his own case by trying to create an artificial distinction between the MEU's "action" and the MEU's "justification" in its response. He claims that he has not sought review of the MEU decision in the same way as was done in *Nwuke* because he made arguments about the "justification" on which the MEU's response was based. He, however, fails to cite any jurisprudence that makes such a distinction, and indeed there is none. In *Kalashnik*,<sup>4</sup> UNAT dismissed the staff member's similar attempt to split the MEU response into two artificial components, "decision" and "procedures". In *Nwuke*, UNAT cited its holding in *Kalashnik*, that the General Assembly did not consider the Administration's response to a request for ME to be a decision that produces direct legal consequences affecting a staff member's terms and conditions of appointment. Mr. Yavuz's attempt to distinguish *Nwuke* from his own case by comparing the factual circumstances of the two, does not make the UNAT's holding in *Nwuke* inapplicable to the case. In any event, Mr. Yavuz errs in his characterization of the factual basis in *Nwuke* where the matters at issue were not simply the MEU's "decision not to compensate" and "one of receivability *ratione temporis*"; rather, in that case, UNAT found that the UNDT had erred in holding that the MEU, through its response, had admitted liability in his case and that the UNDT was not competent to pass judgment on the MEU's responses.

35. Even if UNAT were to find that the UNDT had jurisdiction to review the MEU response in the present case, neither the MEU nor the decision-maker applied an "inappropriate standard". Nothing in the MEU's response indicates that the decision-maker required him to "prove facts" before an investigation could be started. "Provid[ing] a basis to establish a claim" of harassment and abuse of authority is in no way the same as "proving" that harassment and abuse of authority had occurred. Rather, the complained-of passage in the MEU response refers to the requirement in Section 5.14 of ST/SGB/2008/5 that the decision-maker analyse "whether there are sufficient grounds to warrant a formal fact-finding investigation". The UNAT has emphasised that a fact-finding investigation may only be undertaken if there are "sufficient grounds" to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed. This is due to the fact that the mere undertaking of an investigation can have a negative

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<sup>4</sup> *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661.

impact on the staff member concerned. Mr. Yavuz has failed to demonstrate any error with regard to the manner in which the UNDT adjudicated his challenge of the MEU response.

36. The UNDT applied the correct definition of harassment to Mr. Yavuz's claim. Section 1.2 of ST/SGB/2008/5 states that "[h]arassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person". Mr. Yavuz's interpretation that the second part of this test is purely subjective, requiring that the action be perceived to cause offence or humiliation without enquiry as to the reasonableness of such, is baseless. The word "reasonably" applies both to "be expected" and "be perceived". If it were meant the way he claims, the clause "be perceived" would have been set off by commas. Moreover, the provision would not make sense if it were interpreted the way Mr. Yavuz argues. It would be arbitrary to apply a reasonableness test to conduct that might be expected to cause offence and humiliation but not to conduct that might be perceived to cause offence and humiliation. In addition, Mr. Yavuz's interpretation would lead to a requirement that an investigation would have to be undertaken every time a staff member were to assert that they felt offended or humiliated by conduct that they considered unwelcome. There would be no role for the responsible official to "assess" the complaint to determine whether there were "sufficient" grounds to warrant a formal fact-finding investigation, as required under the legal framework.

37. In support of his arguments, Mr. Yavuz further cites factual findings made by the UNDT in Judgment No. UNDT/2021/062, which adjudicated his challenge of the decision not to renew his appointment, that he characterizes as "established facts which clearly indicate possible conduct consistent with the definition of harassment and abuse of authority". Yet these findings do not support an argument that the UNDT should have found that Mr. Yavuz's complaint met a standard that should have compelled the Administration to start an investigation. Mr. Yavuz also wrongly claims that "the UNDT found that [Mr. Yavuz's supervisors] were harsh and impolite". Rather, the UNDT found that Mr. Yavuz's allegations, even if assumed to be true, "reflect the different positions of the contrasting persons in the hierarchy" and do not overcome the limits of ordinary disagreements in a work relationship, "although sometimes expressed in a harsh and impolite way by a supervisor". Thus, the UNDT's statement is a hypothetical one that acknowledges that supervisors may sometimes be harsh and impolite but that such behaviour remains within the boundaries of ordinary disagreements in work relationships.

38. In his appeal, the Appellant has also selectively quoted the DES, who had stated in his e-mail message of 2 March 2018 that he considered the issue not to be underperformance but “rather interpersonal problems and most likely lack of proper management/instruction”. Having “interpersonal problems and “lack of proper management/instruction” does not equate to harassment and abuse of authority. Thus, the DES’s further e-mail on 7 March 2019 indicating that he understood that Mr. Yavuz’s supervisors were “maltreating” him must be understood in that context. In addition, the DES used that phrase in response to Mr. Yavuz’s complaint that Mr. Yavuz felt humiliated at being asked to hold doors for delegates. In this regard, the DES clearly was not expressing an opinion that Mr. Yavuz was being harassed or that his supervisors were abusing their authority, since the DES went on to say that “[i]n my UN career I did all kind of things when needed from opening doors to moving furniture”.

39. In finding the contested decision lawful, the UNDT correctly cited *Benfield-Laporte*, in which UNAT affirmed the approach and reasoning of the UNDT Judgment. While Mr. Yavuz attempts to distinguish that case from his own, this approach—again—fails to render the jurisprudence inapplicable here. While *Benfield-Laporte* related to a complaint of a single act, the relevant holdings from that case relate to how complaints brought under ST/SGB/2008/5 are to be assessed, more generally, and are not specific to situations where the complaint is only of a single incident. The UNDT in that case held that the concept of “abuse of authority” cannot be understood to cover each and every case of impolite and awkward behaviour, that different standards based on various cultural backgrounds exist, and that interpreting “abuse of authority” too broadly would even be counterproductive to an efficient prosecution of the types of conduct ST/SGB/2008/5 wishes to prevent and condemn. Nothing limits this approach, which was approved and affirmed by the UNAT, in cases in which the complaint consists of a single incident. The UNDT in the present case also cited that approach and thus properly grounded its analysis in *Benfield-Laporte*.

40. Mr. Yavuz appears to be basing much of his appeal on his own incorrect understanding of what the UNDT actually held. Mr. Yavuz quotes a definition of harassment incorporating unwelcome conduct in the workplace which however does not appear anywhere in the UNAT *Nwuke* Judgment that he cites. He also claims that the UNDT found that “the subject of a complaint must have awareness of harm, damage or unfairness in order to have committed harassment or abuse of authority”. The UNDT does not state this anywhere in the Judgment. Further, contrary to Mr. Yavuz’s subsequent claim that the UNDT erred in law because “no such

awareness on the part of the perpetrator is contained in the definition of harassment”, the UNDT made no pronouncement on claims of harassment in the cited paragraphs. Ultimately, Mr. Yavuz simply disagrees with the UNDT regarding whether his complaint of harassment and abuse of authority provided sufficient grounds to warrant a formal fact-finding investigation. His repeated assertions that the established facts clearly indicated possible conduct consistent with the definition of harassment and abuse of authority and that his complaint very clearly indicated possible harassment or abuse of authority do not show that the UNDT erred in law or in fact resulting in a manifestly unreasonable judgment.

41. Finally, the UNDT was within its jurisdiction to review Mr. Yavuz’s complaint for evidence of the motivations of Mr. Yavuz’s supervisors. The UNDT correctly noted that its task was to review the validity of the contested decision on grounds of legality, reasonableness and procedural fairness. In making this review, the UNDT was required to assess Mr. Yavuz’s complaint to the extent necessary to decide on the legality and reasonableness of the contested decision. Mr. Yavuz’s complaint clearly alleged improper motives on the part of his FRO and SRO, including a claim that, in allegedly harassing Mr. Yavuz and abusing their positions of authority to his detriment, “they acted systematically, intentionally and in a calculated manner”. The UNDT thus committed no error in reviewing the complaint for “evidence” of “improper motive”. In the case of *Benfield-Laporte*, the UNDT also looked for such evidence in the course of reviewing the contested decision in that case, stating “[t]here is no indication that the Director-General intended to cause the Applicant any harm”. This approach was specifically affirmed by the UNAT. For the same reasons, Mr. Yavuz also does not show that the UNDT had required him to “prove” anything in his complaint before it could merit investigation. On the contrary, the UNDT held that the elements of the complaint, “even if true”, did not furnish sufficient grounds to warrant a formal fact-finding investigation under ST/SGB/2008/5. Mr. Yavuz has failed to demonstrate any error on the part of the UNDT with regard to its review of evidence of the intentions of Mr. Yavuz’s supervisors in committing the conduct of which he complained.

42. The Secretary-General requests that the UNAT dismiss the appeal in its entirety. Mr. Yavuz has not demonstrated any error on the part of the UNDT and he should not be awarded any compensation. In addition, two of the grounds that he lists (the decision to separate him from the Organization and the alleged delay in treating his complaint) are outside the scope of his appeal.

### Considerations

43. The issue before the Appeals Tribunal is whether the UNDT erred in law or in fact, or exceeded its jurisdiction by finding that the Administration's denial to set up a fact-finding investigation panel following Mr. Yavuz's complaint of harassment and abuse of authority was lawful.

#### *Applicable legal framework*

44. There is a commitment that all international organizations must have "zero tolerance" for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority. This is especially true for the United Nations, as such behaviour or conduct is contrary to the spirit of the United Nations Charter, its Staff Regulations and Rules and the Standards of Conduct for the International Civil Service. The "zero tolerance" policy is aimed at providing a safe environment for all United Nations employees,<sup>5</sup> free from discrimination on any grounds and from harassment at work including sexual harassment.

45. As a general rule, this policy aims to tackle the issue of harassment in the workplace mainly by means of two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.<sup>6</sup>

46. Concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, Section 2.1 of ST/SGB/2008/5 provides that "every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse".

47. Section 2.2 adds that "[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed".

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<sup>5</sup> *Sergio Baltazar Arvizú Trevino v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1231, para. 39.

<sup>6</sup> *Kenneth Conteh v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1171, para. 41.

48. Section 5.3 of ST/SGB/2008/5 establishes that “[m]anagers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings”.

49. Sections 5.14 and 5.15 of ST/SGB/2008/5 provide:

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by [Secretary-General’s Bulletin] ST/SGB/2005/21 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)].

50. ST/SGB/2008/5 then sets out the informal and formal procedures that may take place and, in Section 5.17, the final report of those proceedings is referred to as follows: “The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence .... This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.”

51. Section 5.18(a)-(c) provides for the possible courses of action, one of which the responsible official shall take:<sup>7</sup>

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and will inform the alleged offender and the aggrieved individual ... ;

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<sup>7</sup> Internal footnote omitted.

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

52. A final option is established in Section 5.19(d): “Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.”

53. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action. The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.<sup>8</sup> Only in particular situations (i.e., in a case of a serious and reasonable accusation) does a staff member have a right to an investigation against another staff member which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Appeals Tribunal Statute (Statute).<sup>9</sup> However, the Administration’s discretion can also be confined in the opposite direction. There

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<sup>8</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 30; *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33, citing *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 38, *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr.1, para. 31, and *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

<sup>9</sup> *Auda op. cit.*, para. 30; *Nadeau op. cit.*, para. 33, citing *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 40.



are situations where the only possible and lawful decision of the Administration is to deny a staff member's request to undertake a fact-finding investigation against another staff member.<sup>10</sup>

54. Under these provisions, a fact-finding investigation may only be undertaken if there are "sufficient grounds" or, respectively, "reason[s] to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". Consequently, if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 or ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process)) can have a negative impact on the staff member concerned.<sup>11</sup>

55. When it comes to the discretionary authority of the Administration, the Administration is under an obligation to exercise it lawfully according to the purpose of the authorizing statute and within the existing statutory limits. The Administration has not validly exercised its discretion if it has addressed a particular administrative matter in the same way it always has without any additional considerations or has operated under the erroneous belief that it was fettered to make a specific choice, to the exclusion of all other choices amongst the various courses of action open to it. In these situations, the Administration has, illegally, not engaged in a balancing exercise of the competing interests, by considering all aspects relevant for the exercise of its discretion, in order to select the proper course of action.<sup>12</sup>

56. Further, the Appeals Tribunal 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.<sup>13</sup>

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<sup>10</sup> *Nadeau op. cit.*, para. 33.

<sup>11</sup> *Ibid.*, para. 34.

<sup>12</sup> *Ozturk v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-892, para. 16.

<sup>13</sup> *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para. 31; *Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para. 43; *Abu Lehia 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.

57. 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. The first instance tribunal may consider whether relevant matters were ignored, and irrelevant matters considered, and also 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.<sup>14</sup>

58. 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 merit-based review, but a judicial review. 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.<sup>15</sup>

59. We have gone through the record of the present case, examined the grounds of appeal, the Respondent's answer, and hold that the UNDT did not commit an error of law or fact or exceed its jurisdiction.

60. As discussed and set out above, under the applicable legal framework, a fact-finding investigation may only be undertaken if there are "sufficient grounds", i.e., the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the law.

61. The UNDT applied ST/SGB/2008/5 which collectively refers to discrimination, harassment and abuse of authority as "prohibited conduct" but provides that "[d]isagreement on work performance or on other work-related issues is normally not considered harassment

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<sup>14</sup> *Jafari op. cit.*, para. 32; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 27; *Abu Lehia op. cit.*, para. 20.

<sup>15</sup> *Jafari op. cit.*, para. 33; *Abu Lehia op. cit.*, 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.

and is not dealt with under the provisions of this policy but in the context of performance management”. After presenting the definitions for harassment and abuse of authority and reviewing the details of the allegations raised by Mr. Yavuz and the reasoning of the contested decision, the UNDT found that the Administration lawfully concluded that the allegations did not amount to prohibited conduct even if true, “[a]s ... the various incidents alleged in the present case and complained of by the Applicant ... singularly and globally considered do not disclose any possible prohibited conduct under ST/SGB/2008/5 by his FRO or SRO, but reflect the different positions of the contrasting persons in the hierarchy, and do not overcome the limits of ordinary contrasts in a work relationship, although sometimes expressed in a harsh and impolite way by a supervisor”.<sup>16</sup>

62. Notably, in this context the UNDT found that:<sup>17</sup>

... [T]he principle reason for the conflict and discomfort that arose between the Applicant and his supervisors related to his work performance. Indeed, the Applicant’s complaint against his FRO and SRO primarily relates to his disagreement about the normal exercise of managerial authority in respect of his work performance and on the measures taken to improve his performance. Indeed, the Applicant neither alleged nor showed any trace of harassment or abuse of authority out of the above-mentioned domain.

... While some actions from the Applicant’s supervisors may have not been exemplary, as the Respondent admits, the record did not justify initiating an investigation into an issue that was principally a performance management matter.

... Moreover, the incidents described by the Applicant do not fall under any of the examples of “abuse of authority” specifically mentioned in sec. 1.4 of ST/SGB/2008/5.

63. Then, it proceeded to find that, though in Judgment UNDT/2021/062, in which it adjudicated Mr. Yavuz’s challenge of the decision not to renew his fixed-term appointment for performance reasons, Mr. Yavuz’s performance evaluation had been found by the UNDT to be objectively unfair “as it was influenced by the contrasts between the FRO, SRO and the Applicant”,<sup>18</sup> however, the FRO and SRO had been acting in good faith, convinced of performing their duties to the best of their abilities, with no proven intention to abuse their position and/or deliberately underestimating or, worse, harming Mr. Yavuz, and that Mr. Yavuz’s supervisors had followed the performance evaluation process and no sign of

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<sup>16</sup> Impugned Judgment, para. 53.

<sup>17</sup> *Ibid.*, paras. 41, 42, and 44.

<sup>18</sup> *Ibid.*, para. 50.

discrimination or abuse of authority emerged from the record, although the outcome of the performance evaluation was objectively unfair. Finally, the UNDT, having had regard to these findings, determined that the above-mentioned fact did not amount to prohibited conduct such as abuse of authority as defined under the relevant Bulletin.

64. Irrespective of the specific literal formulation of its underpinning reasonings, we agree with and uphold the UNDT's final conclusion that the Administration's decision not to set a fact-finding investigation panel against Mr. Yavuz's FRO and SRO was lawful, as the incidents described in Mr. Yavuz's complaint did not provide sufficient grounds they had engaged in prohibited conduct (harassment, abuse of authority) but fell in the realm of workplace disagreements. According to Section 1.1 of ST/SGB/2019/8, disagreement on work performance or on other work-related issues is normally not considered prohibited conduct and is dealt with in the context of performance management. There was nothing in the FRO and SRO's actions which went beyond normal and acceptable behaviour of superiors.

65. On appeal, Mr. Yavuz submits, however without success, that the UNDT erred in fact and in law in finding that the actions that he had complained of did not meet the threshold for the Administration to initiate an investigation and that, even if the facts were taken as true, they would not constitute harassment or abuse.

66. The term "prohibited conduct" refers to discrimination, harassment and abuse of authority, the definition of which can be found in Section 1 of ST/SGB/2008/5:

1.1 Discrimination is any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

...

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

67. In the present case, Mr. Yavuz does not show, nor can we see, that the incidents mentioned in his complaint with regard to the conduct of his FRO and SRO were in any way motivated by any of the characteristics or traits (or similar) listed in Section 1 of ST/SGB/2008/5, or in which way Mr. Yavuz was treated unfairly compared to other categories of staff members, or the improper use of a position of influence, power or authority against him by his FRO and SRO, other than a normal exercise of managerial powers by them, which, as the UNDT correctly determined, “remains irrelevant if the outcome of the managers’ evaluation is found objectively wrong for other purposes as it was the case”.<sup>19</sup>

68. Hence, we find no reasons to differ from the conclusion reached by the UNDT. 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.<sup>20</sup> We are satisfied that the UNDT’s conclusion is consistent with the evidence. Mr. Yavuz has not put forward any persuasive grounds to warrant interference by this Tribunal.

69. Mr. Yavuz claims that the UNDT applied an incorrect definition of harassment. Specifically, Mr. Yavuz cites Section 1.2 of ST/SGB/2008/5, which states that “[h]arassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person”. Based on this provision, Mr. Yavuz argues

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<sup>19</sup> Impugned Judgment, para. 52.

<sup>20</sup> *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, in turn citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

that the “second part of this test is purely subjective, requiring that the action ‘be perceived to cause offence or humiliation’ without enquiry as to the reasonableness of such”. He contends, further, that, as long as an individual finds conduct unwelcome and feels offended and humiliated by it, the conduct is automatically to be considered harassment or at least possible harassment and would require an investigation. In support of his arguments, Mr. Yavuz cites a number of factual findings made by the UNDT in Judgment No. UNDT/2021/062, which adjudicated his challenge of the decision not to renew his appointment, that he characterizes as “established facts which clearly indicate possible conduct consistent with the definition of harassment and abuse of authority”.

70. Mr. Yavuz’s advanced interpretative proposition of the cited law provisions is misplaced. The same goes for Mr. Yavuz’s understanding of the findings made by the UNDT in Judgment No. UNDT/2021/062, which do not support, as the Secretary-General correctly submits, an argument that the UNDT should have found that his complaint met a standard that should have compelled the Administration to start an investigation.

71. In terms of Section 1.2 of ST/SGB/2008/5, harassment includes conduct “that might reasonably be expected or perceived to cause offence or humiliation to another person”. It is not necessary to establish that the alleged offender was ill-intended, namely the motive of the allegedly offender does not remove his conduct beyond the scope of harassment. Nevertheless, the test is not a subjective one, as it focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person.

72. On this issue, the UNDT Judge made a reference to Judgment No. UNDT/2021/062, wherein the UNDT opined, *inter alia*, that Mr. Yavuz’s performance had not been managed or evaluated in a fair and objective manner by her FRO and SRO, as it had been influenced by the contrasts between them and Mr. Yavuz. However, the UNDT noted, at first, that “one thing is the wrong use of managerial powers—in the present case, the wrong evaluation of performance that is an objective situation (connected to the results)—and another thing is the abuse of authority in performance evaluation (an abusive performance evaluation), which requires something more, that is the scope of harm and damage, or at least the awareness of the unfairness of the performance evaluation in its completion of it”.<sup>21</sup>

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<sup>21</sup> Impugned Judgment, para. 47.

73. In this context, the UNDT held that the FRO and SRO had been acting in good faith, convinced of performing their duties to the best of their abilities, with no proven intention to abuse their position and/or deliberately underestimating or, worse, harming the staff member. “The Applicant’s supervisors followed the performance evaluation process and no sign of discrimination or abuse of authority emerges from the record, although the outcome of the performance evaluation was objectively unfair”.<sup>22</sup>

74. Though the above mentioned UNDT’s first analysis of the complained of behaviour and its reasoning, referring to the motives of the FRO and the SRO, is erroneous, as it seems to have applied a subjective test incorrectly for establishing prohibited conduct, it is, nonetheless, inconsequential for the determination of the material issue in the present case, namely whether from the perspective of the third objective viewer that same behaviour provided sufficient grounds that the alleged facts might amount to such within the meaning of the applicable law. In this regard, as already alluded, the UNDT’s final conclusion is correct.

75. In fact, a close examination of the UNDT’s reasoning indicates that it considered there to be rational connection between the evidence, the contested decision, the reasons given for it and the purpose of ST/SGB/2008/5 (being to prevent and discipline prohibited conduct). In any event, an appeal is not against the reasoning of the lower tribunal; it is against the order.

76. Notably, although the UNDT made express findings on the motives of the FRO and the SRO as well as on the lack of harm or damage, as constituent elements of the administrative process for setting up an investigation panel into Mr. Yavuz’s complaint of prohibited conduct, we understand it to have also considered whether objectively the same conduct of the alleged offenders could reasonably be perceived as causing offence or humiliation, or constituted abuse of authority.

77. In this line of reasoning, the UNDT found that:<sup>23</sup>

although the threshold to initiate an investigation under ST/SGB/2008/5 is low, the Applicant’s case does not reach that level either. The Applicant does not show any trace of discrimination, harassment, or abuse of authority in the present case, but mere normal exercise of managerial powers by his FRO and SRO, which remains irrelevant if the outcome of the managers’ evaluation is found objectively wrong for other purposes as it was the case.

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<sup>22</sup> *Ibid.*, para. 50.

<sup>23</sup> *Ibid.*, para. 52.

On this basis, the UNDT reached its correct final conclusion that the various incidents described in Mr. Yavuz’s complaint “do not disclose any possible prohibited conduct under ST/SGB/2008/5 by his FRO or SRO”,<sup>24</sup> to wit the overall circumstances of the particular case do not offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the law.

78. Although it is clear that Mr. Yavuz was unhappy with his performance evaluation and his working relations with his FRO and SRO and that there were tensions in his work environment, the mere existence of a harassment and abuse of authority complaint does not render the relevant allegations true, nor does it equate that complaint, in and of itself, to a sufficient ground for the Administration to engage in a formal fact-finding investigation of the alleged misconduct. The existence of interpersonal problems does not amount per se to harassment and abuse of authority, nor does the concept of “abuse of authority” cover each and every case of impolite and awkward behaviour, as the UNDT rightly held making a reference to its Judgment in *Benfield-Laporte* (UNDT/2013/162),<sup>25</sup> upheld by UNAT in its Judgment No. 2015-UNAT-505.

79. Based on these legal propositions the UNDT then held that the Administration was acting within the scope of its authority when it decided not to set up a fact-finding investigation panel. Since there was no sufficient ground to believe that the FRO and SRO had engaged in prohibited conduct within the meaning of ST/SGB/2008/5, the Administration could not proceed in the way requested by Mr. Yavuz, namely to initiate a formal investigation against them.

80. We agree with this finding. There was no evidence in the case at bar that this exercise of discretion was inappropriate due to a failure by the Administration to take into account relevant considerations or due to a consideration of irrelevant factors. Consequently, the presumption of regularity of the challenged administrative decision stands. Moreover, as correctly indicated by the Dispute Tribunal, the jurisprudence provides that the tribunals cannot replace the decision-makers in such matters of discretionary authority.

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<sup>24</sup> *Ibid.*, para. 53.

<sup>25</sup> *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/162.



81. Finally, Mr. Yavuz's submissions with regard to the 31 October 2019 MEU decision are not relevant on appeal. Only the ASG's decisions to reject his requests to undertake a fact-finding investigation against Mr. Yavuz's FRO and SRO are subject to judicial review on appeal. Management evaluation is a mere condition of receivability of an application before the UNDT and does not form part of the contested administrative decision.<sup>26</sup> The issues raised on appeal by Mr. Yavuz in terms of the MEU decision are of no legal relevance and will therefore not be reviewed by the Appeals Tribunal.

*Request for moral damages*

82. Mr. Yavuz's claim for moral damages is rejected. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".<sup>27</sup>

83. It follows that the appeal must fail.

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<sup>26</sup> *Nadeau op. cit.*, para. 36; *Kalashnik op. cit.*, para. 29.

<sup>27</sup> *Kule Kongba op. cit.*, para. 34, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, in turn citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 20; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 23.

**Judgment**

84. The appeal is dismissed and Judgment No. UNDT/2021/129 is affirmed.

Original and Authoritative Version: English

Decision dated this 28<sup>th</sup> day of October 2022 in New York, United States.

*(Signed)*

Judge Raikos

*(Signed)*

Judge Colgan

*(Signed)*

Judge Halfeld

Judgment published and entered into the Register on this 16<sup>th</sup> day of December 2022 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar