UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1333

Hasmik Egian

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2022-1683
Date of Decision:	24 March 2023
Date of Publication:	28 April 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Patricia Aragonès

JUDGE GAO XIAOLI, PRESIDING.

1. Ms. Hasmik Egian (Appellant), the Director of the Security Council Affairs Division (SCAD) appeals the judgment of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) that dismissed her application contesting the imposition of certain disciplinary measures for misconduct.

2. Appellant submits to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) that the UNDT committed errors of fact and law in upholding the Organization's misconduct finding and in affirming the sanction of written censure and loss of two steps in grade.

3. For the reasons set out in this Judgment, the Appeals Tribunal dismisses the appeal and affirms Judgment No. UNDT/2022/015 (impugned Judgment).

Facts and Procedure

4. Ms. Egian assumed the role of Director, SCAD, within the Department of Political and Peacebuilding Affairs (DPPA) on 7 March 2016. She held this position at the D-2 level.

5. The post of Chief of the Security Council Practices and Charter Research Branch (SCPCRB), at level D-1, was vacant from June through December 2016. It was held open for the placement of Ms. Y.B. (the complainant), and until Ms. Y.B. was able to assume her duties, Ms. B.M., a staff member at the P-5 level, was the Officer-in-Charge. Prior to Ms. Y.B.'s arrival, there was discussion in SCAD that Ms. Y.B. was unsuitable for the post.[1]

6. In January 2017, at a SCAD divisional meeting, Ms. Egian remarked on the gender composition of senior management (1 male and 2 females, including Ms. Y.B.), stating that she would have preferred 50-50 representation. Ms. Y.B. felt uncomfortable because she had been placed in her post, while the other D-1 level female manager had been competitively selected.[2]

7. In October 2017, at a briefing with a Member State, Ms. Egian was alleged to have said that "there are many brilliant minds working in [SCPCRB]" and Ms. Y.B. "is not one of them". Ms. Egian admitted that she said that "we also have lawyers on the team", which some participants

[1] Report of the Fact-Finding Investigation Panel to Investigate Complaints of Harassment and Abuse of Authority, Case No. 0107/19 (ST/SGB/2008/5) (Panel Report), para. 36.
[2] *Ibid*., para. 41.

viewed as emphasizing that Ms. Y.B., whose background was in information technology, was not a lawyer.[3]

8. At some point in 2017, Ms. Egian placed a call from the Security Council Chamber to Ms. Y.B., only to then ask her to pass the phone to Ms. B.M., which Ms. B.M. perceived as marginalizing Ms. Y.B.

9. In December 2017, there was a need to place two P-4 level staff from one of the teams in the Sanctions Branch to other positions in SCAD. Initial discussions involved Ms. Egian, the Front Office of the Office of the Under-Secretary-General (OUSG), the Executive Office and the Chief of the Sanctions Branch. Two vacant positions on Ms. Y.B.'s team (SCPCRB) were identified as options. However, Ms. Y.B. was not consulted about the placement of the two P-4 staff on her team until after the decision was made.[4]

10. In late 2017 and the first half of 2018, SCAD sought to revamp the Security Council website. Ms. Egian wished to use the services of Mr. V.R., who had performed the original scoping for this project. Mr. V.R. was also the spouse of a senior officer in DPPA. Ms. Y.B. preferred to leverage internal resources to implement the project, but she was overruled. The initial hiring of Mr. V.R. for this project received unflattering coverage in the Inner City Press.[5]

11. In August 2018, a Temporary Job Opening (TJO) at the P-2 level in SCPCRB was advertised both internally and externally. Three hundred and eighty-three individuals applied, including both internal and external candidates. Twenty-two candidates took a written test, and six candidates were interviewed. A selection panel made a recommendation for the position to Ms. Egian on 5 October 2018.[6] Ms. Egian did not endorse the recommendation and instead decided to cancel and re-advertise the TJO, purportedly in order to encourage more internal candidates to apply. Following the second recruitment exercise, an internal G-S staff from SCAD was selected in February 2019.[7]

12. In January 2019, Ms. B.M. requested a flexible work arrangement (FWA) from her manager, Ms. Y.B., to work away from the office for five days per week for two months. Ms. B.M.'s reason for being out of the office for five days per week was due to the work environment.

[3] *Ibid.*, paras. 42-43.
[4] *Ibid.*, para. 50.
[5] *Ibid.*, paras. 53-67.
[6] *Ibid.*, para. 68.
[7] *Ibid.*, paras. 70-71, 75.

Ms. Egian immediately encouraged Ms. Y.B. to approve the request. Later, when Ms. Y.B. made a FWA request to Ms. Egian to work remotely from another country, Ms. Egian did not approve the request promptly.[8]

13. On 21 January 2019, Ms. Y.B. filed a formal complaint of prohibited conduct against Ms. Egian, alleging that Ms. Egian had created a hostile work environment and misused United Nations resources.

14. On 7 March 2019, the Executive Officer of DPPA (EO/DPPA) requested approval from the Under-Secretary-General for Political and Peacekeeping Affairs (USG/DPPA) to establish a fact-finding panel (Panel) to investigate allegations of misconduct under the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The EO/DPPA proposed that two retirees residing in the New York area, who were both OIOS-trained and rostered investigators, would serve on the Panel and be paid for their services.

15. The Panel interviewed sixteen staff members, including Ms. Egian, Ms. Y.B., and fourteen other witnesses. The Panel also reviewed numerous documents.

16. On 16 May 2019, the Panel submitted its final report to the USG/DPPA. The Panel concluded, in pertinent part, that:

> Ms. [Y.B.] has been a victim of demeaning and disparaging remarks by Ms. Egian and that (...) Ms. Egian's behavior could be identified as harassment and abuse of authority according to the applicable norms.
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> . . .
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> [T]he recruitment of Mr. [V.R.], who is the spouse of a senior official in the same Department, should have been treated in a manner that prevented the Organization's exposure. The decision to finance the position, as well as his selection and appointment point to a lack of the necessary absolute transparency.
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> . . .
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> [T]he recruitment process for an urgently needed six-month P-2 post to assist in making the Repertoire annual (...) took almost eight months. (...) The Panel consider[ed] that, taking account of the risks involved to the Organization, the decision by Ms. Egian to re-advertise the P-2 post (...) may be considered as abuse of authority.[9]

[8] *Ibid*., paras. 79-86.
[9] *Ibid*., Executive Summary, pp. 1-2.

17. On 25 November 2019, the Assistant Secretary-General for Human Resources (ASG/HR) advised Ms. Egian that it had been decided to issue formal allegations of misconduct against her (Allegations Memorandum). In particular, it was alleged that she engaged in:

> a. Creating a hostile work environment towards Ms. [Y.B.] by: i) making disparaging and demeaning remarks against Ms. [Y.B.], humiliating and belittling Ms. [Y.B.] in front of her colleagues or others; ii) sidelining Ms. [Y.B.] from SCPCRB-related decisions and/or work; and iii) abusing your authority over Ms. [Y.B.] by showing favoritism towards Ms. [B.M.]
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> b. Misusing UN assets and resources in relation to the recruitment of Mr. [V.R.], demonstrating favoritism or giving rise to the perception of favoritism; and
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> c. Unreasonably interfering in a recruitment exercise relating to a P-2 TJO vacancy in SCPCRB, and by doing so, also misusing UN resources.[10]

18. By letter of 29 October 2020 (the Sanctions Letter), Ms. Egian was informed that the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC), decided to drop the allegations under subparagraph (b) of the Allegations Memorandum, but found that the allegations under subparagraphs (a) and (c) were established by a preponderance of the evidence and constituted misconduct. For this misconduct, the USG/DMSPC decided to impose on Ms. Egian the disciplinary measures of written censure and loss of two steps in grade, in accordance with Staff Rules 10.2(a)(i) and (ii) (contested decision).[11] This letter was placed in Ms. Egian's Official Status File.

19. On 27 January 2021, Ms. Egian filed an application with the Dispute Tribunal challenging the Administration's imposition of the disciplinary measures.

The UNDT Judgment

20. The UNDT examined whether the facts underlying the two charges in the Sanctions Letter were established by a preponderance of the evidence.

21. With regards to the first charge – that Ms. Egian created a hostile work environment for Ms. Y.B. – the UNDT reviewed several incidents. First, the UNDT concluded that the Administration had not established that Ms. Egian had made demeaning or disparaging remarks

[10] 25 November 2019 Letter of ASG/HR to Ms. Egian, p. 17.
[11] Secretary-General's Bulletin ST/SGB/2018/1/Rev.2 (Staff Regulations and Staff Rules of the United Nations).

about Ms. Y.B.'s suitability for the position before Ms. Y.B. arrived. The Dispute Tribunal noted that there was already in DPPA an unfavorable view of her suitability that was held by individuals other than Ms. Egian.[12]

22. Second, the UNDT determined that Ms. Egian's comment about preferring a 50-50 gender balance among SCAD managers could not, in itself, be reasonably perceived as intended to harass Ms. Y.B., but could contribute to a pattern of behavior that creates a hostile work environment.[13]

23. Third, the UNDT concluded that the testimonies of witnesses about Ms. Egian's statements about Ms. Y.B. at a meeting with a Member State in October 2017 were conflicting, and it was not possible to establish by a preponderance of the evidence what precisely was said. Accordingly, the Dispute Tribunal considered that these remarks did not contribute to a hostile work environment.[14]

24. Fourth, the UNDT found that the Administration could not rely on Ms. Egian calling Ms. Y.B.'s cell phone in order to speak to Ms. B.M. as evidence of harassment, when Ms. Y.B. did not complain about this incident.[15]

25. Fifth, with regard to the placement of the two P-4 staff on Ms. Y.B.'s team, the UNDT was not convinced that Ms. Egian's actions constituted harassment. The Dispute Tribunal acknowledged that Ms. Egian spoke to the manager of the Sanctions Branch (which was losing the two staff members) before speaking to Ms. Y.B., the manager of SCPCRB (which would receive the two staff members) but found that "not mak[ing] identical communications to the two directors is not objectively harassing behavior". Rather, the UNDT found that the Ms. Egian's managerial style in this incident contributed to creating a hostile work environment.[16]

26. Sixth, the UNDT found that the differing treatment by Ms. Egian with respect to the FWA requests from Ms. B.M. and Ms. Y.B. did not establish that Ms. Egian abused her authority over Ms. Y.B. The Dispute Tribunal noted that the FWA requests from Ms. B.M. and Ms. Y.B. were not identical and required different levels of consideration, as Ms. B.M. requested FWA from within the New York duty station, while Ms. Y.B.'s request was for FWA outside of the duty station.[17]

[12] Impugned Judgment, paras. 23-25.
[13] *Ibid.*, para. 31
[14] *Ibid.*, para. 37.
[15] *Ibid.*, para. 41.
[16] *Ibid.*, para. 47.
[17] *Ibid.*, para. 52.

27. On the second charge – unreasonable interference with the recruitment process for the P-2 TJO, the UNDT concluded that the record "clearly shows" that Ms. Egian's interference led to the sidelining of Ms. Y.B. and added considerable futile work for her and other staff in SCPCRB. The UNDT concluded that "through her unlawful interference", Ms. Egian "wasted considerable resources and time of her team, while also creating a hostile work environment".[18]

28. In sum, the UNDT concluded that there was a preponderance of the evidence to support that Ms. Egian created a hostile work environment and unlawfully interfered with the recruitment process for the P-2 TJO. However, the Dispute Tribunal rejected the Administration's finding that Ms. Egian had harassed Ms. Y.B.[19]

29. The UNDT considered whether Ms. Egian's due process rights were respected, as she claimed that the USG/DPPA and the EO/DPPA had conflicts of interest. The Dispute Tribunal rejected the claim that the USG/DPPA had a personal interest in investigating Ms. Egian because of the Inner City Press article about the recruitment of Mr. V.R. The Dispute Tribunal noted that the letter appointing the Panel was only about the personal grievances raised by Ms. Y.B.[20]

30. However, the UNDT noted that the EO/DPPA was a close acquaintance of Ms. Y.B. and he was also interviewed as a material witness to the investigation. Under these circumstances, the Dispute Tribunal concluded it was a "procedural flaw" for the EO/DPPA to have constituted the Panel. Nonetheless, since the main requirements of due process were met, in terms of Ms. Egian having notice of the allegations and the opportunity to be heard, the UNDT did not consider that this flaw tainted the fact-finding process.[21]

31. Turning to whether the sanction was proportionate to the misconduct, the Dispute Tribunal found that the Administration acted within the bounds of its discretion in determining that Ms. Egian's misconduct was serious in nature, and the imposed sanction was in line with the past practice of the Organization in matters of comparable misconduct.[22]

32. The UNDT accordingly dismissed the application.

[18] *Ibid.*, para. 58.
[19] *Ibid.*, paras. 64-65.
[20] *Ibid.*, paras. 70-71.
[21] *Ibid.*, paras. 73-76.
[22] *Ibid.*, paras. 83-84.

33. On 13 April 2022, Ms. Egian filed an appeal of the impugned Judgment, to which the Secretary-General submitted his Answer on 13 June 2022.

Submissions

Ms. Egian's Appeal

34. Appellant requests that the impugned Judgment be vacated, and the findings of misconduct and sanction be rescinded. In addition, Appellant requests an award of moral damages for medical harm caused by the contested decision.

35. Firstly, Appellant submits that the UNDT erred in fact and law when it considered the conflict of interest of the USG/DPPA and the EO/DPPA.

36. Appellant points out that prior to Ms. Y.B.'s complaint against her, the USG/DPPA had been publicly criticized for not taking action against Appellant with respect to the recruitment of Mr. V.R. Thus, Appellant argues, it was in the interest of USG/DPPA to take action against her, which conflicted with her obligation to remain independent in relation to the investigation of Ms. Y.B.'s complaint. Appellant claims that it was erroneous for the UNDT to believe that because Ms. Y.B.'s complaint did not touch on issues related to Mr. V.R.'s recruitment, that there was no conflict of interest. Appellant points out that the Panel engaged in an inexplicable deviation from Ms. Y.B.'s complaint into the issues around Mr. V.R., which gives rise to a reasonable apprehension of bias by USG/DPPA. Appellant states that the UNDT failed to exercise its jurisdiction when it refused to enquire as to why the Panel investigated this other issue.

37. Appellant acknowledges that the Dispute Tribunal found that the EO/DPPA had a conflict of interest in the subject of the investigation (due to his relationship with Ms. Y.B.) but claims that the Dispute Tribunal erred in finding it necessary for Appellant to show that this relationship had a material impact on the contested decision.

38. In addition, Appellant submits that the UNDT erred in fact and law in finding that there was no evidence that the Panel was biased. Appellant states that she provided significant evidence of bias by the Panel, including the Panel's leading questions posed to witnesses, labeling each incident as a type of misconduct at the beginning of every interview, prejudging that misconduct occurred, making findings of fact that were never put to Appellant in her interview, and forming

conclusions unsupported by evidence. Appellant states that these actions of the Panel tainted the evidence that they gathered.

39. Appellant submits that the UNDT erred in fact and law in finding it irrelevant that the Panel members were retirees, pointing out that as retirees they were remunerated for their work, and the EO/DPPA who provided them with this opportunity had a conflict of interest.

40. Secondly, Appellant claims that the UNDT erred in fact and law in finding that certain actions that were not harassment were still misconduct. Appellant notes that the UNDT found that Appellant's comment about the gender composition of senior management *did not* represent harassment, but that it "could contribute" to a hostile work environment. Appellant argues that the mere possibility that a comment could contribute to a hostile work environment is not a sufficient basis for a misconduct finding.

41. Appellant also argues that the UNDT erred in law by finding misconduct that was "established exclusively on subjective reaction". Appellant notes that the UNDT found that Appellant's placement of two P-4 staff on Ms. Y.B.'s team was an exercise of her managerial duties and was "not objectively harassing behavior" but that it "did contribute to creating a hostile work environment". Thus, Appellant argues that the UNDT elevated an objectively appropriate managerial action to misconduct based on a subjective response to the action.

42. Appellant submits that the UNDT erred in fact, leading to a manifestly unreasonable decision, by finding a course of conduct that contributed to a hostile work environment. Appellant points out that the UNDT found only three acts of misconduct – the comment on gender diversity, the communication on the placement of the two P-4 staff on Ms. Y.B.'s team, and the cancellation of the P-2 TJO recruitment. Appellant points out that Ms. Y.B. worked for her for a period of three years, and the UNDT erred in concluding that these three incidents, which were not in and of themselves harassing, resulted in a hostile work environment.

43. Thirdly, Appellant submits that the UNDT erred in law in concluding that the cancellation of the P-2 TJO recruitment contributed to a hostile work environment, solely because it created "considerable futile work" and there was "visible frustration" with this decision. Appellant argues that by using this definition, unpopular managerial acts could become acts of misconduct simply because the decisions are unpopular.

44. Appellant submits that the UNDT erred in law in finding that there was no breach of Appellant's due process rights, when Appellant was sanctioned for cancellation of the P-2 TJO recruitment, which the Allegations Memorandum referred to as a "misuse of resources" not an "abuse of authority". Appellant claims that she was robbed of the opportunity to present evidence and arguments as to how the definition of abuse of authority did not apply to this scenario.

45. Appellant argues that the UNDT erred in fact by stating that the Allegations Memorandum referred to her interference in the P-2 TJO recruitment as contributing to the sidelining of Ms. Y.B., when the Allegations Memorandum makes no such assertion. The Sanctions Letter identifies victims of this purported abuse of authority as Ms. Y.B. and "other impacted SCPCRB staff", yet the Allegations Memorandum did not identify these individuals and thus Appellant's due process rights were not respected in this regard.

46. Appellant submits that the UNDT erred in fact and law by finding misconduct on a ground that was not presented by the Respondent. Appellant states that the UNDT made a finding that she engaged in individual favoritism in canceling the P-2 TJO recruitment, but this was not the submission of the Administration, which stated that Appellant's actions were not guided by favoritism towards any SCAD staff member.

47. Appellant submits that the UNDT erred in fact and law in concluding that her actions with respect to the P-2 TJO recruitment were an abuse of authority. Appellant argues that abuse of authority is defined as an action taken "against another person"; whereas in her case, the Administration did not identify her motivation as acting against another person, but rather to give more opportunity to internal candidates. Appellant argues that the UNDT further erred in calling her actions "unlawful" when it has never been alleged that her conduct was unlawful. Finally, Appellant submits that even assuming her actions on the recruitment caused frustration, this does not meet the definition of abuse of authority.

48. Fourthly, Appellant submits that the UNDT erred in law in finding that the sanction was proportionate. Appellant points out that the UNDT upheld the sanction, but at the same time, found that seven of the acts for which she was sanctioned were determined by the Dispute Tribunal to not meet the definition of harassment. Of these seven acts, the UNDT determined that only three contributed to creating a hostile work environment. Thus, Appellant argues, the number of incidents and gravity of misconduct for which she was sanctioned radically changed by virtue of the UNDT's findings. Accordingly, Appellant submits, what might have been proportionate at the

time of the Administration's sanction could not be proportionate given the significantly reduced findings in the impugned Judgment.

49. Appellant states that the UNDT further erred in law by referencing sanctions of staff members who committed non-sexual harassment, when at the same time, the UNDT found that she had not committed harassment.

50. Appellant submits that the Administration sanctioned her for creating unnecessary work; whereas the UNDT found that she had exercised her managerial functions "not skillfully". Appellant argues that the culpability found by the UNDT is of a different order than that stated in the Sanctions Letter. Appellant states that the UNDT erred in law by failing to consider whether the sanction should have been adjusted accordingly.

51. Appellant also requests an award of moral damages for medical harm that she experienced as a result of the sanction, for which she presented evidence to the UNDT.

The Secretary-General's Answer

52. Firstly, the Secretary-General submits that the UNDT properly concluded that a preponderance of the evidence showed that Appellant had abused her authority and created a hostile work environment. The UNDT drew this conclusion after an examination of the record, including the investigation report (with the sworn and signed interview statements) and Appellant's comments thereon.

53. The Secretary-General points out that the UNDT confirmed the Administration's determination that two incidents (making comments about the gender composition of SCAD managers and placing the two P-4 staff on Ms. Y.B.'s team without prior consultation) "could" and "did", respectively, contribute to a pattern of behaviour creating a hostile work environment.

54. The Secretary-General submits that the UNDT did a full review of the testimonies in reaching its conclusion that Appellant abused her authority in interfering with the P-2 TJO recruitment and also created a hostile work environment. The Secretary-General thus argues that the UNDT correctly determined that there was a preponderance of the evidence to support that Appellant committed misconduct.

55. The Secretary-General submits that the UNDT was correct to find that Appellant committed an abuse of authority when she cancelled and re-started the P-2 TJO recruitment. The Secretary-General argues that this was an abuse of authority regardless of the fact that it was not targeted to benefit a particular individual. Appellant's unreasonable insistence on cancelling the recruitment over the objections of her subordinates, including Ms. Y.B., to satisfy her preference for a category of applicants (internal candidates within SCAD) falls squarely within the definition of abuse of authority. The UNDT was correct to find, after review of the testimonies and emails, that the facts established that Appellant's actions wasted the resources and time of her team, while also creating a hostile work environment.

56. The Secretary-General submits that Appellant's arguments that the UNDT elevated unpopular managerial actions by her to the level of misconduct is irrelevant. The Secretary-General asserts that it is an established fact that Appellant unreasonably interfered with the P-2 TJO recruitment and the UNDT relied on this finding to conclude that Appellant abused her authority and contributed to creating a hostile work environment and thus was appropriately sanctioned for this finding.

57. Secondly, the Secretary-General submits that the settled jurisprudence of the UNAT is such that the Tribunals do not interfere with a sanction decision unless it is "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity".[23] The Secretary-General submits that the UNDT properly considered whether the sanction was proportionate, in terms of the UNDT considering the nature of the misconduct, whether any aggravating or mitigating factors were present, and the past practice of the Organization in similar situations. The Secretary-General claims that the UNDT's approach was consistent with the UNAT's well-established jurisprudence, and the UNDT was correct to determine that the sanction was proportionate and to defer to the Administration's exercise of discretion even though the UNDT had not found harassment established.

58. The Secretary-General argues that the UNDT properly considered the correct factors in assessing the proportionality of the sanction, including that Appellant had failed to conduct herself in a manner befitting an international civil servant and that she had wasted the resources of the Organization to further her own personal preferences. He notes that the

[23] *See, e.g., Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.

UNDT correctly reviewed past cases and found that the Administration had imposed comparable or more severe sanctions in cases involving comparable conduct. The Secretary-General further points out that the sanction imposed was on the milder spectrum of options available to the Administration, and thus the UNDT was correct to decline to interfere with the Administration's exercise of discretion.

59. The Secretary-General submits that Appellant is incorrect to claim that the UNDT did not consider the difference between the misconduct sanctioned by the Administration and the misconduct established by the UNDT. He asserts that there is no indication that the UNDT disregarded its own finding that the Administration had incorrectly concluded that harassment had been established when the UNDT evaluated the proportionality of the sanction.

60. The Secretary-General submits that it was not erroneous for the UNDT to rely on jurisprudence from both sexual and non-sexual harassment cases, as there is overlap in these definitions in ST/SGB/2008/5.

61. The Secretary-General submits that the UNDT's finding with regard to Appellant's actions in the placement of the two P-4 staff on Ms. Y.B.'s team is not necessary to affirm the impugned Judgment. It is not even entirely clear that the UNDT relied on Appellant's actions in placing the two P-4 staff on Ms. Y.B.'s team (without prior consultation), when the Dispute Tribunal affirmed the sanction. The Secretary-General contends that the UNDT's finding that Appellant's conduct in placing the two P-4 staff on Ms. Y.B.'s team served to contribute to a hostile work environment was not necessary to uphold the sanction but serves to underscore that the sanction for abuse of authority was not absurd or flagrantly arbitrary.

62. Thirdly, the Secretary-General submits that the UNDT properly identified the essential questions to be considered when it comes to a due process analysis as whether the staff member was adequately appraised of the allegations and had a reasonable opportunity to be heard before any action was taken against the staff member. The UNDT correctly found that these essential requirements were met in Appellant's case.

63. With regard to the USG/DPPA's alleged conflict of interest, the Secretary-General asserts that Appellant misconstrues the impugned Judgment, and that the UNDT did not consider it necessary for Appellant to prove improper motive on the part of the USG/DPPA.

Rather, the UNDT found that even if the USG/DPPA had a political interest in clarifying the recruitment of Mr. V.R., this was not directly related to the decision to investigate Appellant.

64. The Secretary-General submits that there is no merit in Appellant's claim that the alleged conflict of interest of the EO/DPPA raised questions of bias or impartiality on the part of the Panel. He highlights that there was no evidence of bias by the Panel, which indeed dismissed several charges against Appellant as unsubstantiated. The Secretary-General notes that the EO/DPPA's alleged conflict was disclosed to the Panel. He states that there is no evidence that the mere fact that the EO/DPPA administratively established the Panel or that the Panel members were remunerated, means that the contested decision should be vitiated. Moreover, contrary to Appellant's arguments, the UNDT was not obliged to examine all of Appellant's claims about possible bias of the Panel.

65. The Secretary-General also submits that Appellant's complaint that the UNDT did not inquire into why the Panel investigated Mr. V.R.'s recruitment is misconceived. He points out that the allegations against Appellant as regards Mr. V.R.'s recruitment were dropped in the Sanctions Letter and thus the UNDT was under no obligation to explore the Panel's motivations or seek document disclosure in this regard. The Secretary-General also notes that the USG/DPPA's office did not directly manage the investigation and was not involved in the disciplinary process.

66. The Secretary-General refutes Appellant's claim that she was not on notice of the charges related to her interference with the P-2 TJO recruitment, stating that the Allegations Memorandum clearly informed her of such. The Secretary-General also states that the Allegations Memorandum provided her with sufficient details to understand that her interference impacted other SCPCRB staff members, and that she had the opportunity to respond.

67. Fourthly, because there was no error on the part of the UNDT, the Secretary-General requests that Appellant's request for an award of medical damages be rejected.

68. Finally, the Secretary-General states that Appellant is merely reiterating the arguments that she made before the UNDT, and this is not sufficient to establish an error on appeal. In any event, Appellant has not established any reversible error by the Dispute Tribunal and the appeal should accordingly be dismissed.

69. For all of the foregoing reasons, the Secretary-General requests that the UNAT dismiss Appellant's appeal in its entirety.

Considerations

70. The Appeals Tribunal's review of a challenge to a disciplinary sanction is based on our well-settled rule applicable to such cases. In *Veronica Irima Modey-Ebi,* [24] the Appeals Tribunal stated:

> ... In disciplinary cases the Appeals Tribunal will examine: i) whether the facts on which the disciplinary measure is based have been established; ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.

71. According to the submissions of Ms. Egian and the Secretary-General, the main issues in the present case are as follows: i) Did the UNDT err in concluding that, by a preponderance of the evidence, Appellant's actions had contributed to a hostile work environment and constituted an abuse of authority? ii) Did the UNDT err in concluding that the established facts amounted to misconduct? iii) Did the UNDT err in finding that the Administration's sanction was proportionate, even though the UNDT rejected all of the Administration's findings on harassment? iv) Did the UNDT err in concluding that Appellant's due process rights were not violated by the alleged conflict of interest of the USG/DPPA and the EO/DPPA? We take each of these issues in turn.

i) *Did the UNDT err in concluding that, by a preponderance of the evidence, Appellant's actions had contributed to a hostile work environment and constituted an abuse of authority?*

72. The Appeals Tribunal's analysis of this first issue begins, as it must, from the relevant legal provision. Section 9.1 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides:

> The applicable standard of proof is:
>
> (a) Clear and convincing evidence, for imposing separation or dismissal of the subject staff members. This standard of proof is lower than the criminal standard of "beyond a reasonable doubt"; and

[24] *Veronica Irima Modey-Ebi v. Secretary-General of the United Nations,* Judgment No. 2021-UNAT-1177, para. 34.

> (b) Preponderance of the evidence (more likely than not that the facts and circumstances underlying the misconduct exist or have occurred), for imposing any other disciplinary measure.

73. Thus, according to Section 9.1(b) of ST/AI/2017/1, the standard of proof for a disciplinary sanction that does not result in termination, as in this case, is "preponderance of the evidence".

74. The Appeals Tribunal has also confirmed the above-mentioned standard of proof in *Suleiman*[25] as follows:

> ... As the disciplinary sanction imposed in this matter was not termination but a fine and a written censure, it is sufficient that the Tribunals find that there was a preponderance of evidence.

75. In this case, the UNDT examined two charges against Ms. Egian in the Sanctions Letter: (a) creating a hostile work environment towards Ms. Y.B.; and (b) unreasonable interference in the P-2 TJO recruitment exercise in SCPCRB. The UNDT examined six incidents under the first charge in the Sanctions Letter and concluded that the facts in four incidents, i.e. Appellant making disparaging and demeaning remarks against Ms. Y.B. prior to Ms. Y.B. joining SCAD, Appellant commenting about Ms. Y.B. at a meeting with a Member State, Appellant making a phone call from the Security Council Chamber to Ms. Y.B., and Appellant's abuse of authority over Ms. Y.B. by showing favoritism towards Ms. B.M., were not established by a preponderance of the evidence. In the other two incidents, i.e. a comment made by Appellant regarding the gender composition of SCAD managers and Appellant's placement of two P-4 staff on Ms. Y.B.'s team (without timely consulting Ms. Y.B.), the UNDT concluded that while Appellant's actions did not constitute harassment of Ms. Y.B., these actions "could contribute to a pattern of behavior which creates a hostile work environment" or "did contribute to creating a hostile work environment".[26] As for the second charge, the UNDT found that Appellant "unlawfully interfered with a recruitment exercise", and "wasted considerable resources and time of her team while also creating a hostile work environment through her actions".[27]

[25] *Suleiman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1006, para. 10.
[26] Impugned Judgment, paras. 31, 47.
[27] *Ibid*., para. 58.

76. The Appeals Tribunal notes that the UNDT's findings on these incidents were based on extensive examination of the record in the Panel's dossier, including the testimonies of all the concerned witnesses, the Allegations Memorandum, the Sanctions Letter, the submissions from both parties, as well as contemporaneous emails amongst those involved. The UNDT considered all the evidence and arguments presented before it by Appellant and the Appeals Tribunal concludes that the UNDT's findings satisfied the requisite standard of proof for disciplinary sanctions other than those involving separation or termination.

77. The Appeals Tribunal observes that, with regard to the UNDT's findings on Appellant's alleged comment regarding the gender diversity amongst SCAD managers, her handling of the placement of two P-4 staff on Ms. Y.B.'s team, and her interference with the P-2 TJO recruitment exercise, Appellant did not seriously dispute the facts found by the UNDT, rather, she disagreed with the UNDT's qualification of her actions as "could" or "did contribute to creating a hostile work environment".

78. The Appeals Tribunal notes that "hostile work environment" is not defined separately in the relevant legal framework but is instead subsumed in the definitions of "abuse of authority" and "harassment" in ST/SGB/2008/5.

79. Specifically, with respect to the definition of abuse of authority, Section 1.4 of ST/SGB/2008/5 provides: [28]

> 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.

80. Concerning harassment, Section 1.2 of ST/SGB/2008/5 provides: [29]

> Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person.

[28] Emphasis added.
[29] Emphasis added.

> *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.

81. In addition, Section 3.2 of ST/SGB/2008/5 stipulates the duties of managers and supervisors:[30]

> *Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct.* They must *act as role models by upholding the highest standards of conduct.* Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfill their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and *they will be subject to administrative or disciplinary action, as appropriate.*

82. Finally, Staff Regulation 1.2(a) provides the basic rights and obligations of staff as follows:[31]

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

83. Appellant, as a D-2 level official of the United Nations, should act in all circumstances in a manner befitting her status as an international civil servant. Her comments about the gender composition of the SCAD managers, even accepting that she made them with no malicious intent as she claimed, did cause concerns and discomfort among the division managers at the meeting, albeit for different reasons. These kind of comments undoubtedly did not contribute to a harmonious work environment. The UNDT did not err in finding that such comments could contribute to a pattern of behavior that creates a hostile work environment.

[30] Emphasis added.
[31] Emphasis added.

84. The foregoing analysis also applies to the placement of the two P-4 staff on Ms. Y.B.'s team. The UNDT is correct in finding that although Appellant was engaged in managerial acts, she could have used a more skillful approach. The Appeals Tribunal shares the view that Appellant's management of the whole process of the placement of the two P-4 staff on Ms. Y.B.'s team caused discord and disharmony within her division and was perceived by the affected manager, Ms. Y.B., as sidelining her. Thus, the UNDT's finding that Appellant's managerial style in this incident "did contribute to creating a hostile work environment" is reasonable.

85. Appellant contends that her actions are entirely different from those, such as "intimidation, threats, blackmail or coercion", giving rise to a hostile work environment. However, Section 1.4 of ST/SGB/2008/5 specifies that "[a]buse 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".[32] It is clear that the four specific acts listed in Section 1.4 and highlighted by Appellant are only *examples* of the types of conduct that may create a hostile work environment. Section 1.4 does not provide an exclusive list, and other acts may also give rise to a hostile work environment. Appellant thus misconstrues the pertinent rule.

86. In the Appeals Tribunal's view, the UNDT correctly found that Appellant's interference with the P-2 TJO recruitment led to the sidelining of Ms. Y.B. and added considerable futile work for Ms. Y.B. and other SCPCRB staff members, wasted considerable resources and time of her team, while also creating a hostile work environment. Appellant cancelled the almost completed P-2 TJO recruitment in order to recruit an internal candidate. Regardless of whether her motivation was benign, the fact is that Appellant interfered with a lawfully conducted recruitment process which led to the hiring of an internal staff member within SCAD instead of one of the external candidates originally recommended in the cancelled recruitment process. Appellant's unreasonable insistence that the recruitment be cancelled over the objections of colleagues in subordinate positions, including Ms. Y.B., to satisfy Appellant's personal preference that a specific category of applicants be selected, falls squarely within the definition of abuse of authority, regardless of whether it was "targeted" to benefit any one person. The Appeals Tribunal finds no merit to Appellant's characterization that this finding means that "unpopular managerial acts could become acts of misconduct simply because the

[32] Emphasis added.

decisions are unpopular". The UNDT did not err in fact and law in concluding that Appellant's actions with respect to the P-2 TJO recruitment were an abuse of authority and contributed to a hostile work environment.

ii) Did the UNDT err in concluding that the established facts amounted to misconduct?

87. With respect to the second issue on appeal, the guiding principle is found in Staff Rule 10.1 (a), which provides:[33]

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

88. Based on the above analysis, Appellant's actions were established as contributing to creating a hostile work environment and also were an abuse of authority as a D-2 level official. These actions also then constitute misconduct under the above-mentioned legal framework. The Appeals Tribunal agrees with the UNDT's conclusion in this regard.

89. Appellant argues that the UNDT erred in fact and law in finding that certain actions that were not harassment were still misconduct. The Appeals Tribunal holds that "misconduct" is a broader concept than "harassment", wherein the former includes any failure of the staff to comply with their obligations under the United Nations' legal framework for the conduct of international civil servants. The UNDT did not err in fact and law in finding that certain of Appellant's actions that were not harassment were still misconduct.

90. The UNDT found that Appellant's comments about the gender composition of senior management in SCAD *did not* represent harassment, but that they "could contribute" to a hostile work environment. Appellant argues that the mere possibility that a comment could contribute to a hostile work environment is not sufficient for a misconduct finding. However, in the Appeals Tribunal's view, the high standards of conduct for international civil servants laid down by the relevant Staff Regulations and Rules, especially those holding high positions at the D-2 level,

[33] Emphasis added.

justify that even if there is only a possibility of creating a hostile work environment, the contested actions may still constitute misconduct.

91. The UNDT found that Appellant's placement of two P-4 staff on Ms. Y.B.'s team was a valid exercise of her managerial duties and was "not objectively harassing behavior" but that it "did contribute to creating a hostile work environment". Contrary to Appellant's argument, this does not mean that the UNDT established misconduct "exclusively on subjective reaction". While the UNDT did not find that the incident served to establish harassment, creating a hostile work environment is nonetheless misconduct under ST/SGB/2008/5.

92. We are also mindful of our longstanding jurisprudence that UNDT findings are accorded a degree of deference and will not be overturned lightly. In *Messinger*,[34] the Appeals Tribunal stated:

> ... It is not sufficient for an appellant to state that he or she disagrees with the findings of fact or to repeat the arguments submitted before the UNDT. An appellant must identify the apparent error of fact in the Judgment and the basis for contending that an error was made. The appellant must satisfy this Tribunal that the finding of fact was not supported by the evidence or that it was unreasonable. This Tribunal considers that some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard.

93. In *Ross*,[35] the Appeals Tribunal likewise mentioned:

> ... [T]he Appeals Tribunal is not a forum for a party to reargue the case without identifying the defects and demonstrating on which grounds an impugned UNDT judgment is erroneous. More is required. The appellant must demonstrate that the UNDT has committed an error of fact or law warranting intervention by this Tribunal. As has been repeatedly stated by the Appeals Tribunal, "[i]n the absence of a compelling argument that the UNDT erred on a question of law, or on a question of fact resulting in a manifestly unreasonable decision, we will not lightly interfere with the findings of the Dispute Tribunal.

[34] *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36 (internal citation omitted).
[35] *Ross v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1000, para. 65 (internal citation omitted).

94. None of Appellant's arguments challenging the UNDT's confirmation of her actions as misconduct have merit. We conclude that Appellant has failed to establish that the UNDT made a manifestly unreasonable decision warranting the intervention of the Appeals Tribunal.

iii) Did the UNDT err in finding that the Administration's sanction was proportionate, even though the UNDT rejected all of the Administration's findings on harassment?

95. Appellant next contends that the UNDT failed to consider the difference between the misconduct for which she was sanctioned by the Administration and the misconduct that was established by the UNDT. She argues that the number of incidents and the gravity of the misconduct found had altered radically from the administrative stage to the review by the UNDT. Appellant also argues that the UNDT erred in referencing the Organization's past practice involving discipline for (non-sexual) harassment and abuse of authority when harassment was not established in her case.

96. Concerning the proportionality of the sanction, Staff Rule 10.3 (b) provides:

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

97. The Appeals Tribunal's jurisprudence on the evaluation of the proportionality of a disciplinary sanction is well-settled. In *Karkara*,[36] the Appeals Tribunal pointed out:

> ... The matter of degree of the sanction is usually reserved for the Administration which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of the administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures such as a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy the victims and restore the administrative balance. That is why the Tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. The Secretary-General also has the discretion to

[36] *Ravi Karkara v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1172, para. 72 (internal citation omitted).

> weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.

98. In *Zaqout*,[37] where the staff member was subject to a harsher sanction than that imposed on Appellant here, the Appeals Tribunal reasoned:

> ... After reviewing the allegations and the testimonies, the investigation found that there was evidence the Appellant used abusive, inappropriate and unprofessional language not only toward the Complainant but also toward other colleagues.
> ...
> ... As such, the [Administration] imposed disciplinary measures on the Appellant that included a written censure and a loss of one grade (...)
> ...
> ... [T]he Dispute Tribunal correctly determined that the disciplinary sanctions of written censure and loss of one grade were not the most severe measures available and were proportionate to the offence, especially in light of the clear pattern of abusive behavior exuded by the Appellant.

99. The UNDT found that Appellant had created a hostile work environment through her actions in three incidents and abused her authority in the P-2 TJO recruitment process, thereby establishing misconduct. The UNDT then examined the proportionality of the sanction imposed on Appellant based on the established misconduct. In doing so, the UNDT followed the Appeals Tribunal's well-established jurisprudence on judicial review of disciplinary measures, considered the Organization's past practice, and concluded that the sanction of written censure and loss of two steps in grade was within the discretion of the Administration. We find no fault in the UNDT's approach and conclusion in this regard.

100. Staff Rule 10.3(b) requires that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. Therefore, when examining proportionality, it is the nature and gravity of the misconduct that should be considered. Abuse of authority is in itself serious misconduct. Appellant's conduct was particularly grave in light of the senior management position she held and the consequences of her action. Although Appellant's actions did not constitute harassment, and out of the seven charged incidents, only three were established, the nature and gravity of abuse of authority alone is enough to warrant the impugned sanction.

[37] *Iyad Youssef Zaqout v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1183, paras. 8, 10, and 42.

101. The nature and gravity of the contested misconduct should be examined on a case-by-case basis. The UNDT referenced the Organization's past practice where staff members in comparable managerial or senior positions were sanctioned for comparable misconduct. Whether the past practice involved harassment and abuse of authority, or only one or the other, is of no relevance. There is no merit in Appellant's argument on this point.

102. In *Konaté*,[38] the challenged sanction was affirmed by the UNAT although not all the allegations of misconduct were proven. The UNDT considered the sanction of separation from service proportionate, even though it did not uphold the allegation of forgery against the applicant. On appeal, this Tribunal held:

> ... [W]hen reviewing a disciplinary sanction imposed by the Administration, the role of the Appeals Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.
>
> ... *Although not all the allegations of misconduct with which the staff member was charged were proven*, it was established by the Administration and the UNDT that Mr. Konaté failed to apply formal methods of solicitation in respect of contracts, in violation of UNFPA Financial Regulations, Rules and Procurement Procedures, and also failed to refer a contract to the UNFPA Headquarters Contracts Review Committee, in violation of further norms.
>
> ... The Appellant has not established any errors of fact or law warranting reversal of the impugned Judgment, in which the UNDT correctly declined to accept a defence based on alleged superior orders. No staff member working in procurement can be so naive as to believe that the procedures in place to ensure the proper administration of United Nations financial and economic resources and to prevent improper management can be set aside following orders to the contrary from his or her supervisor.
>
> ... In analyzing the proportionality of the sanction, the first instance Judge considered that despite the fact that it was severe, it was not unduly harsh. This Court sees no reason to depart from that conclusion, as the sanction cannot be considered absurd or arbitrary.

103. The case law thus demonstrates that even when all the allegations of misconduct are not proven, the imposed sanction may still be upheld. The reduction of the number of the established incidents of misconduct will not necessarily entail an adjustment to the imposed sanction. Appellant's argument that the UNDT failed to consider the difference between the

[38] *Konaté v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-334, paras. 18-21 (emphasis added).

misconduct charged by the Administration, the misconduct established by the UNDT, and the totality of the circumstances of the work environment over the relevant time period (three years) was therefore also without merit.

104. As has been emphasized consistently by the Appeals Tribunal, we will not interfere with the Administration's discretion unless "the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity."[39] In some cases, for example, in *Koutang*[40] and in *Konaté*,[41] even though the sanctions ultimately imposed could be considered severe or harsh, they were nevertheless not unreasonable, absurd or disproportionate, and therefore the Appeals Tribunal did not substitute its judgment for that of the Administration. In the present case, given the nature and seriousness of Appellant's misconduct, the sanction imposed on Appellant was not blatantly illegal, arbitrary, excessive, absurd, or disproportionate. As such, the Appeals Tribunal finds that imposing the sanction of written censure and loss of two steps in grade was a reasonable exercise of the Administration's broad discretion, with which the Appeals Tribunal will not lightly interfere.

105. In accordance with the foregoing, Appellant's argument that the UNDT erred in law in finding that the disciplinary sanction was proportionate is not supportable.

iv) Did the UNDT err in concluding that Appellant's due process rights were not violated by the alleged conflict of interest of the USG/DPPA and the EO/DPPA?

106. As has been established by the jurisprudence of the Appeals Tribunal, whether a party's due process rights have been fully respected during the whole process is an important aspect of judicial review. In *Negussie*,[42] the Appeals Tribunal emphasized:

> ... To observe a party's right of due process, especially in disciplinary matters, it is necessary for the Dispute Tribunal to undertake a fair hearing and render a fully reasoned judgment. Although it is not necessary to address each and every claim made by a litigant, the judge has to take the party's submissions into consideration and lay down, in its judgment, whether the above-mentioned criteria are met.

[39] *See, e.g., Portillo Moya v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-523, para. 21.
[40] *Koutang v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-374, para. 30.
[41] *Konaté* Judgment, *op. cit.*, para. 21.
[42] *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 19.

107. Appellant submits that the UNDT erred in fact and law when considering the alleged conflict of interest on the part of the USG/DPPA and the EO/DPPA and erred in fact and law in finding no evidence that the Panel was biased.

108. To be specific, with regard to the claimed conflict of interest by the USG/DPPA, the UNDT was correct in finding that the allegations in relation to the recruitment of Mr. V.R. were dropped by the Administration and this issue was not directly related to the decision to investigate Appellant. Appellant's argument that the UNDT required her to prove ill-motive by the USG/DPPA to show a conflict of interest existed is without merit. As for the contention that the UNDT failed to exercise jurisdiction by refusing to enquire into why the Panel chose to investigate the recruitment of Mr. V.R., as this allegation had been dropped, the UNDT was under no obligation to review this issue. Besides, the UNDT denied Appellant's request for disclosure regarding this issue, which indicates that the UNDT did in fact properly exercise its jurisdiction.

109. With respect to the claimed conflict of interest by the EO/DPPA, the UNDT found that allowing the EO/DPPA to establish the Panel was a procedural flaw. Nonetheless, citing the Appeals Tribunal's decisions in *Sall*[43] and *Karkara*[44], the UNDT found that the main requirements of due process were met, and this procedural flaw did not taint the fact-finding process *ab initio*. The UNDT's approach followed the well-established jurisprudence of the Appeals Tribunal that not every procedural irregularity will render a disciplinary measure unlawful. Only substantial procedural irregularities will do so.

110. As has been explained in *AAD*[45], procedural irregularity does not necessarily mean due process rights were violated and does not necessarily affect the sanction. As we stated therein :

> ... With regard to due process, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.
>
> ... The Dispute Tribunal correctly held it was a very basic principle of due process in a disciplinary case that each of the relevant facts and allegations of misconduct be presented to the employee or staff member in such a manner that they can easily understand them, and they be afforded an adequate opportunity to respond to those allegations.

[43] *See, e.g., Sall* Judgment, *op. cit.*, para. 33; *see also, Ali Halidou v. Secretary-General of the United Nations,* Judgment No. 2020-UNAT-1070, paras. 32-33.
[44] *Karkara* Judgment, *op. cit.*, para. 76.
[45] *AAD v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1267/Corr. 1, paras. 66-69.

> ... We agree with the Dispute Tribunal that the allegations [in the memorandum] were too ambiguous and confusing (...) [T]he allegation memorandum could be interpreted as being equivocal and therefore, unclear. This confusion makes the staff member's response to the allegations difficult and therefore, was a significant procedural irregularity and violation of due process.
>
> ... However, this irregularity does not support the rescission of the finding of misconduct or the overturning of the disciplinary sanctions. The misconduct that has been factually established is serious enough on its own to support the initial sanctions as discussed below (...) In other words, the evidence that does establish the misconduct (...) meets the high standard appropriate to the gravity of the allegations and severity of the consequences for such misconduct. Moreover, AAD had the opportunity to defend herself appropriately, having been sufficiently appraised of the allegations against her.

111. Even more relevant is our decision in *Belkhabbaz*,[46] in which the Appeals Tribunal considered that the Executive Director of OAJ had a potential conflict of interest in the establishment of a fact-finding panel, yet concluded that this did not taint the ultimate decision taken by the ASG/OHRM based on the fact-finding panel's report. Moreover, just as in the present case, the Executive Director in *Belkhabbaz*, had appointed retirees to the panel from a roster, which the Appeals Tribunal did not find problematic, as noted below:

> ... On 19 May 2015, the former Executive Director of OAJ appointed *two retired staff members* from the roster maintained by OHRM as members of the panel to investigate Ms. Belkhabbaz's complaint. The investigators reviewed the documents provided by Ms. Belkhabbaz and the former Chief of OSLA and interviewed 17 witnesses, in addition to Ms. Belkhabbaz. The former Chief of OSLA responded in writing to the questions posed by the panel but refused to be interviewed. On 6 September 2016, the panel submitted its report to the OiC ASG/OHRM. The report stated that there was no evidence that: a) the reassignment of Ms. Belkhabbaz's cases was of a retaliatory nature; b) the copying of others on e-mails dealing with confidential issues concerning Ms. Belkhabbaz, such as performance issues and a reprimand, was done maliciously or with an intent to harm; and c) there was a pattern of hostile, harassing or threatening treatment by the Chief of OSLA towards Ms. Belkhabbaz.
>
> . . .
>
> ... [T]he former Executive Director of OAJ was not the decision-maker of the contested decision. She was responsible for appointing the panel, and her role was administrative and preliminary to the contested decision. The rule against bias applies only to the relevant decision-maker and there was no challenge to the decision appointing the

[46] *Belkhabbaz (formerly Oummih) v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873, paras. 19 and 84 (emphasis added).

> panel. The evidence does not support a reasonable perception or inference that the ASG/OHRM, when taking the decision, was biased against Ms. Belkhabbaz.

112. Notwithstanding that the Appeals Tribunal does not find the EO/DPPA's involvement in the appointment of the Panel to be a fatal flaw, the Organization should be mindful to avoid this kind of procedural flaw in constituting such panels.

113. Concerning the essential requirements of due process in disciplinary cases, Staff Rule 10.3(a) provides:

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

114. According to this rule, due process requires that a staff member who is subject to an investigation be informed of the misconduct charges and be provided with the opportunity to contest the allegations against him or her. In the present case, the key elements of Appellant's due process rights were met, given that she was fully informed of the charges against her and was given the opportunity to contest them and to seek advice from OSLA or other counsel.[47] The Appeals Tribunal is satisfied that Appellant's due process rights were met and the interests of justice were served in the present case. Appellant's arguments that the EO/DPPA and the Panel violated her due process rights were without merit.

115. Appellant argues that the UNDT erred in law when it found that she was afforded due process in connection with the P-2 TJO recruitment. The Allegations Memorandum clearly informed Appellant that her actions, including her interference in the P-2 TJO recruitment, "creat[ed] such a hostile work environment (...) through harassment and abuse of authority (...)" It also provided sufficient details regarding the impact on Ms. Y.B. and other SCPCRB staff members, and informed her that, if established, her conduct would constitute harassment and abuse of authority under ST/SGB/2008/5. Appellant had the opportunity to present

[47] *See, e.g.*, *Leal v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-337, para. 24; *Ladu v. Secretary-General of the United Nations,* Judgment No. 2019-UNAT-956, para. 41.

evidence and arguments to respond to all aspects of this allegation. The UNDT was thus correct to find that Appellant had been "afforded full due process in regard to this incident".[48]

116. In accordance with the foregoing, the Appeals Tribunal holds that Appellant's contentions about her due process rights violations have been duly taken into consideration and appropriately dealt with by the UNDT. Appellant is merely repeating her submissions before the UNDT and expressing disagreement with the first instance judgment. The Appeals Tribunal finds no merit to Appellant's appeals against the UNDT judgment concerning alleged violations of her due process rights.

v) Appellant's request for moral damages for medical harm

117. Appellant requests that the UNAT award her moral damages for medical harm caused by the contested decision which was sought and evidenced before the UNDT. Since no illegality was found, there is no justification for the award of any compensation.[49]

[48] Impugned Judgment, para. 57.
[49] *See, e.g., Sall* Judgment, *op. cit.*, para. 43; *Ladu* Judgment, *op. cit.*, para. 47.

Judgment

118. Ms. Egian's appeal is dismissed, and Judgment No. UNDT/2022/015 is hereby affirmed.

Original and Authoritative Version: English

Dated this 24th day of March 2023 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Gao, Presiding	Judge Raikos	Judge Halfeld

Judgment published and entered into the Register on this 28th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar