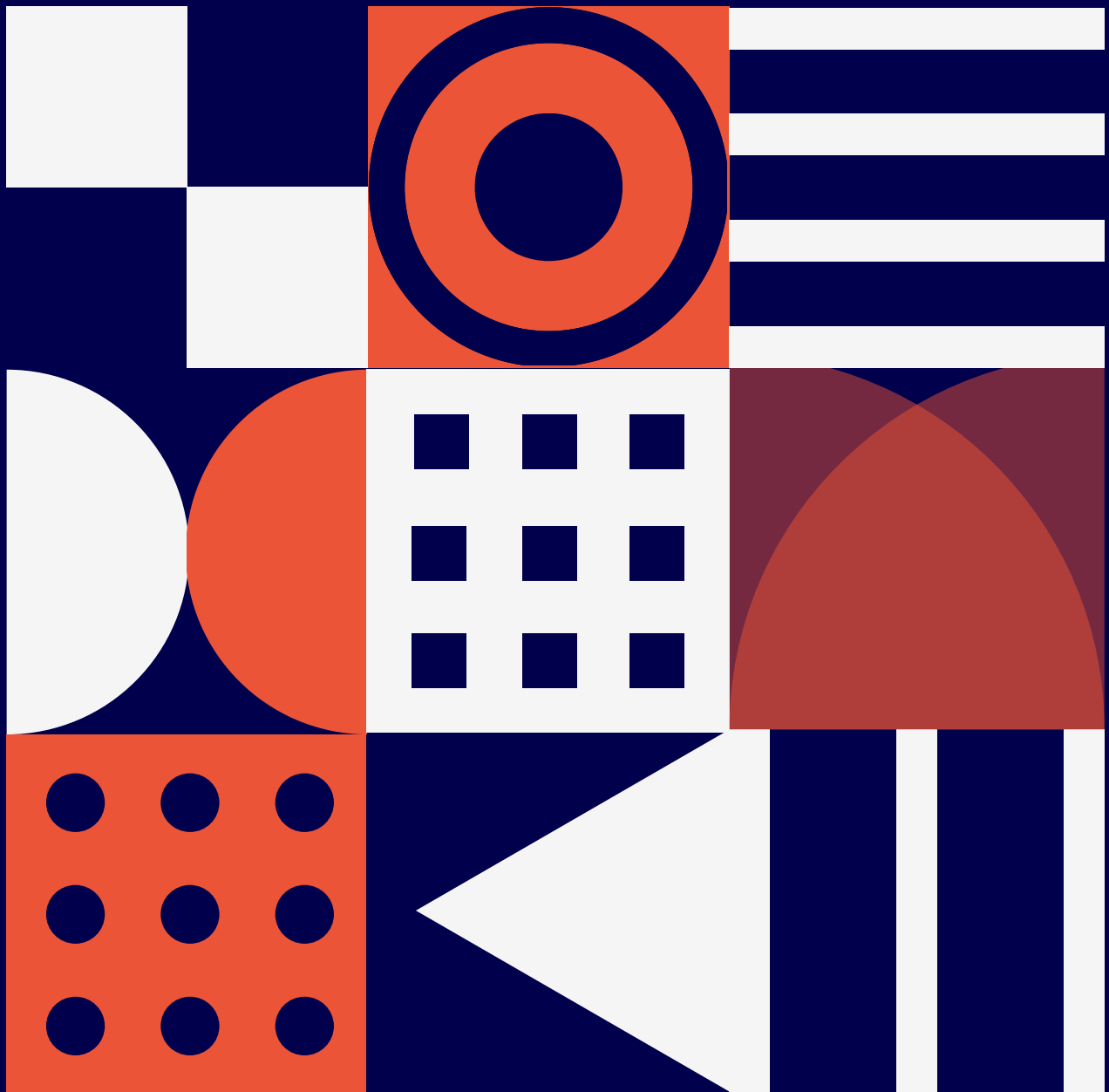


International Administrative Tribunals

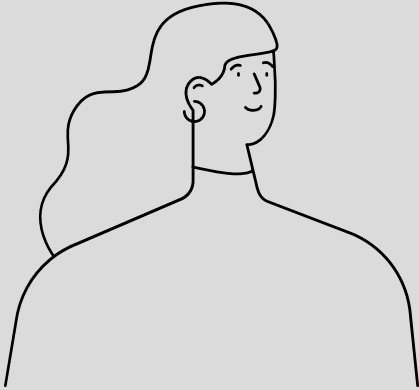
# Case Law Digest

Modulaw  
2023



# Note

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***The purpose of this digest is to provide a brief overview of what we consider to be leading or interesting cases based on the types and volume of work we undertook in 2023.***

We have included judgments from each of the Administrative Tribunal of the International Labour Organisation, the United Nations Appeal Tribunal and the Administrative Tribunals of multilateral development banks.

This publication would not be possible without the contribution of our consultant, Lucija Baumann.

We hope this is a useful resource for all readers.

Ludovica Moro & Neha Dubey  
[ludovica@modu.law](mailto:ludovica@modu.law) | [neha@modu.law](mailto:neha@modu.law)

Modulaw  
[www.modu.law](http://www.modu.law)

The case law summaries contained in this document were prepared by Modulaw for information only. They are not official records and should not be relied upon as authoritative interpretations of the rulings made by the respective Tribunals. For the authoritative texts, please refer to the judgment or order rendered by the respective Tribunal.

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## Abbreviations

ADB	Asian Development Bank
ADBAT	Asian Development Bank Administrative Tribunal
ALWOP	Administrative leave without pay
EBRD	European Bank for Reconstruction and Development
EBRDAT	European Bank for Reconstruction and Development Administrative Tribunal
HR	Human Resources
ILOAT	Administrative Tribunal of the International Labour Organization
Interpol	International Criminal Police Organization
ITLOS	International Tribunal for the Law of the Sea
OSCE	Organization for Security and Co-operation in Europe
SLWOP	Sick Leave Without Pay
UNAT	United Nations Appeals Tribunal
UNDT	United Nations Dispute Tribunal
UNICEF	United Nations Children’s Fund
WBAT	World Bank Administrative Tribunal
WTO	World Trade Organization

## Administrative decision

### UNAT Judgment No. 2023-UNAT-1313

**Legal Principle:** A recommendation to institute disciplinary action normally will not be an administrative decision because it may lack immediacy or finality and thus would not have a direct effect. A decision is only an administrative decision if it is of an administrative nature, adversely affects the contractual rights of a staff member and has a direct, external legal effect. Staff members do not have any rights to seek an independent review of an investigation by the Office of Audit and Investigation (**OAI**).

**Facts:** Various staff members made allegations that the Appellant had viewed sexually explicit images on his smartphone during a workshop. Based on those allegations, the OAI launched an investigation. OAI found that the allegations were substantiated and recommended disciplinary action. However, the organisation found that the photos provided by witnesses, who wished to remain anonymous, were not clear enough and consequently there was insufficient evidence to charge the Appellant with misconduct. The Appellant then lodged a complaint about malicious reporting against him, but the OAI found that an investigation was not warranted and closed the case. The Appellant appealed this decision to the UNDT, which held the appeal was receivable and that OAI had followed all applicable procedures, and dismissed the application.

**UNAT held:** The OAI's recommendations that (i) disciplinary action should be taken against the complainant; and (ii) no investigation was required into the Appellant's allegations of malicious reporting by other staff members, did not constitute administrative decisions. They were intermediate recommendations and did not have a direct, legal or adverse impact on the Appellant's employment rights. Where a decision requires several steps to be taken by different functionaries, only the last of which is directed at the staff member, the previous decisions or actions of the organisation lack direct effect, and only the final decision is appealable or reviewable. Preparatory or intermediate decisions are not reviewable.

## Disability benefits

### WBAT Decision No. 692

**Legal Principle:** Short Term Disability (**STD**) benefits refers to the inability of a staff member to perform the material duties of their “regular job”, whereas Long Term Disability (**LTD**) benefits do not depend on whether a staff member is limited from performing the material duties of their own job. There is no entitlement to LTD benefits if a staff member is able to perform another job.

**Facts:** The Applicant suffered a “grand mal seizure” and was approved for STD benefits for the maximum 24-month benefit period, after which the Applicant sought to transition to LTD benefits. The Bank’s Claims Administrator and Administrative Review Panel (**ARP**) both determined that the Applicant was not entitled to transition to LTD benefits.

**WBAT held:** The Tribunal held that the ARP’s determination was appropriately and reasonably based on a review of a range of medical evidence relating to the Applicant’s eligibility for LTD benefits. The Tribunal observed that the LTD standard is not met if a staff member is able to perform another job – whether that be a somewhat different type or level of job or a job with some accommodations – for which they are nevertheless reasonably suited by education, training, or experience, despite their illness or injury. The Tribunal concluded that the Applicant’s claim for LTD benefits was properly denied by the ARP. The Tribunal found that there were processing delays on the part of the Claims Administrator for which the Applicant was awarded USD 10,000.

## Disciplinary measures

### ILOAT Judgment No. 4615

**Legal Principle:** A decision to terminate a staff member's appointment will be unlawful if it fails to follow a proper disciplinary procedure, notwithstanding that the factual basis for termination may be lawful.

**Facts:** The Appellant was issued with a written reprimand for creating an inappropriate work environment and harassing one of her subordinates. Her subordinate also lodged a harassment complaint against her. The Advisory Board found the Appellant's conduct was inappropriate and recommended that the Secretary-General terminate her appointment, which he did. The Appellant appealed on the basis of unfair dismissal and claimed material damages for loss of salary, moral damages and legal costs.

**ILOAT held:** The organisation had not followed its own rules and regulations on the procedure for termination, and in particular, no disciplinary measure may be decided unless the official concerned has been informed of the charges made against them and has had the opportunity to state their case. Although the termination decision purported to be on the basis of unsatisfactory performance, it was actually based on the Advisory Board's findings that the Appellant's conduct amounted to harassment, so the Secretary-General should have initiated disciplinary proceedings and given the Appellant the opportunity to be heard. The termination decision must therefore be set aside and damages awarded as the Appellant was not requesting reinstatement. The Appellant was awarded material damages equivalent to one year of her salary and entitlements, moral damages of EUR 5,000 and legal costs of EUR 4,000.

### ADBAT Decision No. 126

**Legal Principle:** The Tribunal cannot substitute its assessment for that of the head of the organisation unless there is a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty.

**Facts:** The Applicant was found to have transmitted inappropriate media in the form of pornography, including child pornography, during office hours and using Bank-issued equipment. He was dismissed for misconduct, declared permanently ineligible to work as a consultant or contractual employee with the ADB or any ADB-financed activity, and could only access to the ADB premises with approval of the Director of Human Resources.

**ADBAT held:** Considering the repeated character and seriousness of the misconduct, and the senior position held by the Applicant, the Bank properly considered the relevant factors of the nature of the misconduct and multiplicity of the transgressions in deciding the disciplinary measures to be applied. The severity of the penalties imposed on the Applicant were not disproportionate to the gravity of the offence and fell within the range of reasonable

options available in managerial discretion. Accordingly, there was no justification to substitute the decision and measures imposed by the Bank.

### UNAT Judgment No. 2023-UNAT-1328

**Legal Principle:** The decision to place a staff member on ALWOP due to exceptional circumstances is a reviewable decision. The onus is on the organisation to prove the objective existence or factual basis of the exceptional circumstances.

**Facts:** The Appellant was found to have committed misconduct, as seen in a video clip that was circulated on social media, of him apparently engaging in an act of a sexual nature with a female passenger in a UN vehicle. The Appellant contested the decision to place him on ALWOP, a seizure of his personal smartphone by OIOS for its investigation, and a decision to extend his placement on administrative leave with pay.

**UNAT held:** Based on the evidence available, which easily identified the Appellant, the seriousness of the alleged misconduct and the damage to the trust relationship between the Appellant and the UN organisation, the ALWOP decision was rational and justified. The seizure of the Appellant's personal phone did not involve or constitute an administrative decision, and this issue was rendered moot by the return of the smartphone.

### UNAT Judgment No. 2023-UNAT-1317

**Legal Principle:** The administrative decision to impose sanctions or disciplinary measures on staff members is the organisation's prerogative in the exercise of its discretion. Other staff members cannot challenge that decision, even though they may also have been victims, because they are not directly affected by the disciplinary measure.

**Facts:** The Appellant contested the decisions arising from her complaint of sexual harassment by her former supervisors. The Appellant's complaints resulted in investigations, disciplinary proceedings and sanctions being imposed on the subjects of those complaints. The organisation provided the Appellant with a letter containing a detailed abstract of the investigation findings and informing her of the actions taken by the organisation. The Appellant sought review of this decision on the basis that it did not provide information on the specific disciplinary actions taken.

**UNAT held:** The organisation acted promptly when it received the complaints by placing the Appellant on certified sick leave for approximately two months and reassigning her at her request. An affected individual may contest the outcome of an investigation, but the organisation's decision to impose sanctions on the subjects of the complaint is not subject to challenge by the affected individual. The lack of details regarding the disciplinary measures and managerial action communicated to the Appellant did not render the information defective under Section 5.18(c) of ST/SGB/2008/5.



## Evidentiary standards

### UNAT Judgment No. 2023-UNAT-1370

**Legal Principle:** The UNDT should engage in a fact-finding exercise to establish whether the facts pertaining to misconduct allegations exist as a high probability; and then apply the principles, rules and standards of the legal framework to decide if the proven facts constitute misconduct. Then, as a separate exercise, taking account of all relevant (proven) facts and considerations, the UNDT must decide (on the evidence) whether the sanction was proportionate. The contents of an investigation report usually will be hearsay, unless the relevant witnesses themselves testify before the UNDT and their statements in the report are admitted into evidence in the course of their testimony.

**Facts:** The Appellant contested the decision to summarily dismiss him for abuse of authority, harassment, and sexual harassment. The UNDT found that there was clear and convincing evidence of harassment and the creation of a hostile work environment, that the allegations of sexual harassment had not been established, and that while there was sufficient evidence of gift-giving to third parties, the seriousness of the gift-giving remained unclear. The UNDT partially rescinded the disciplinary decision, replaced the sanction with separation from service with notice and termination indemnity, and awarded compensation in lieu of rescission in the amount of six months' net base salary.

**UNAT held:** The task of the UNDT in disciplinary matters is to determine if the facts actually exist as a high probability and not merely to review whether the determination of the facts by the internal investigator was reasonable and procedurally fair. Where the UNDT is faced with a genuine dispute of fact irreconcilable on documentary evidence alone, the UNDT in its judgment must make explicit findings pertaining to the credibility and reliability of the evidence and provide a clear indication of which disputed version it prefers and explain why. In this case, the UNDT relied exclusively on hearsay evidence drawn from the investigation report and other documents, but gave no consideration to the lack of oral evidence and whether this was sufficient to meet the burden of proof. The Appellant was denied the opportunity to face his accusers in both the investigative and judicial proceedings. Therefore, the Secretary-General had not met the burden to prove the alleged misconduct as highly probable. The UNAT granted the appeal, rescinded the disciplinary decision and directed the Secretary-General to expunge the Appellant's name from any register of sexual harassers. Alternatively, the Secretary-General could pay compensation in lieu of rescission in the amount of two years of net base salary.

### ILOAT Judgment No. 4663

**Legal Principle:** A staff member must, as a general rule, have access to all the evidence on which an authority bases or intends to base a decision that adversely affects them. Such evidence cannot be withheld on grounds of confidentiality. The organisation has a duty of care to deal with harassment cases as quickly and efficiently as possible.

**Facts:** The Complainant challenged Interpol's refusal to acknowledge her allegations of harassment and to provide her with a copy of the full inquiry report. The Joint Appeals Committee found that the preliminary inquiry had been conducted lawfully and thoroughly, the Organization had acted in good faith and the excerpt of the inquiry report sent to the Complainant constituted a response to her request that she be sent a version of the report that could be disclosed.

**ILOAT held:** The failure to disclose the entire preliminary inquiry report to the Complainant, which was central to the case, before the Joint Appeals Committee delivered its opinion and the Secretary-General adopted the impugned decision, was a breach of due process. A staff member must be provided with all the materials an adjudicating body uses in an internal appeal. The disclosure of extracts of a preliminary investigation report is generally not sufficient. The Tribunal held that the procedural irregularities identified and the slowness of the internal appeal procedure caused the Complainant significant moral injury and awarded EUR 25,000 in moral damages.

## Flexible working arrangements

### UNAT Judgment No. 2023-UNAT-1342

**Legal Principle:** There is no right to flexible working arrangements but they should be viewed favourably where possible, depending on the requirements of the role. Staff members should seek written approval from their managers and follow Secretary-General Bulletin ST/SGB/2019/3 to set up flexible working arrangements.

**Facts:** The Appellant, a P3 Child Protection Officer, left her hardship mission for medical reasons. She challenged UNICEF's decision to deny her sick leave request and place her on SLWOP, instead of providing reasonable accommodations due to her medical vulnerability and enabling her to work. The UNDT rejected the case on the basis that the global rotation policy at UNICEF had been implemented to ensure crucial presence on the ground and that telecommuting was not appropriate for the functions of the Child Protection Officer role.

**UNAT held:** The Appellant was given sufficient opportunity to apply for sick leave and sufficient notice of the need for her to return to the duty station. However, she did not request such sick leave, nor did she return to work, leaving no option for UNICEF other than to place her on SLWOP. She did not provide evidence of any compelling personal circumstances or medical exemption in support of any telecommuting arrangements.

## Harassment and Sexual Harassment

### ILOAT Judgment No. 4601

**Legal Principle:** Harassment can involve a series of incidents over a period of time and can be the result of the cumulative effect of several incidents which, taken in isolation, might not be viewed as harassment. Historical allegations that may not have been investigated at the time can be considered as part of a pattern of conduct when a fresh complaint is made.

**Facts:** The Office of Internal Oversight (**OIO**) investigated a complaint and concluded that incidents in 2002, 2003, 2007, 2011 and 2014 substantiated allegations of harassment and abuse of authority made against the Complainant. OIO recommended that the Complainant should receive a sanction commensurate with his misconduct, and WTO imposed the sanction of summary dismissal. The Complainant appealed.

**ILOAT held:** There was no limitation period at WTO and given the updates to its staff rules and regulations after 2014, OIO's consideration of older internal complaints was justified. However, in this case, the WTO's decision was fundamentally flawed due to a misinterpretation of the facts. The investigation was launched on the basis of the internal complaint lodged in 2018 by one of the five people who had made the complaints in 2013 and 2014. This was four years after the review of those complaints had been concluded and after several internal organisational measures had been decided upon at the time, such as transferring the person making the allegations to another division. Therefore in principle, following her transfer, that person was no longer capable of being the subject of new incidents of harassment by the Complainant. There were no new incidents of harassment reported after 2018. The ILOAT set the decision aside and ordered that the Complainant's retirement date and associated entitlements be adjusted.

### UNAT Judgment No. 2023-UNAT-1332

**Legal Principle:** Sexual misconduct must be shown by the evidence to have been highly probable. In order to come to a reasoned conclusion on the disputed facts in a sexual assault case, judges must satisfy themselves on the credibility and reliability of the persons concerned and provide cogent reasons for those findings. Whether there is consent will depend on the circumstances of each case and the totality of the evidence. However, there are circumstances where there clearly can be no consent in law, such as when the activity is clearly forced, where the complainant lacks capacity to consent, where there is inducement or where the complainant communicates, by words or conduct, an express lack of agreement to engage in or continue the activity. A determination that a staff member committed rape or sexual assault is undeniably serious misconduct that must lead to an end of the employment relationship between the staff member and the organisation.

**Facts:** The Appellant was dismissed based on two counts of misconduct: (i) that he raped, sexually assaulted and harassed another staff member; and (ii) that he failed to cooperate with the Office of Audit and Investigation Services (**OAIS**) during its investigation.

**UNAT held:** A finding of sexual misconduct against a staff member is a serious matter with grave implications for their reputation, standing, and future employment prospects. For that reason, the UNDT must base its finding of sexual misconduct on sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and a legal conclusion that all the elements of sexual misconduct have been established by clear and convincing evidence. The evidence established that the Appellant engaged in non-consensual sex with the complainant to a high degree of probability. The UNAT accepted the UNDT majority view that the complainant was credible in her testimony, whereas the Appellant's account was generally lacking in credibility. The UNAT rejected the Appellant's argument that because the complainant did not struggle, scream, or attempt to flee, her passive behaviour equates to consent. The UNAT held that this was clearly incorrect and contrary to a reasonable standard in sexual assault cases.

### **UNAT Judgment No. 2023-UNAT-1333**

**Legal Principle:** Misconduct is a broader concept than harassment and includes any failure of a staff member to comply with their obligations under the UN legal framework for the conduct of international civil servants. Actions that are not harassment may still be misconduct. In 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, the UNAT will not interfere with UNDT findings. Tribunals will only interfere and rescind or modify a sanction where it is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd.

**Facts:** The Appellant was found to have committed misconduct by (i) creating a hostile work environment in which she disparaged, demeaned and humiliated the complainant; and (ii) unreasonably interfering in a recruitment exercise and misusing UN resources. The sanctions imposed on her were a written censure and a two-step grade reduction.

**UNAT held:** The UNDT's findings satisfied the requisite standard of proof for disciplinary sanctions other than those involving separation or termination, and were a reasonable exercise of the organisation's discretion. The nature and gravity of the contested misconduct should be examined on a case-by-case basis. It was a procedural flaw for a manager who knew the complainant in the case to be the officer who established the fact-finding panel, but this irregularity did not render the disciplinary process or sanctions unlawful.

## Performance review

### OSCE Panel of Adjudicators Case No: OSCE PoA 2/2022

**Legal Principle:** Constructive dismissal cases are characterized by the organisation acting in a manner inconsistent with any further maintenance of the employment relationship. Mere expression of disagreement, admonishment, or criticism regarding work performance, or conduct within a supervisory relationship, shall not normally be considered harassment.

**Facts:** The Applicant commenced work at OSCE in April 2021 and had a meeting with HR and their supervisor to discuss performance in September 2021. Following the meeting, they understood that they could initiate a Performance Improvement Plan, resign or that OSCE could terminate the contract. HR also advised the Applicant to submit a formal complaint if they considered that their negative performance review was a result of their supervisor's harassment. At the end of September, the Applicant submitted their resignation and gave one month's notice. Prior to their last date, they also lodged a request for review of the decision to terminate their contract or extend probation due to unsatisfactory performance.

**OSCE Panel held:** Given that the Applicant had voluntarily resigned and left, OSCE had not taken any explicit administrative decision to terminate their appointment. Accordingly, there was no constructive dismissal and no decision for the Panel to review. OSCE had in fact considered a range of options, including giving the Applicant a positive performance review, and the Applicant could not establish any harassment or retaliation on the facts.

### ADBAT Decision No. 127

**Legal Principle:** The assessment of staff members' annual performance is made by the Bank and cannot be substituted by the Tribunal unless it appears that the evaluation has not been reached by the proper processes, is arbitrary, discriminatory or improperly motivated or is manifestly unreasonable. The mere fact of strained relations between a staff member and their supervisor does not in itself render a performance review unfair or irregular.

**Facts:** The Applicant challenged his performance evaluation and requested that (i) his rating be expunged and replaced with a higher rating; (ii) that measures be taken against his supervisor's alleged "*mala fide* acts" that downgraded his rating; and (iii) he be awarded retrospective salary increases, USD 1,000,000 in moral damages and USD 60,000 in costs.

**ADBAT held:** The ADB followed its performance review procedures such that there were no procedural flaws. The Applicant bears the burden of proving any other defects in the decision and had not produced sufficient evidence to establish that his supervisor's assessment was motivated by *mala fides*, or that there was any other misconduct. The Applicant's performance issues had been recorded in the previous year and were properly presented to him. The Applicant's misconduct allegations were properly dealt with by the Office of Professional Conduct. The Tribunal dismissed the appeal and held that the Applicant had not substantiated his moral damages or costs claims.

## Recruitment

### UNAT Judgment No. 2023-UNAT-1337

**Legal principle:** A recruitment process that began under one specified process should continue under that process. An organisation is not bound to conclude the recruitment process. It is open to the organisation to conclude that no candidate meets the objective criteria, cancel the recruitment and recommence it in the hope of attracting better candidates than those who had previously applied.

**Facts:** The Appellant challenged the cancellation of a recruitment exercise, claiming that ITLOS had failed to follow the shortlisting procedure in the relevant Administrative Instruction (AI). The Appellant claimed that ITLOS had listed candidates in alphabetical order instead of provisional order of priority, that the AI was amended during recruitment, and that as he should have been selected as a suitable candidate instead of cancelling the recruitment exercise.

**UNAT held:** ITLOS was not obliged to conclude the recruitment once it had begun, and that had the authority to cancel the process. Although UNAT was concerned by the change to the recruitment procedure during the course of the recruitment, it could not discern how this affected the Appellant's candidacy. Being the only candidate who meets one of many criteria does not mean that appointment to the post should follow indiscriminately.

### EBRDAT Case No. 2023/AT/03

**Legal Principle:** The test for reviewing allegations of bias in a recruitment process is whether a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the selection process was biased. At every stage of the recruitment, every candidate must be treated on an equal footing and with full impartiality.

**Facts:** The Appellant challenged a recruitment process in which his candidacy did not continue beyond the first interview round on the basis that the selection process was (i) procedurally flawed; and (ii) tainted by the unconscious bias of the hiring manager against him. In the first instance decision, the procedural flaws were upheld (lack of transparency, lack of written records, insufficient assessors) but the findings of unconscious bias were rejected. The Appellant was awarded material damages of 3 months' net base salary.

**EBRDAT held:** The Appellant appealed against the finding of no unconscious bias. The Tribunal upheld the appeal, finding that in light of the selection process being tainted by serious procedural flaws, it was impossible to rule out the possibility of unconscious bias. The recruitment process did not include measures to preclude any potential bias and this defect, and the impact it had on the Appellant's health and wellbeing, warranted the payment of additional moral damages of GBP 5,000.

## Termination due to restructuring

### [UNAT Judgment No. 2023-UNAT-1367](#)

**Legal Principle:** A non-renewal of a fixed-term appointment can be challenged on the grounds of procedural irregularity, that the staff member had a legitimate expectation of renewal, or that the decision was arbitrary or motivated by bias, prejudice or improper motive. A Tribunal should not interfere with an organisational restructuring exercise unless there is evidence that the organisation's discretion was exercised unreasonably, unlawfully or without due process.

**Facts:** The Appellant contested the decision not to renew his fixed-term appointment. The UNDT accepted that the decision to abolish the Appellant's post had been rational, that the Appellant had been given fair and adequate consideration and that he had failed to adduce clear and convincing evidence of improper motive or bias sufficient to rebut the presumption of regularity.

**UNAT held:** The abolition of a post resulting from a reorganisation or on the grounds of operational requirements usually constitutes a valid reason for non-renewal or not extending a fixed-term appointment. If the organisation is able to minimally show that the staff member was given full and fair consideration, then the evidentiary burden shifts to the staff member to show that they were subject to an act of unreasonableness or unfairness. Here, the evidence confirmed that the abolition of particular posts was due to client requirements and there was a genuine restructuring that led to the retrenchment of 29 staff members. The fact that the Appellant had been placed on a performance improvement plan was not an indication of bias, or clear and convincing evidence that the rationale to abolish his post was unreasonable. The Appellant had failed to discharge the evidentiary burden to rebut the presumption of regularity, and the appeal was dismissed.



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## Contact

Ludovica Moro | ludovica@modu.law  
Neha Dubey | neha@modu.law

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