



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

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Judgment No. 2023-UNAT-1401

**Moïse Alain Nkoyock (Fils)**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**JUDGMENT**

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Before:	Judge Graeme Colgan, Presiding Judge Leslie F. Forbang Judge Katharine Savage
Case No.:	2022-1767
Date of Decision:	27 October 2023
Date of Publication:	13 December 2023
Registrar:	Juliet E. Johnson

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Counsel for Appellant: Sètondji Roland Adjovi

Counsel for Respondent: Angélique Trouche

**JUDGE GRAEME COLGAN, PRESIDING.**

1. Moïse Alain Nkoyock (Fils), now a former staff member at the United Nations Office of Counter Terrorism (UNOCT), Vienna, contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) several disciplinary sanctions that had been imposed on him. These included loss of three steps in grade, deferment for three years of eligibility for consideration for promotion, and a requirement to attend on-site or online interactive training on workplace civility and communication. These sanctions had been imposed for creating a hostile, offensive and humiliating work environment between 2015 and 2018, when Mr. Nkoyock was Officer-in-Charge (OIC), at the Department of Software Products for Member States (SPMS), United Nations Office on Drugs and Crime (UNODC).
2. By Judgment No. UNDT/2022/115 issued on 20 October 2022 (impugned Judgment), the UNDT dismissed the application.
3. Mr. Nkoyock has filed an appeal.
4. For the reasons that follow, we grant the appeal and reverse the impugned Judgment.

**Facts and Procedure**

5. There are two distinct phases to this proceeding which we will address separately in light of Mr. Nkoyock's grounds of appeal and in particular his assertion that he was denied due process by the UNDT. First, we will summarise the events that led to the sanctions being imposed upon him by the Organization; and second, we will address the procedure directed by the UNDT to deal with his application to it.
6. The UNDT made no independent findings of fact in the sense of seeing and hearing witnesses give evidence about matters in dispute between the parties. It reviewed and adopted the findings made and reported on by the Organization's own investigation. In these circumstances we have no alternative but to summarise those factual findings adopted by the UNDT, although allowing potentially for their revision, if errors in them are alleged and the Appellant's appeal is allowed in this regard. In general, those summarised relevant events were the alleged creation by Mr. Nkoyock of a hostile work environment affecting a number of anonymized work colleagues during the three-year period from 2015 to 2018. This behaviour

was said to have included the use of words and other conduct characterised variously as “demeaning, intimidating, humiliating, and abusive”.

7. Mr. Nkoyock joined the Organization in 2006. As the outcome of an internal restructuring in May 2015, he became OiC of SPMS, UNODC in Vienna.

8. On 17 February 2022, he transferred to UNOCT at the P-5 Level. He then held a continuing appointment. He was tasked with breaking up silos of staff grouped around particular products and implementing what was called a “matrix approach”. This was to assemble staff along functional lines to foster collaboration across functional areas and to encourage cross-team communications.

9. There were formal complaints by other staff members about his management style. The complainants described him, variously, as aggressive, intimidating and uncompromising in his interpersonal managerial style.

10. In April and May 2018, four formal complaints were separately filed against Mr. Nkoyock by four supervisees, Mr. AK, Mr. R, Mr. T and Mr. S (the complainants). The Organization categorised these complaints, according to the wording used in the relevant documentation, as allegations of harassment and abuse of authority. Mr. Nkoyock responded to the allegations when they were put to him.

11. On 28 June 2018, the Chief of the Human Resources Management Service (HRMS), UNODC (Chief, HRMS), acting as the responsible official in this case, convened an investigative panel pursuant to Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The investigative panel was composed of two trained individuals from a roster established for that purpose. They were not current staff members of the Organization.

12. The investigative panel was appointed not only to investigate the complaints made against Mr. Nkoyock. They were also to investigate at the same time similar complaints made against another manager, a Team Leader, who is not a party to this case and who was not in the complainants’ reporting lines.

13. The terms of reference for the investigative panel (provided to it on 28 August 2018) included, pertinently, that it was to “establish the facts with respect to the allegations made by the aggrieved individuals”. The investigative panel was expressly informed that it was not required to determine whether the facts as found by it constituted prohibited conduct or misconduct.

14. On 31 October 2018, the investigative panel issued its investigation report (the Report). This runs to 96 pages without annexures. The detailed complaints of the complainants against both subjects of the investigation together with supporting documentation add a further 196 pages to that Report. It is a lengthy and comprehensive report, including summaries of the complaints and Mr. Nkoyock’s responses to them as told to the investigative panel.

15. The Report revealed significant evidence of a hostile work environment created by Mr. Nkoyock: “a pervasive pattern of demeaning, intimidating, humiliating and abusive words and actions towards not only [his] subordinates but also his superiors, peers and external counterparts”.

16. On 30 September 2019, the Director of the Administrative Law Division, Office of Human Resources, Department of Management Strategy, Policy and Compliance (DALD/HR and DMSPC, respectively) informed Mr. Nkoyock of the formal allegations of misconduct against him and invited him to present his comments. Mr. Nkoyock provided detailed comments on 6 and 22 January 2022.

17. By letter dated 23 September 2020 (Sanction Decision), the Assistant Secretary-General for Human Resources (ASG/HR) conveyed to Mr. Nkoyock the decision of the Under-Secretary-General for DMSPC to impose on him “the disciplinary measures of a loss of three steps in grade, deferment for three years of eligibility for consideration for promotion in accordance with Staff Rule 10.2(a)(ii) and (vi), together with a requirement to attend on-site or online interactive training on workplace civility and communication details”. The letter stated

that it had been established by a preponderance of evidence that Mr. Nkoyock had created a hostile, offensive and humiliating work environment by:<sup>1</sup>

- engaging in a behavioural pattern of using words and/or action of a demeaning, intimidating, humiliating, and/or abusive nature towards [his supervisees, Mr. S, Mr. T and/or Mr. R];
- in April 2016, expressing [his] dissatisfaction with [Mr. AK, a supervisee] in a meeting with several participants and in [his] e-mail to his subordinates, which was perceived by [Mr. AK] and others as demeaning, intimidating and humiliating;
- repeatedly asking [Mr. R and Mr. T] if they had reported prohibited conduct on [the Appellant's] part to the Staff Council or to the management, which [Mr. R and Mr. T] perceived as offensive and intimidating;
- repeatedly asking [Mr. S, Mr. T, Mr. R and Mr. K (a witness)] to give [him] the name of the person who gave the letter of 15 February 2018 from South Africa to [his] supervisor implying reprisal against the person; and
- in April 2018, pressuring [Mr. T], whom [he] assigned to lead the software deployment team, to tell [Mr. AK] not to copy [Mr. T] on e-mails relating to goCASE deployment.

18. Consequently, Mr. Nkoyock was found to have breached Staff Regulation 1.2(a), Staff Rule 1.2(f), and Sections 2.3, 3.1 and 3.2 of ST/SGB/2008/5. Three aggravating factors had been taken into account: the conduct involved several victims and was repeated over a long period of time; Mr. Nkoyock was put on notice about his behaviour but refused to take corrective actions; and Mr. Nkoyock had received a reprimand in 2018. Two mitigating factors were considered: the challenging circumstances of the team; and Mr. AK's refusal to comply with Mr. Nkoyock's instructions. The Administration, however, rejected Mr. Nkoyock's positive work performance as mitigating circumstance. Rather it considered that his long satisfactory service with the Organization aggravated and illustrated Mr. Nkoyock's misuse of his position of trust.

19. On 24 December 2020, Mr. Nkoyock filed with the UNDT his challenge to the Sanction Decision.

20. The next paragraphs of this Judgment summarise the challenged interlocutory aspects of the case before the UNDT.

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<sup>1</sup> Sanction Letter, p. 1.

21. On 29 April 2021, Mr. Nkoyock filed a motion seeking the production of evidence. He requested that the UNDT order the production of the report of the OIOS investigation into alleged further and retaliatory allegations made by some of the original complainants against him, investigation report No. 0019/020.

22. On 2 June 2022, by Order on Case Management No. 60 (GVA/2022), the UNDT directed the parties to advise whether a hearing was required, and to provide a list of potential witnesses, if any, with justification of each witness' relevance. The UNDT also requested Mr. Nkoyock to justify his request for the production of investigation report No. 0019/020.

23. On 13 June 2022, the Secretary-General submitted that no hearing was needed in the absence of a material dispute about the facts and provided a list of witnesses in the event of a hearing taking place. Mr. Nkoyock submitted that a hearing was warranted (as already requested in his application which also listed witnesses) and provided reasons for requesting the disclosure of investigation report No. 0019/020.<sup>2</sup> He also submitted a motion requesting the disclosure of two additional investigation reports (No. 0413/019 dated 27 February 2021<sup>3</sup> and No. 0847/020 dated 26 November 2020<sup>4</sup>) on grounds that they were relevant to his case because they provided elements which impugned the credibility of the complainants.

24. On 24 June 2022, the UNDT issued Order No. 68 (GVA/2022). The UNDT directed the Secretary-General to file on an *ex parte* basis a copy of the three investigation reports to allow the UNDT to rule on their relevance. Being an *ex parte* production of them, this meant that unless and until those reports were determined to be relevant to and admissible in the proceedings, they would not be disclosed to Mr. Nkoyock.

25. On 1 July 2022, the Secretary-General filed *ex parte* the three investigation reports Nos. 0019/020, 0413/019 and 0847/020.

26. On 4 August 2022, the UNDT issued Order No. 77 (GVA/2022). The UNDT found "no compelling reason to lift the confidentiality of the investigation report [No.] 0019/20".<sup>5</sup> The

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<sup>2</sup> The investigation concerned requests for Protection against Retaliation (PaR) from five staff members. Three of the five PaR complainants complained of prohibited conduct against Mr. Nkoyock in April and May 2018. Two of the five PaR complainants cooperated with the fact-finding panel investigation of two complaints of prohibited conduct against Mr. Nkoyock.

<sup>3</sup> The investigation concerned possible misconduct by one of the complainants of prohibited conduct against Mr. Nkoyock.

<sup>4</sup> The complaint did not result in an investigation. OIOS closed the matter without further action.

<sup>5</sup> Order No. 77 (GVA/2022), para. 16.

UNDT stated that investigation report No. 0019/20, which concerned a retaliation complaint against Mr. Nkoyock, post-dated the complaints of prohibited conduct, and therefore regardless of its outcome, investigation report No. 0019/20 could not provide evidence of any ulterior motive for the complaint of prohibited conduct against Mr. Nkoyock. The UNDT further considered that investigation reports Nos. 0413/019 and 0847/020 had limited probative value and ordered that the findings of these two reports be disclosed while the balance of the two reports was to remain undisclosed. It also directed that Mr. Nkoyock provide comments on the disclosed findings.

27. On 10 August 2022, Mr. Nkoyock sought to persuade the UNDT that it should reconsider Order No. 77 (GVA/2022) and require full disclosure of the three OIOS investigation reports.

28. On 19 August 2022, by UNDT Order No. 78 (GVA/2022), the UNDT denied Mr. Nkoyock's request for full disclosure. The UNDT also denied the request for a hearing after having reviewed in detail Mr. Nkoyock's grounds for the UNDT to hear from witnesses.

29. The UNDT proceeded to consider and decide Mr. Nkoyock's proceedings on the papers before it.

#### *The UNDT's Judgment*

30. On 20 October 2022, the UNDT issued the impugned Judgment dismissing Mr. Nkoyock's application.

31. It rejected Mr. Nkoyock's claim that the complainants' investigation statements were not reliable and found no evidence of bias or collusion by the complainants or other witnesses against him. It noted that the investigative panel interviewed not only the complainants, but also a wide range of other staff members. The UNDT found that the witnesses' statements pointed to a pattern of Mr. Nkoyock abusing his authority. By contrast, the UNDT determined that the investigation reports, which Mr. Nkoyock had requested be disclosed, did not demonstrate alleged bias against him. The issues raised in these investigation reports emerged subsequently to the complaints made against him in the instant case. In the absence of proof to the contrary, the UNDT found that the witnesses' statements given to the investigative panel were reliable.

32. The UNDT also considered that Mr. Nkoyock failed to demonstrate any racial bias by the complainants or witnesses based, as he alleged, on remarks in the interview transcripts. Mr. Nkoyock had said that he had “never heard or faced any such remarks before” (we assume they appeared in the investigation materials) which pointed away from the likelihood that they had been made by those witnesses.

33. The UNDT therefore found that the facts alleged against him had been established by a preponderance of evidence. Reviewing the applicable legal framework, the UNDT was also satisfied that the facts constituted misconduct.

34. Turning to the issue of proportionality of the sanction, the UNDT found it appropriate for the Administration to consider Mr. Nkoyock’s professional background, including a reprimand he had received in 2018. The UNDT dismissed Mr. Nkoyock’s claim that the Administration had failed to consider his positive performance as a mitigating circumstance. The UNDT considered that previous positive performance had limited relevance to the present case. It concluded that the sanction imposed on the Appellant was appropriate and lawful.

35. Finally, the UNDT held that Mr. Nkoyock’s due process rights had been fully respected during the procedure leading to the Sanction Decision. The UNDT dismissed Mr. Nkoyock’s contention that the Chief, HRMS, had a serious conflict of interest barring her from acting as the responsible official under ST/SGB/2008/5. In addition, the UNDT found that the members of the investigative panel were appointed and paid for by UNODC, and there was no ground to doubt their integrity. The UNDT concluded that the Administration had not demonstrated that in this case, it was not possible to select panel members from the department, office or mission before choosing individuals from the external panel member roster. The UNDT considered, however, that there was no evidence that this had any impact on the investigation’s outcome or on Mr. Nkoyock’s procedural rights. The UNDT also rejected Mr. Nkoyock’s claim that the investigative panel exceeded its terms of reference. Accordingly, the UNDT declined to grant any remedies in the absence of any illegality and rejected the application entirely.

*Procedure before the UNAT*

36. On 19 December 2022, Mr. Nkoyock filed his appeal, and on 20 February 2023, the Secretary-General filed his answer.



## Submissions

### Mr. Nkoyock's Appeal

37. Mr. Nkoyock contends that the UNDT erred in law and procedure by refusing, in Orders Nos. 77 and 78, to hear witnesses and declining to order the production of investigation reports. Mr. Nkoyock had asked in his 29 April 2021 motion that the UNDT order the Ethics Office and/or OIOS to provide him with a copy of investigation report No. 0019/020. In support of his motion, Mr. Nkoyock maintained that since the complainants and witnesses had already been disclosed to him in the contested disciplinary case, there was no issue with confidentiality. Furthermore, in his 13 June 2022 reply to Order No. 60, he stated that all the information about the claims of retaliation and who had made them was already known to him when he was asked to respond by OIOS to the allegations of retaliation. There was thus no additional protection of confidentiality required for this investigation report. He says that it is the findings by OIOS that led them to state that Mr. Nkoyock had not committed any retaliation, that are important.

38. Mr. Nkoyock submits that the UNDT disregarded the linkage between the complaints of retaliation and the complaints of prohibited conduct by the same complainants who were already motivated to retaliate against him. The investigation of the retaliation complaints was done by professional investigators within the wider Organization, not by the handpicked investigative panel appointed by the Chief, HRMS, which the UNDT determined, constituted a procedural irregularity. Therefore, investigation report No. 0019/020 was highly relevant to Mr. Nkoyock's case and should have been disclosed to him. The fact that the investigation of prohibited conduct was done before the retaliation investigation does not make the findings of investigation report No. 0019/20 on retaliation which led to those claims being dismissed any less relevant to highlighting the retaliatory motivations of the claimants in bringing the claims of prohibited conduct against Mr. Nkoyock.

39. Mr. Nkoyock relies on Judge Colgan's concurring opinion in *Icha*,<sup>6</sup> which Mr. Nkoyock argues highlights the inequality of arms that he faced before the UNDT. He submits that by refusing his motion for production of evidence and then making its own unilateral assessment of the probative value of the investigation reports without giving him the opportunity to

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<sup>6</sup> *Domitilla Bianca Icha v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1077, Concurring Opinion of Judge Graeme Colgan.

analyse and comment, the UNDT placed him in the impossible position of having to prove ill-motivation of the complainants without the full information available, some of which may even have been withheld from the UNDT. Consequently, the UNDT erred in not ordering that investigation report No. 0019/020 be provided to him. For similar reasons, Mr. Nkoyock submits that the UNDT also erred in not ordering that the full OIOS investigation reports Nos. 0413/019 and 0847/020 be provided to him.

40. Mr. Nkoyock claims that the UNDT erred in refusing his request to hold an oral hearing and to call witnesses to testify. In particular, he claims that he wanted to call his supervisor to give the UNDT evidence about his managerial performance. It was extremely relevant to adduce his supervisor's testimony to explain how Mr. Nkoyock's performance, particularly in managerial competencies, had been rated at "Fully Meets or Exceeds Expectations" given that the Sanction Decision referred to his supervisor as stating that Mr. Nkoyock's "weak point is managing staff". His supervisor had not made any negative comment in any of Mr. Nkoyock's previous performance documents, either as First Reporting Officer or Second Reporting Officer. Consequently, the UNDT erred in fact when it concluded that his supervisor's evidence was not relevant.

41. Mr. Nkoyock submits that the UNDT further erred when it denied him the opportunity to question, as a witness, the Chief, HRMS. The latter had a serious conflict of interest after personally and improperly selecting the members of the investigative panel from the OHRM roster knowing that she would be a key witness that would be interviewed during the investigation. She herself had admitted that there might be a "perception" of a conflict of interest if the matter were to be referred back for managerial action. The UNDT therefore erred in fact when concluding that the evidence Mr. Nkoyock wished to adduce or be adduced, together with her testimony, was irrelevant to these proceedings.

42. The UNDT further erred in not summoning the four complainants to testify. Mr. Nkoyock had submitted that the complainants had lied during their OIOS testimony and manufactured allegations motivated by retaliation after he had implemented tight project management controls and eliminated their "grave train site visits" where they were able to claim substantial daily subsistence allowances. Mr. Nkoyock had clearly disputed the veracity of the complainants' testimony throughout the disciplinary and judicial process.

43. Mr. Nkoyock also takes issue with the UNDT's finding that Mr. K's testimony was not tainted by ulterior motives. Mr. K was immediately appointed as OiC of SPMS when Mr. Nkoyock was placed on Administrative Leave With Pay (ALWP), and then was immediately regularized against his former P-4 position when he moved to UNOCT.

44. Furthermore, the UNDT erred when it failed to subpoena Mr. B whose testimony would have enabled him to establish the racist environment that the UNDT simply dismissed as "mere allegations of racism". As a consequence of the above, Mr. Nkoyock contends that the UNDT's refusal to hear witnesses and to allow him to produce evidence were serious errors of procedure and law that impacted the decision in this case. The UNDT erred on questions of fact resulting in a manifestly unreasonable decision.

45. Finally, turning to the composition of the investigative panel, Mr. Nkoyock contends that had current staff members been appointed to conduct the investigation as per the requirements of Section 5.14 of ST/SGB/2008/5, those staff members would not have needed to be remunerated separately and in addition to their existing salaries; whereas after being handpicked by the Chief, HRMS, the investigators were paid by UNODC. Moreover, the Chief, HRMS selected the investigators without first giving full consideration to the requirements of Section 5.14 of ST/SGB/2008/5 that "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".

46. Mr. Nkoyock requests the UNAT to declare that his due process rights were violated and to rescind the 25 September 2020 decision in its entirety. Alternatively, if the UNAT considers that a sanction is warranted, Mr. Nkoyock asks that the UNAT reduce the sanction to the administrative/managerial measure (the requirement to attend on-site or online interactive training on workplace civility and communication) under Staff Rule 10.2(b) and Section 5.18(b) of ST/SGB/2008/5. If the remedy includes rescission of the decision of "a loss of three steps in grade", Mr. Nkoyock further asks that the emoluments removed from his salary since 25 September 2020 reflecting the difference between P-5 Step 1 and Step 4, be paid to him with five per cent interest through off-cycle payroll. In addition, pension fund payments reflecting the P-5 Step 4 level should be made to cover the difference of his pension entitlements since 25 September 2020. In the further alternative, Mr. Nkoyock requests that the impugned Judgment be set aside and remanded to the UNDT for additional findings of fact by another judge.

**The Secretary-General's Answer**

47. The Secretary-General contends that Mr. Nkoyock failed to demonstrate any procedural error. First, whether the three investigation reports were disclosed to Mr. Nkoyock would not have changed the outcome of the case. The UNDT had access to the investigation reports and determined that they were “of limited probative value” and as such their disclosure would have had no impact on the lawfulness of the Sanction Decision. The purported bias would also not change anything about Mr. Nkoyock’s misconduct, as alleged conduct by others than Mr. Nkoyock is beyond the scope of the instant case. The UNDT was correct to reject Mr. Nkoyock’s plea for the disclosure of documents that are irrelevant to the case. As rightly found by the UNDT, there is no evidence in the record of improper motives against Mr. Nkoyock.

48. Second, the UNDT has broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence. The admissibility of evidence rests primarily with the UNDT which has an appreciation of all the issues for determination and the evidence before it. The information obtained during an investigation is confidential pursuant to Section 5.2 of ST/SGB/2008/5 and Section 10.1 of ST/AI/2017/1. The UNDT was correct to state that “there must be a compelling and relevant reason for the Tribunal to order the disclosure of a confidential document”. Contrary to Mr. Nkoyock’s argument, vague allegations of bias cannot be allowed to overcome or bypass such a strong imperative of confidentiality. The UNDT was provided with the three investigation reports on an *ex parte* basis and upon review, concluded that none of them demonstrated the alleged bias. These reports also concern facts about events that occurred after the complaint and are “hence not supportive of [Mr. Nkoyock]’s claim of malicious motives”. Mr. Nkoyock is also incorrect in assuming that confidentiality only concerns names contained in the investigation reports.

49. Further, the Secretary-General claims that there is no merit to his challenge of the UNDT’s decision to deny a hearing, despite Mr. Nkoyock’s reasons for calling witnesses. Mr. Nkoyock does not dispute the incidents showing his harassing behaviour against his colleagues, as set out in the Sanction Decision and the impugned Judgment. Instead, his arguments in favour of a hearing rely on hearing witnesses to establish his performance over the years. Such testimony would have no impact on the fact that the incidents set forth in the Sanction Decision actually occurred. Similarly, there is no relevance to calling the Chief, HRMS to testify on her purported conflict of interest, in the absence of evidence of such conflict. There is also no evidence that the complainants’ testimonies were not truthful. The UNDT rightly found as speculative Mr. Nkoyock’s assertion that

Mr. K was coveting his post. As for Mr. B's alleged racist remarks, the UNDT correctly noted that Mr. Nkoyock himself had considered that there was no "multiculturalism issue" in his team. Mr. B did not witness the specific incidents underlying the Sanction Decision and any supposed bias on his side appears irrelevant to the lawfulness of the Sanction Decision.

50. Furthermore, the Secretary-General maintains that there is no merit to Mr. Nkoyock's claim of irregularity of the appointment of the members of the investigative panel. First, contrary to Mr. Nkoyock's (and the UNDT's) view, Section 5.14 of ST/SGB/2008/5 does not require a responsible official to first look for panel members within the department, office or mission concerned, before considering individuals on a panel member roster. This provision merely professes a preference, as a matter of policy and practice, that individuals from within the department should be sought first before resorting, if necessary, to the roster. Non-compliance with that preference will not lead to the nullity of any appointment from the roster provided the selection is not unreasonable. There is no evidence supporting any claim that the selection from the roster was unreasonable in this case. In the instant case, the Chief, HRMS as the responsible official, correctly selected trained members from the roster. Mr. Nkoyock does not demonstrate any legal flaw in the nomination process of the investigative panel. His contention that the panel members owed their allegiance (through their remuneration) to the Chief, HRMS is "completely misplaced". As the legal framework allows for the investigative panel to be composed of former staff members, remunerating them for their work does not give rise to illegality.

51. Finally, the Secretary-General maintains that Mr. Nkoyock failed to demonstrate the relevance of his performance evaluation. Mr. Nkoyock wrongly contends that the UNDT erred in fact in finding that he had limited management experience prior to stepping in as OiC of SPMS and that his previous performance evaluations were not relevant. Mr. Nkoyock fails to demonstrate that such arguments would have any impact on the outcome of the impugned Judgment. In the instant case, the Administration considered Mr. Nkoyock's performance but stated in the Sanction Decision that the cases concerned his misuse of the position of trust that had been given to him by virtue of his long satisfactory service with the Organization and that therefore his performance record did not constitute a mitigating factor. The Secretary-General contends that Mr. Nkoyock does not demonstrate this as being unreasonable, nor does he show the relevance of his prior managerial experience to the instant case. The UNDT was correct to find that supervisors who reviewed Mr. Nkoyock's performance evaluation were not "at the receiving end" of his harassment pattern towards his own supervisees.

52. The Secretary-General concludes that Mr. Nkoyock failed to show any error by the UNDT warranting the UNAT's intervention and asks that the UNAT dismiss the appeal.

### **Considerations**

53. We have identified nine separate grounds of appeal advanced by Mr. Nkoyock which we will now address. Some overlap with others, and some are different aspects of others. For example, several of the Appellant's separate criticisms address the consequences of the UNDT not holding a hearing with witnesses and are said to illustrate why it erred in not allowing this. We will address these grounds collectively. We start with an overview of the way in which the UNDT dealt with Mr. Nkoyock's appeal (brought by application) challenging the Respondent's administrative decision.<sup>7</sup>

#### *General considerations*

54. The UNDT did not approach the case before it as an appeal against the conclusions of the Organization, including a hearing of relevant witnesses addressing contentious issues. Rather, it reviewed judicially and more narrowly the conclusions of the Organization's own internal investigation. At paragraph 29 of its Judgment, it stated: "[T]he burden of proof to demonstrate the alleged misconduct [lies] with the Organization. On the other hand, it is incumbent upon [Mr. Nkoyock] to provide evidence that substantiates his arguments to successfully challenge the facts that were established by the investigation." It is not clear whether the UNDT considered that the onus on Mr. Nkoyock "to provide evidence" extended to doing so by calling witnesses who would testify before the Dispute Tribunal, or whether it considered that the Appellant could satisfy that onus otherwise, presumably by adducing responses that he had made to the OIOS investigation and/or to the Organization before it determined whether he was guilty of the misconduct alleged against him.

55. It is at least conceptually difficult, if not impossible, to reconcile these two adjacent statements about the onus of proof in an appeal such as this before the Dispute Tribunal. If the Secretary-General had to establish the misconduct as the UNDT first said, then that is irreconcilable with the following statement that it was incumbent on Mr. Nkoyock to

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<sup>7</sup> The nature of the proceeding brought before the UNDT is an appeal. The vehicle by which it is brought before the UNDT is an application. That is illustrated by the statutory words and phrases used: for example, in Articles 2(1)(a) and (b) and 2(4) of the UNDT Statute and Article 16(2) of the UNDT Rules of Procedure.

substantiate his arguments to impeach the Organization's investigation's findings. Further, it is difficult to accept, if Mr. Nkoyock bore the onus the UNDT attributed to him, how he was to discharge that without at least some evidence of witnesses before the Dispute Tribunal. We will elaborate on this issue subsequently.

56. The problems emanating from this approach to its function are illustrated by the UNDT's subsequent conclusions. For example, it addressed Mr. Nkoyock's contention that the evidence of alleged workplace harassment given to the investigation by some complainants was unreliable, biased against him, and ill-motivated. The UNDT said it did not find any evidence of these serious allegations of collusion and bias on the part of the staff members who made statements to the investigation. However, not only are such serious allegations inherently difficult to prove or disprove without *viva voce* evidence (oral evidence by the witnesses given before the tribunal of fact and subjected to questioning), but, by definition, the investigation did not make a judicial assessment of the credibility of those deponents who gave their accounts of Mr. Nkoyock's conduct to the investigators. The fact, as the UNDT found, that others had given similar accounts of the Appellant's conduct, while establishing consistency, did not address his separate allegations of bias against him and collusion by those witnesses. Consistency of re-telling is not the same as veracity, absence of bias or absence of collusion. Put another way and theoretically, witnesses who are consistent in their own accounts or corroborative of each other are not necessarily also thereby witnesses of truth and independent objectivity. Where, before the UNDT, an applicant alleges that persons who gave accounts to an organizational investigation should not be believed, it will be difficult if not impossible to decide this issue without seeing and hearing such witnesses including questioning them if there is to be a thorough, independent, and judicial determination of the issue.

57. A reading of the UNDT's 32-page Judgment, lengthy and detailed as it is, does not leave the reader informed of what was alleged by the Secretary-General to have been Mr. Nkoyock's misconduct which warranted the imposition of the sanctions. Even a summary, let alone the detail of that, can only be found in the investigation report to the Organization which then made its decision about that conduct. What the Organization itself concluded he said and did, when, and to whom, are absent from the Judgment. It is not a matter of it being light on detail: there is a complete absence of any analysis or even summation of the raw evidence affecting those allegations made against him.

58. We should not be thought to be too critical of the UNDT Judge in this case in so deciding it. This is probably consistent with the methodology adopted in some cases by the UNDT of considering OIOS investigation reports and adopting them, albeit critically in some respects. As we have pointed out in recent Judgments, including some at least which were published before the UNDT wrote its Judgment in this case, the OIOS's role is not to determine the truth or otherwise of the allegations against the staff member, irrespective whether this is to the clear and convincing or to the preponderance (balance of probabilities) evidential standard as it was in this case. That is the task of the Organisation or the body responsible for the staff member's employment. It was incumbent on the UNDT to determine whether the Respondent, not the investigator by its report to the Organization, had established liability to the requisite standard. It is simply impossible to say whether that was achieved in this case because of the way in which the UNDT expressed its Judgment.

59. It was not the UNDT's role to consider and approve the investigator's conclusions, omitting both the responsibility of the Respondent to do so and without the Dispute Tribunal for itself considering independently at least all the disputed evidence, and reaching judicial conclusions on it. The investigator's role is to investigate facts and report to the Organization. The Organization's role is to determine administratively whether it is satisfied that there was misconduct and, if so, the consequence of that. The UNDT's role is to consider judicially an appeal against the Organization's decision.

60. The UNDT's statutory role is not limited to a judicial review of the internal investigative process and report, or of the decision of the Organization to impose sanctions for misconduct by a staff member. The UNDT's statutory role is to hear, consider and decide an appeal brought against the Organization's decisions in relation to the staff member.

61. In this case, by purporting to determine evidentially disputed facts about Mr. Nkoyock's conduct, the UNDT relied solely on its reading of the OIOS's report and its consideration of submissions from counsel for the parties. It failed to conduct its own hearing of evidence which the investigators had concluded was against the staff member and, in effect, adopted the investigators' conclusions as its own. Mr. Nkoyock was thereby deprived of an independent judicial consideration of the case against him, the role for which the UNDT was established. It thereby erred in law.



*Recourse to ex parte and inadmissible evidence*

62. The UNDT also erred in law more particularly at paragraph 43 of its Judgment. There it rejected Mr. Nkoyock's assertion that persons who had made allegations against him were improperly biased against him. It did so by recourse to evidence in the investigation report(s) that it had considered *ex parte* but found to be inadmissible in the appeal. By refusing him access to these reports and thereby their introduction into evidence in its Order No. 77, the UNDT can only have concluded that they, or at least the substance of those outcomes the UNDT allowed access to, were not relevant.

63. However, in the following paragraph, the Judge states expressly that she analysed all three investigation reports to reach her conclusion that there was no bias against him as Mr. Nkoyock had alleged. If the reports were irrelevant and the Secretary-General and the UNDT were entitled to withhold them from Mr. Nkoyock, the Dispute Tribunal should not then have relied on their contents in making a finding against him. If, as it did however, it used them as relevant evidence, the reports should have been admitted into evidence and disclosed to Mr. Nkoyock. It would follow from this, also, that he should have been allowed an opportunity to dispute those reports before the UNDT, but he was not.

64. This was a breach of the Appellant's due process or natural justice rights. To decide a case on evidence that is known to one party and to the Dispute Tribunal but is kept from the other party, is not consistent with and indeed is antithetical to, an independent and neutral Dispute Tribunal established by the General Assembly. It is a fundamental principle of fairness recognised by most legal systems that parties to litigation are entitled to know the cases against them and thereby have an opportunity to accept or contradict these including by calling impeaching evidence, by cross-examination, and by submissions made to the tribunal. Here, we can only conclude that the UNDT decided, after its *ex parte* examination of the documents, that they were irrelevant, yet it subsequently took their contents into account against the staff member. That too was an error of law.

*Due process in the investigation*

65. Were Mr. Nkoyock's due process rights respected in the investigative process? Mr. Nkoyock says that the Respondent was obliged to exhaust the possibility of selecting an investigative panel constituted of current staff members before going, as it did, to external

investigators, albeit former staff members. The Respondent says that Section 5.14 of ST/SGB/2008/5 does not require a responsible official to first consider constituting a panel from within the Organization. It says that this first port of call is merely preferential and non-compliance with it by going to the external panel will not invalidate the panel appointed if the selection is “not unreasonable”.

66. The relevant Section reads:<sup>8</sup>

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.

67. The Section is directory and uses mandatory language including in relation to the source of the panel members. The responsible office shall only appoint from the external panel “if necessary”.<sup>9</sup> That contemplates the responsible office being unable to appoint a panel, or panel members, internally so that it is “necessary” to go to the panel. This interpretation of the section, which we accept, is contrary to that contended for by the Respondent. Adherence to the appointment process was a due process right that Mr. Nkoyock could have expected the Secretary-General to have complied with, but he did not.

68. What is the consequence of this non-compliance? The Respondent says that even if this was so, no harm was caused to the Appellant thereby. While we do not accept Mr. Nkoyock’s allegation that the panel investigators were beholden to the Organization because they were paid by it, there is nevertheless a serious question about this breach. No reasons were ever established as to why the panel members were not selected from within the Organization. The UNDT’s Judgment records that panel selection was made by the Chief, HRMS. The UNDT accepted that the Organization erred in the panel selection process (with

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<sup>8</sup> Emphases in italics added.

<sup>9</sup> While the section vests responsibility for the preliminary assessment of the complaint in “the responsible *official*”, the appointment of the panel is the responsibility of “the responsible *office*”. Whether this is a typographical error so that both duties should be carried out by the same person, or there is a deliberate differentiation between the two so that different people perform the separate functions, is unclear. The term “*responsible office*” is not defined, and the term is not used elsewhere in the Bulletin. We have assumed, therefore, that both duties are intended to be conducted by “*the responsible official*” as defined.

which we agree) but decided ultimately that this was an insufficiently consequential error to affect the validity of the decision. We address that issue subsequently.

*Bias by the Responsible Official?*

69. The Appellant says that the Chief, HRMS had a conflict of interest which ought to have precluded her in any event from making those appointments of panel members. The appeal on this point is that by prohibiting him from questioning witnesses at a hearing (and in particular the Chief, HRMS whose presence he had requested for this purpose), the Appellant was improperly deprived of an opportunity to establish bias by her.

70. While we cannot go so far as to say that the action by the Chief, HRMS in herself appointing the investigative panel was a biased exercise of power, we conclude that there were grounds on which the UNDT should have allowed Mr. Nkoyock to have questioned her as a witness before the Dispute Tribunal. Not only was the appointment of the panel wrongfully undertaken as we have identified previously in this Judgment, but, as the Chief, HRMS herself is said to have conceded, she could have been called by the investigators to provide evidence to them as a relevant witness on other pertinent and controversial matters which were the subject of the investigation. Bias in law is not just blatant prejudice against someone or predetermination of an issue, but perhaps, more commonly, the perception of potential bias, the inappropriate participation of someone in a process that may affect adversely the rights of others. It is into this latter category that the role of the Chief, HRMS fell. Although we cannot and do not conclude whether it would have succeeded, Mr. Nkoyock had a sound case to advance in this regard and the UNDT was wrong to have deprived him of that opportunity to do so by questioning the Chief, HRMS as a witness. This was likewise an error by the Dispute Tribunal.

*Rejection of retaliation complaint evidence*

71. Mr. Nkoyock has challenged the UNDT's decision not to allow evidence about a further complaint by some of the original complainants against him that he had retaliated against them in response to their complaints about his conduct. There was an investigation of these complaints of retaliation, but it found that there was no substance to them. Mr. Nkoyock wished to adduce evidence of that investigation and in particular the report which he said concluded that he had not retaliated against the complainants. He also wished to have those complainants give evidence before the UNDT for him to attempt to impeach their credibility

by reference to what he said were their unsubstantiated claims against him of retaliation. The UNDT determined that because the allegations of retaliation related to conduct by the Appellant that was said to have occurred after those complainants had complained initially about the Appellant's conduct towards them, such evidence would be irrelevant to the matter before it and was thus inadmissible.

72. While that assessment was correct factually and as far as it went, the UNDT did not address the reasoning behind the proposed evidence and its relevance as it should have. It was Mr. Nkoyock's case that the complainants' accounts given to the investigation panel of their interactions with him were not only untrue but that they had been ill-motivated against him. His case was that he wished to show that what he believed had been found as their false complaints of retaliation by him, corroborated and made more likely his assertion that their original complaints had also been false and ill-motivated. His intention was not to establish what had happened (in which case the UNDT's sequencing reasoning was correct) but rather to impeach the credibility of the complainants. Evidence of their subsequent but associated conduct towards him was the means by which he sought to do so and was relevant to their credibility. By determining to exclude this evidence, the UNDT failed to take relevant considerations into account.

73. Had it correctly approached the requests for admission of this evidence, it should have allowed its admission, both in the form of disclosing the investigation reports into the retaliation claims and by allowing Mr. Nkoyock to question the complainants before the Dispute Tribunal to challenge their credibility. This is, of course, not to say what would have been the outcome or in particular whether the UNDT would or would not have found those complainants to have been credible. This error of law was not assisted by the UNDT's approach of assessing the credibility of those complainants solely by reference to the written statements in the investigation report which were not able to be challenged effectively by the Appellant.

*Challenge to Mr. K's motive and credibility*

74. Mr. Nkoyock says that the fact that one of the complainants, Mr. K, assumed the Appellant's role when he, Mr. Nkoyock was placed on ALWP and was subsequently advantaged in his (Mr. K's) employment was both an indication of an ulterior motive for Mr. K's evidence and a reason also why the Appellant should have been given an opportunity to cross-examine Mr. K. While we agree that, in the overall circumstances and for reasons already given, Mr. K should have been able to be questioned as a complainant, we do not agree that, without more, Mr. K's

employment changes by themselves were sufficient evidence of ulterior motive that it should have been rejected as tainted.

75. Similarly, we conclude that while Mr. B, as a complainant, should have given evidence and been able to be cross-examined, there was otherwise insufficient evidence of racial discrimination against Mr. Nkoyock that this should have caused the UNDT to find that the case against the Appellant was so infected by this prejudice that it should have been rejected.

*Appeal against sanctions imposed*

76. Turning to the sanctions imposed on Mr. Nkoyock and upheld by the UNDT, we are satisfied that the Dispute Tribunal erred twice, once in fact and once in law, in that part of its decision relating to the Appellant's record of employment.

77. The UNDT held that Mr. Nkoyock's work performance assessments (which he had placed before it) were irrelevant to the sanctions imposed as the consequence of his treatment of his staff. That was because, it said, those previous assessments had not been of his performance in managing staff but only of the technical performance by him of his role. That was contrary to the evidence that Mr. Nkoyock had then supervised a significant number of staff. It also appears to have been based on the Dispute Tribunal's own speculative belief about what had happened. It was also a wrong conclusion because the Dispute Tribunal erroneously upheld the Respondent's own refusal to take account of this mitigating factor in the Organization's assessment of the sanctions to be imposed by it when it stated in the Sanction Decision: "The present case is, in essence, your misuse of the position of trust given to you by virtue of your long satisfactory service with the Organization. Therefore, your service record, or performance appraisal, including positive reports for 2017-2018, does not constitute [a] mitigating factor."

78. The Respondent was wrong to have negated the effect of that relevant "long satisfactory service" by concluding, in effect, that it was neutralised by Mr. Nkoyock's appointment to a role in which he had to put the Organization's difficult restructuring decisions into effect. The UNDT was likewise in error of law to have upheld that erroneous conclusion by the Organization.

79. It is clear from the circumstances of this case that had Mr. Nkoyock had prior issues with staff he supervised, these would probably have come to the Organization's notice as did these events, but that did not occur. We are satisfied also that the performance appraisal

process for managerial staff with supervisory responsibilities, as was the Appellant prior to these events, took account of that staff member's managerial element of their role and its performance. Mr. Nkoyock's previous unblemished record of management of staff was thus a mitigating factor that the UNDT both failed to consider and indeed rejected expressly. This conclusion accords with that of the Organization, upheld by the UNDT, that these events occurred at a time of heightened stress for all concerned and during which Mr. Nkoyock had the unenviable task of making organizational change that was not welcomed by those affected by it.

80. Had the UNDT not erred in this way, we are satisfied that it would have ameliorated (albeit modestly) the sanctions imposed on him and which it upheld.

81. While, individually and alone, these errors of law and fact might have been able to be overlooked in the sense that any one of them alone would not have had the effect of setting aside the UNDT's Judgment, collectively they make such an outcome unsafe. The Judgment under appeal must and will be set aside and the Respondent's decision rescinded.

*Consequences of rescission on remedies*

82. We recognise that, more than three years having elapsed since the imposition of the sanctions and Mr. Nkoyock having ceased employment with the United Nations, rescission of the decision would have little or no practical effect for him. However, the errors in both the UNDT's procedure and the sanctions imposed on the Appellant, should still be marked.

83. The errors of law affecting the way the UNDT carried out its role are, collectively and cumulatively, such that the Judgment of the UNDT must be reversed. Mr. Nkoyock's employment with the Organization having ended subsequently for reasons apparently unrelated to these matters, this provides a difficulty in determining a just remedy for him. Rescinding the decisions to discipline him and the sanctions imposed on Mr. Nkoyock as we do, limits significantly those remedies.

84. Article 9(1) of the UNAT Statute provides relevantly:

**Article 9**

1. The Appeals Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

85. Pursuant to Article 9(1)(a) of the Statute of the Appeals Tribunal we reverse the Judgment of the UNDT and rescind the impugned decisions. Because, however, those decisions concerned disciplinary sanctions for misconduct as a result of which Mr. Nkoyock's employment was not terminated, it would not be appropriate to fix a sum of in-lieu compensation. Nor has he proven any compensable harm under Article 9(2) of the UNAT Statute.

86. Mr. Nkoyock has been represented by private counsel and, we assume, at a cost to him. But for the restrictions on making costs' awards in this jurisdiction, we may have been inclined to ensure that, having been successful on this appeal, he should not be "out of pocket". However, Article 9(2) of the UNAT Statute provides that we can only award costs against a party who has "manifestly abused the appeals process". There is no suggestion that the Secretary-General has done so in this case. In these circumstances, we cannot compensate Mr. Nkoyock for any costs he incurred in having succeeded in this appeal.

87. In spite of this, given that he has succeeded on the merits in this appeal, there is no reason why the emoluments removed from Mr. Nkoyock's salary from 25 September 2020 until the date of his separation from service, reflecting the difference between P-5 Step 1 and Step 4, should not be paid to him, with interest.

88. Because of the nature of the sanctions imposed and Mr. Nkoyock's cessation of employment with the Organization, it is not appropriate to grant any other remedies sought by the Appellant.

### **Judgment**

89. The appeal is granted, the impugned decisions are rescinded and Judgment UNDT/2022/115 is reversed. The emoluments removed from Mr. Nkoyock's salary from 25 September 2020 until the date of his separation from service, reflecting the difference between P-5 Step 1 and Step 4, are to be paid to him, with interest at the US prime rate.

90. Interest is to be calculated at the US Prime Rate applicable at the due date of the entitlement (i.e. the payday of each month during the period in question, from 25 September 2020 until the date of his separation from service) to the date of payment. The Judgment shall be executed within 60 days of the date the Judgment is issued to the parties. If this Judgment is not executed within 60 days, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

Original and Authoritative Version: English

Decision dated this 27<sup>th</sup> day of October 2023 in New York, United States.

*(Signed)*

Judge Colgan, Presiding

*(Signed)*

Judge Forbang

*(Signed)*

Judge Savage

Judgment published and entered into the Register on this 13<sup>th</sup> day of December 2023 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar