



International Administrative
Tribunals

CASE LAW digest

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Modulaw



note

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 2024.

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 other international organisations.

This publication would not be possible without the contribution of our consultant, Laura Papasodaro.

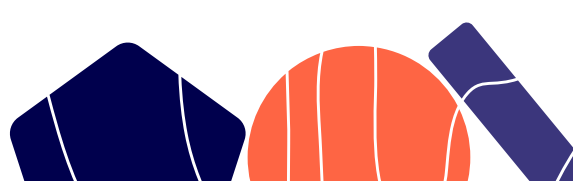
We hope this is a useful resource for all readers.

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Abbreviations

EPO	European Patent Office
FAO	Food and Agriculture Organisation
HR	Human Resources
IGO	UNHCR Inspector General's Office
ILOAT	Administrative Tribunal of the International Labour Organisation
OIOS	UN Office of Internal Oversight Services
OSCE	Organisation for Security and Co-operation in Europe
UNAT	United Nations Appeals Tribunal
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNAMID	United Nations African Union Mission in Darfur
UNDT	United Nations Dispute Tribunal
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees – UN Refugee Agency
UNRWA	United Nations Relief and Works Agency for Palestine Refugees
WBAT	World Bank Administrative Tribunal
WHO	World Health Organisation

1. Breach of Confidentiality

ILOAT Judgment No. 4804

Legal Principles: Compensation for a breach of confidentiality is only awarded where the complainant provides proof of the specific moral damage incurred.

Facts: EPO held a meeting with staff representatives regarding the revision of the calculation of parental contributions for in-house and Office-subsidized crèches. At that meeting, the Director of HR disclosed that the complainant had already filed a complaint with the Tribunal challenging the increase in parental contributions. As part of his appeal, the complainant sought moral damages for the breach of confidentiality.

ILOAT held: EPO acknowledged that the complainant's name and his pending complaint should not have been disclosed at the meeting. Therefore, the Tribunal only assessed whether that breach of confidentiality caused the complainant a moral injury warranting compensation. The complainant bears the burden of proof that he suffered moral injury. Here, the Tribunal considered that EPO's disclosure was made in a neutral way and the complainant did not submit any evidence to establish that he suffered any damage to his reputation or other injury as a result of EPO's disclosure. Accordingly, despite the breach of confidentiality, the Tribunal found that the complainant's request for damages was unsubstantiated and dismissed the appeal.

2. Discrimination

UNAT Judgment No. 2024-UNAT-1486

Legal Principles: In deciding whether a staff member has suffered discrimination or been treated in a discriminatory manner, the Tribunal must consider whether that person has objectively been treated differently to another in a way that is unfair and unwarranted, has the potential to impair their dignity as a person or affect them adversely in a comparably serious manner. For conduct to have been prejudicial to a staff member it must be shown to have been harmful to them in circumstances in which it was unfair and unwarranted.

Facts: A former staff member at UNAMID contested the decision not to renew his fixed-term appointment. He claimed that he was treated unfairly as someone placed in a similar situation had been relocated instead of terminated. The UNDT ruled in his favour, rescinding the decision and awarding him compensation. Both parties appealed to the UNAT.

UNAT held: The administration has a broad discretion to reorganize operations and departments to adapt to the organisation's economic vagaries and challenges. In taking a decision, the administration is under a duty to act fairly, justly and transparently, and is not to be motivated by bias, prejudice or improper motive. There exists a presumption of regularity in respect of administrative acts, with it falling to the employee to rebut that presumption.

Here, the applicant had no right of reappointment or reassignment after the expiry of his appointment. His situation was different to that of his colleague, who was reassigned exceptionally outside the regular staff selection system because he could not return to Afghanistan for security reasons. On the evidence, the applicant could not establish any procedural irregularity or that he was treated differently in a manner which was unfair to him or had the potential to impair his dignity. The appeal was dismissed.

UNDT Judgment No. UNDT/2024/053

Legal Principles: Differential treatment which pursues a legitimate policy is not unfair discrimination if there is a rational connection between the differentiation and the purpose it is designed to achieve.

Facts: In December 2022, the UN General Assembly established a new parental leave framework effective for 2023, consolidating maternity, paternity, and adoption leave into 16 weeks of unified parental leave for all parents, with an additional 10 weeks for birth parents. This framework replaced the previous entitlements of 16 weeks for maternity leave and 4-8 weeks for paternity leave.

In March 2023, both applicants requested 16 weeks of parental leave under the new parental leave scheme but their requests were rejected. After unsuccessful management evaluation requests, the applicants jointly filed an application before the UNDT.

The applicants argued that the transitional measures, which provide an additional 10 weeks of special leave with full pay to staff members on maternity leave as of 1 January 2023, were discriminatory because they create a gender distinction.

UNDT held: In conducting a judicial review of the validity of the Secretary-General's exercise of discretion, the Dispute Tribunal reviews whether the decision was lawful and rational. The transitional measures at stake are meant to benefit birth parents, as per WHO recommendations on breastfeeding, and are not intended for parents who did not give birth. The Tribunal found no discrimination in the decision as the policy differentiates based on the legitimate health needs of birthing parents. It was also within the Secretary-General's authority to apply the policy to parents whose children were born or adopted on or after 1 January 2023. The applicants' requests for parental leave were rejected in accordance with the policy, and the Tribunal upheld the decision, ruling that the transitional measures were not discriminatory.

3. Duty of Care

WBAT Decision No. 704

Legal Principles: The Bank's duty cannot and does not extend to insulating staff members from all risk of developing a personal illness. The duty of care of the organisation is not an absolute duty that would, effectively, make the organisation the insurer of staff members' well-being, irrespective of whether there was a failure of reasonable care that could be attributed to the organisation.

Facts: In January 2022, the applicant began experiencing significant abdominal pain and other gastroenterological symptoms, and was initially diagnosed with bacterial infections. Over the following months, despite treatment and multiple diagnoses, her symptoms persisted and worsened, prompting her to seek guidance from medical services and requesting Out of Country Care (OOCC) for specialized treatment. In May 2022, she was evacuated to Spain, where an emergency hospital visit revealed a diagnosis of colon cancer requiring surgery, followed by chemotherapy beginning in June 2022. The applicant was placed on Short-Term Disability while undergoing treatments in Madrid.

The applicant claimed that the Bank failed to take appropriate action consistent with its duty of care in response to the applicant's worsening medical condition and that the Bank failed to facilitate timely access to needed diagnostic services by adopting a "wait-and-see" approach and delaying a Non-Emergency Medical Evacuation (NEME) to access diagnostics abroad, even though local resources were inadequate.

WBAT held: The Bank had a duty of care to ensure staff safety but is only required to take reasonable measures. A breach of the duty arises when there is a failure to take reasonable care. Here, the Bank acted reasonably in responding to the applicant's medical concerns. Despite the applicant's delayed follow-up and failure to fully use all available medical options, the Bank provided timely advice and support, including OOCC. When the applicant's condition worsened, the Bank authorized a NEME. In these circumstances, the Bank's actions were reasonable based on the information available at the time and did not breach the Bank's duty of care towards the applicant.

4. Eligibility for compensation

UNDT Judgment No. UNDT/2024/006

Legal Principles: A claimant must prove the connection between an illness and the performance of official duties in order to be eligible for compensation. A reconsideration of a decision cannot last more than a year and thus block the receivability of a complaint on the basis that a final decision has not yet been made.

Facts: While assigned to a Temporary Operation Base in South Sudan, the applicant developed jaundice-like symptoms. He was examined by a Medical Officer, diagnosed with almost 10 years of alcohol abuse and referred to a higher-level hospital. There, the applicant was diagnosed with jaundice due to a stone inside his gallbladder that blocked bile flow into his intestines. This diagnosis and the following treatment turned out to be wrong.

The applicant filed a compensation claim which was denied by the Advisory Board on Compensation Claims (ABCC) on the basis that the applicant's injuries and referral were not causatively related to the performance of official duties.

UNDT held: The test to determine eligibility for compensation is that the illness must be incurred during the performance of official duties. "Official duties" implies that a duty that was not part of the applicant's official remit would not be covered by way of compensation. This language covers the eventuality of staff members incurring illnesses in the course of activities which are outside the scope of their official duties, which would not be subject to compensation. To determine whether the factual circumstances surrounding the applicant's illness fall into the category of being "incurred during performance of official duties", it was necessary to look at the detailed facts surrounding the case.

The applicant was an interpreter for a military liaison officers and force protection contingents who were ensuring safe passage and freedom of movement of humanitarian convoys in South Sudan. It was likely that a person could develop symptoms from the stress and trauma of this position. The details of the sickness and the action taken/treatment applied by various doctors who treated the applicant did not identify stress or trauma as the cause of the illness suffered by the applicant. The applicant did not provide any expert medical evidence in relation to the true cause of his medical conditions.

The Tribunal therefore found no fault with the ABCC decision to deny the Applicant's claim for compensation for injury and illness incurred during and resulting from his UN employment.

5. Investigation Procedures

ILOAT Judgment No. 4779

Legal Principles: Exceeding time limits for investigation procedures does not render the investigation unlawful. Exceeding the time limits prescribed for disciplinary proceedings does not render the sanction ultimately imposed unlawful. The right to privacy must be balanced with the need to tackle misconduct on the part of officials.

Facts: In February 2020, the complainant was investigated on allegations of fraud in relation to the payment of an education grant and breach of private obligations. In December 2020, she was notified of the charges against her and the submission of the case to the Joint Advisory Committee (JDC). On 30 July 2021, the complainant was notified that, based on the JDC Report, the Secretary-General of the ITU had made the decision to dismiss her.

The complainant challenged her dismissal on numerous bases, including that the investigation and disciplinary proceedings exceeded time limits. She further alleged that her right to privacy was violated by the Audits Unit's access to her private emails in her professional email account.

ILOAT held: Neither the time limit within which the investigation should normally be completed, nor the requirement to state the reasons why that time limit has been exceeded, is intended to have the effect of invalidating the investigation report in the event of a breach. However regrettable the delay may be, it does not render unlawful the sanction imposed at the conclusion of the disciplinary proceedings on the basis of the findings contained in the investigation report. Further, although an organisation must respect the confidentiality of private messages stored in a professional email account, that requirement must be balanced against the requirements intrinsic to the need to combat fraud and, more generally, the need to tackle misconduct on the part of officials. The Tribunal determined all of the complainant's pleas to be unfounded and dismissed the complaint.

UNAT Judgment No. 2024-UNAT-1427

Legal Principles: Investigators have an obligation to investigate and report on exculpatory evidence. The mental state of the actor or alleged wrongdoer may also be relevant and significant. Once alerted of a staff member's medical condition with possible influential and relevant medical factors, investigators are expected to inquire further into those factors.

The organisation has a separate role from the investigators and an independent responsibility to consider and apply relevant factors in its decision-making.

Facts: The applicant had surgery to remove brain tumours and was assessed as being physically fit to resume work. However, the applicant suffered adverse physical and psychological conditions which he attributed to his previous neurological condition and/or its treatment. A number of complaints were lodged against the applicant for engaging in workplace harassment, discrimination and creating a hostile working environment. The applicant declined to respond to the allegations and he was informed that the allegations were established by clear and convincing evidence, and the disciplinary measure imposed was separation from service with compensation in lieu of notice and without termination indemnity.

The applicant appealed his termination to the UNDT, which held that the IGO was required to investigate all relevant evidence and had failed to inquire about the applicant's medical condition, despite the applicant stating this may have played a part in his conduct and despite references to this in other witness evidence. The UNDT rescinded the decision, remanded the case to UNHCR for re-decision and awarded the applicant USD 5,000 as moral damages. The Secretary-General appealed the UNDT judgment.

UNAT held: The IGO and UNHCR failed to take account of a relevant consideration, namely the medical context in which the established misconduct occurred. If there was or may have been a link between the applicant's medical condition and his behaviour towards other staff, IGO should have investigated and reported it, and its failure to do so led the decision-maker into error. The Administration has the onus of proving the commission of the alleged acts or omissions that amount to misconduct. The mental element of misconduct is itself comprised of two constituents: (1) the conscious choice or the exercise of free will to do or not to do the act, a necessary condition of responsibility; and (2) the intention to attain a desired result of doing so, called the knowing intention. This second element distinguishes intentional from non-intentional misconduct. Where facts supporting the existence of the first element emerge during an investigation, the obligation of the Administration to investigate exculpatory evidence arises, to ascertain that the act or omission was the result of the staff member's free will.

The role of the investigation body is not to act as a neutral umpire in a contest of adversarial foes to determine what happened solely by reference to evidence placed before the investigator by the parties. The investigation bodies are given extensive powers to investigate within fair process and natural justice limitations.

The Tribunal held that UNDT erred in rescinding the decision to separate the applicant from service, as this was outside of the powers granted to the UNDT by statute. However, the UNAT maintained the applicant's award of USD 5,000 for damages.

OSCE Panel of Adjudicators Decision No. 1/2024

Legal Principles: Although disciplinary decisions are based on the exercise of discretion and the Panel will not interfere by replacing the administration’s assessment by its own preference, such discretion is not unfettered. It is for the Panel to check whether general criteria for the correct use of discretion were observed, including whether all relevant facts and circumstances of a case have been taken into account and whether sufficient reasoning for the decision is given.

Facts: On 22 November 2021, the applicant filed a formal harassment complaint against a colleague, who wrote them emails saying that despite not being the applicant’s direct supervisor, they would now oversee the applicant’s performance and monitor their work closely. In December 2021, the alleged offender responded and made a counter-allegation. In August 2022, the investigative report concluded there was no evidence of harassment. In January 2023, the applicant submitted an addendum to address the counter-allegations. In March 2023, the OSCE exonerated both parties from the harassment claims. The applicant requested an internal review in April 2023, and in September 2023, the Internal Review Board upheld the decision. The OSCE endorsed the recommendations. In December 2023, the applicant requested an external review, citing (1) flaws in the decision for failing to correctly establish and distinguish the facts, recognise and analyse the evidence; and (2) excessive delays for over two years.

OSCE PoA held: The Panel’s role in a disciplinary matter is to ensure that discretion is exercised correctly, including taking into account all relevant facts and circumstances. If important facts are overlooked or ignored, the decision cannot stand. In this case, the Panel found that the investigation report upon which the decision was based was incomplete and did not fully represent the sequence and impact of the incidents as several key facts were either omitted or inadequately addressed. The decision was rescinded.

Further, there was significant delay in the processing of the complaint and the handling of the request for internal review. Even though the applicant did not specifically request compensation for those delays, the Panel awarded EUR 5,000 to the applicant in accordance with OSCE’s practice to grant an ex gratia payment for “delays in processing”.

ILOAT Judgment No. 4862

Legal Principles: Organisations are not obligated to disclose investigation reports before the issuance of an administrative decision on a harassment complaint unless such disclosure is expressly required by applicable staff rules, policies, or regulations. Any disclosure of an investigation report prior to the decision on a harassment complaint must be evaluated based on the specific circumstances of the case.

Facts: The complainant, a former staff member of UNAIDS, lodged a sexual harassment complaint against a Deputy Executive Director in 2017. A preliminary investigation conducted by WHO IOS concluded that the allegations were not substantiated. Following new allegations against the same person, the investigation was re-opened and conducted by UN OIOS. The final investigation report was issued to WHO in August 2020.

The complainant requested access to the investigation report to WHO but received no substantial answer. After exhausting all internal remedies, the complainant filed a complaint before the ILOAT contesting the decision to not provide her with the final investigation report at the end of the investigation and before any decision was taken on the harassment complaint.

ILOAT held: The complainant's request to access the investigation report before a decision on her harassment complaint was unfounded and premature. There are no UNAIDS, WHO or UN rules or policies requiring disclosure of an investigation report at this point in the process. The Tribunal distinguished two scenarios: (1) cases concerning an administrative decision notified to a staff member which is based on an investigation report; and (2) cases concerning earlier requests for disclosure – that is, requests made shortly after the completion of the report and before the adoption of a decision. In the first situation, an organisation is ordinarily bound to disclose the investigation report together with the decision on the complaint, or at least shortly after, where requested by the concerned party. On the contrary, in the second situation, unless it is otherwise established in the staff rules and regulations, an organisation is not bound to disclose the investigation report before a decision is adopted.

The Tribunal acknowledged that its case law has occasionally stated that the alleged victim of harassment must be provided with the investigation report before the issuance of the decision on the harassment complaint. However, it considered that this principle can only be applied on a case-by-case basis, where the specific circumstances of the case so demand. That was not the case here, considering that the subject of the allegations had retired well before the complainant's request for disclosure of the investigation report, and so there was no urgent need for the complainant to obtain the investigation report in advance.

6. Legal Standing

ILOAT Judgment No. 4853

Legal Principles: In the absence of demonstrated interest or impact on rights, it is difficult to justify a legal challenge to another's appointment. The complainant must show either immediate or potential long-term interest in the outcome.

Facts: In April 2016, the Administration sought to transfer the complainant, then Director of the Liaison Office for North America, to a new position. Various options were considered but medical and other reasons delayed a decision. Ultimately, in February 2017, the complainant was transferred to Senior Policy Officer, FAO Regional Office for Europe and Central Asia. In April 2017, the FAO announced a vacancy for a different Director position, for which the complainant did not apply. After a candidate turned down the role, the Director-General appointed another person on an ad interim basis. The complainant's appeal to the ILOAT sought to overturn this direct appointment and for him to be awarded moral and material damages. FAO argued that the complainant lacked a cause of action because he did not apply for the position when it was open for competition.

ILOAT held: The Tribunal's authority depends on whether the challenged decision adversely affects a complainant's rights or interests. For standing, a staff member must demonstrate some form of injury or potential injury caused by the appointment. Participation in a competition or expressed interest in the position may serve as evidence of such injury. If there is evidence that a staff member has manifested an interest in a position, then they have an interest in the preservation of the position for possible future appointment to it. That interest may be expressed, for example, by the staff member applying for the position in a competition; or it may be inferred from all the circumstances, which might include that occupying the position would be a logical career progression or development for the staff member concerned. But, in the absence of evidence of interest, it is difficult to discern what legal effect the appointment of another person to a position has on a staff member who has no interest in that position, even though she or he is qualified to be appointed to it. The complaint was dismissed.

ILOAT Judgment No. 4881

Legal Principles: Staff members cannot challenge decisions regarding their reporting lines or the designation of supervisory functions, as these are within the organisation's prerogative. However, exceptions exist where a staff member has a cause of action: (1) when the decision directly adversely affects the rights conferred by their terms of appointment, or (2) when the decision involves manifest perversity, making the challenge lawful.

Facts: The complainant, a security officer at UNESCO, challenged the change in his immediate supervisor. This change was prompted by an audit of the Security Unit. Despite efforts by several security officers, including the complainant, to address management issues and request a return to supervision by the previous supervisor, the Assistant Director-General for Administration and Management confirmed the new supervisor's role in the reporting structure. The complainant contests the denial of his request to change the supervisor designation in the IT tools.

ILOAT held: The Tribunal stated that staff members cannot ordinarily be allowed the opportunity to challenge measures determining their reporting lines or the choice of persons designated to exercise supervisory functions. It is the organisation's prerogative to take such decisions and they cannot therefore be considered to adversely affect those staff members.

As an exception, there are two particular situations in which a staff member may be considered to have a cause of action in challenging decisions of this type. The first is where the contested decision has a direct adverse impact on the rights conferred by that staff member's terms of appointment; the second is where the decision in question involves a manifest perversity that renders her or his challenge lawful. However, the Tribunal found that neither of these situations arose in the present case and therefore dismissed the complaint.

7. Misconduct

UNDT Judgment No. UNDT/2024/009

Legal Principles: Dishonesty constitutes serious misconduct that justifies separation.

Facts: The applicant submitted false information in her job applications for posts with the organisation, namely that she did not have a relative working for a public international organisation, and she certified the truthfulness of the statements. As a consequence, the applicant was separated from service as a disciplinary measure. The applicant contested the decision.

UNDT held: The Tribunal found no procedural flaws in the procedure adopted to investigate and impose the disciplinary action taken and that in the circumstances, there was no basis for a more lenient disciplinary measure. The imposition of separation from service is applied because the misconduct is considered serious. The seriousness of the misconduct is related to the fact that the organisation expects employees to be of high integrity, and dishonesty is inconsistent with high integrity. The measure was proportionate as the misconduct committed was very serious and there were no mitigating factors.

UNRWA/DT Judgment No. 2024/011

Legal Principles: Aggravating factors relating to the same conviction must be considered as one single aggravating factor. Undue delay in disposing of the case may be considered as a mitigating factor. If the organisation decides not to give this weight as a mitigating factor, it must explain why.

Facts: The applicant contested the decision to impose on him the disciplinary measures of a written censure and suspension without pay for six months following a finding of misconduct (possession of illegal drugs).

UNRWA DT held: The Tribunal upheld the finding of misconduct but determined that the agency had erred in law when imposing the disciplinary sanctions. The Tribunal considered that the severity of the applicant's sanction must have been based to a significant degree on the agency's weighing of aggravating and mitigating factors, since the misconduct in itself was not found to be serious misconduct. The Tribunal found that UNRWA relied on two aggravating factors relating to a previous conviction and gave this undue weight, thus committing an error of law. Further, UNRWA did not count as a mitigating factor the fact that there was undue delay in disposing of the case and did not explain the reasons why. Accordingly, the Tribunal rescinded the decision to suspend the Applicant without pay for six months but upheld the written censure.

UNAT Judgment No. 2024-UNAT-1456

Legal Principles: Misconduct in the context of misrepresentation requires not only the provision of false information but also clear and convincing evidence of intent to mislead. Negligence or unintentional omission does not satisfy this standard. The Administration bears the burden of proving misconduct to a clear and convincing standard, particularly when alleging dishonesty or intentional misrepresentation.

Facts: The applicant, a Nepalese national and former UNSMIL staff member, was separated from service for serious misconduct after failing to disclose his familial relationship with his half-brother, also a UN staff member, during job applications in 2015 and 2018. This omission violated UN Staff Regulations aimed at preventing nepotism. Investigations concluded that the Appellant knowingly misrepresented his family status, leading to his separation from service, albeit with compensation in lieu of notice and termination indemnity. He challenged the decision before the UNDT, which upheld the separation considering that “half-brother” falls under the definition of “relatives” who should be disclosed on application forms if they happen to be employed by the United Nations. The UNDT considered the sanction proportionate.

UNAT held: The appeal centred on three questions: (1) whether misrepresentation in application forms requires intent to mislead; (2) whether clear evidence showed that the Appellant intentionally withheld his relationship with his half-brother; and (3) whether “relative” in the application form includes half-siblings.

For misconduct to be established, there must be clear and convincing evidence of both false information and intent to mislead. The evidence showed that at the time of the applications, the Appellant did not know and had no reason to know that his half-brother worked for the UN. The UNAT considered that the application form required disclosure of “relatives”, which is less specific than the Staff Rules’ definitions of prohibited family relationships. The UNAT found the term “relative” ambiguous and insufficiently precise to conclude that half-siblings are automatically included under this category and prompted the Secretary-General to clarify. The appeal was upheld, and the judgment was overturned.

8. Moral Damages

UNAT Judgment No. 2024-UNAT-1442

Legal Principles: Three elements must be proved in order for compensation to be awarded: (1) an illegality; (2) the harm; and (3) a nexus between these two elements. There is no absolute rule regarding the nature or quantum of evidence required to support a moral damages claim. Sufficient evidence beyond the staff member's testimony may take the form of the overall underlying circumstances, testimony of witnesses, or expert testimony.

Facts: The Applicant was awarded JOD 400 (~USD 564) in moral damages by the UNRWA DT due to the Agency's undue delays during the investigative process. The agency took 11 months to authorise the investigation, contrary to the 10 days prescribed by UNRWA's policies. The Commissioner-General appealed against the decision.

UNAT held: Moral damages can be awarded even in the absence of a finding of substantive illegality on the merits of the case, when procedural irregularities were detrimental to the staff member's well-being. In other words, a finding of substantive illegality is not a necessary precondition to having a right to moral damages. A violation of rights suffered as a result of an undue delay may be tantamount to an illegality for the purposes of having a basis to award moral damages.

The UNRWA DT was the trier of fact and was empowered to exercise its discretion in formulating remedies, provided it was consistent with the evidence, its statute and the fair administration of justice. The UNAT considered that the issue of moral damages is necessarily unique in each case. In this case, the UNRWA DT gave weight to the Applicant's testimony, which was in part corroborated by her psychologist's letter, and properly disregarded her husband's statement and a medical report which pre-dated the investigative delays. Accordingly, the UNAT upheld the UNRWA DT's decision to award moral damages in the amount of half of one month's salary.

9. Recruitment

UNRWA DT Judgment No. 2024/031

Legal Principles: It is the administration's right to fix pay, but such right must be exercised without discrimination. Failure to apply eligibility requirements and directives consistently, particularly when applying stricter criteria to a specific candidate, violates principles of fairness, transparency and non-discrimination, and creates the appearance of bias.

Facts: The applicant, a UNRWA staff member, applied for a Protection Coordinator position and ranked third among shortlisted candidates. After the top two candidates withdrew, she was considered for urgent appointment but was deemed ineligible for the advertised salary due to lacking two years of international experience, which was listed as "desirable" in the job criteria. Instead, she was offered the position at a much lower salary, which she declined. She contended the decision was biased and unfair, as she had passed all recruitment stages, was recommended by the Hiring Panel, and had been performing the role's duties since March 2020. A decision review request was rejected on procedural grounds. She sought either appointment at the advertised salary or compensation.

UNRWA DT held: The Tribunal found a discrepancy in the international experience required between the job's Terms of Reference (ToR) and a directive used in the recruitment. While the ToR listed two years of international experience as "desirable", the directive required five years of "relevant" experience for P3 roles. The Tribunal concluded that the directive's stricter requirements were to be preferred. None of the selected candidates met the requirements, yet the Agency offered the first and second selected candidates the full advertised salary and offered the Applicant 75% less, citing her lack of experience.

The Tribunal held that selectively applying the directive created an appearance of bias. Appearance of bias may arise when a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased and that a reasonable apprehension of partiality is normally sufficient to vitiate a decision. There is no need for an applicant to show ulterior motive, bad faith or actual bias. The Tribunal ordered compensation for the applicant.

10. Sexual Harassment

UNDT Judgment No. UNDT/2024/034

Legal Principles: The UN policy on sexual exploitation speaks to various kinds of situations in which sexual abuse is used overtly or impliedly, or where a person may fairly assume that if they do not give in to sexual demands they may face further harassment, discrimination, retaliation or punishment. Intimidation can be intended or unintended and may just be in words.

Facts: UNHCR IGO's report found that the applicant had attempted to kiss the victim on the mouth, touched her breasts and taken her hand to make her feel his erection, insisted on questioning her why she was refusing his advances, and told her of his interest in a romantic relationship. These incidents occurred in a short period over a few days. UNHCR considered this conduct to be sexual harassment and dismissed the applicant, who appealed the dismissal decision.

UNDT held: The applicant's conduct consisted of overt sexual harassment in the attempt to extract sexual favour, but even though no such favour was extracted, the harassment caused harm to the victim who was put in fear of loss of her position and caused unnecessary tension in staff relations. A degree of perceived harassment can be forgiven or treated with a response which presupposes that an inappropriate approach was withdrawn without sexual harm. But in this case, both words and acts were used together during a short period of persistence. When this happens in a work setting it can cause serious emotional stress and hurt. The victim was a reliable witness and the Tribunal considered the complaint was sufficiently detailed and the sequence of events plausible.

Dismissal is one of the most draconian and drastic penalties that can be imposed in an administrative or employment matter. However, keeping the perpetrator of such conduct in the workplace would leave open the possibility of retaliation by the perpetrator to the victim who made the complaint, and would expose the organisation to damages claims by the victim due to the unabated impact of the harassment on them. In these circumstances, the administration had little or no option other than dismissal as the sanction for sexual harassment.

The applicant also argued that he had no opportunity to question the complainant during the IGO investigation. The UNDT considered that certain precautions can be made before and in trial to protect the alleged victim against re-victimization, since it is often the case that a face-to-face confrontation between the parties is particularly damaging to the victim. The idea of securing the rights of the victim would be undermined if she had to face cross-examination before a charge was brought and before the applicant was deemed to have committed the breach of conduct.

UNAT Judgment No. 2024-UNAT-1412

Legal Principles: A supervisor has an obligation to recognize a power imbalance and its impact on the professional and social relationship, and to act accordingly in his dealings with a supervisee.

Facts: The applicant, a UNHCR employee, contested his separation from service where he was found to have sexually harassed a UN Volunteer by making unwelcomed advances and comments and attempting to touch her without her consent. The UNDT upheld the disciplinary measure on the basis that the facts were established by clear and convincing evidence, that the conduct amounted to sexual harassment, that the sanction was proportionate considering the gravity of the misconduct, the fact that it was not the most severe sanction available and that it was consistent with what was applied in similar cases. The applicant appealed the UNDT judgment.

UNAT held: The UNDT correctly assessed the case and dismissed the appeal. The Tribunal assessed (1) whether the facts were established by clear and convincing evidence, (2) whether the established facts constituted misconduct, (3) whether the sanction was proportionate and (4) whether due process was observed. The Tribunal found the following and dismissed the appeal on all grounds:

- (1) The UNDT correctly determined that the facts underlying the allegations were established by clear and convincing evidence relying on interviews, parties' admissions and documentary evidence.
- (2) The established facts constituted harassment. A close and friendly relationship between a supervisor and UN Volunteer does not excuse unwanted sexual advances, and supervisors have an obligation to recognise the impact of power imbalances on relationships. The applicant suggested that his conduct was not unwelcome. The Tribunal clarified that it is not the responsibility of the recipient to signal that sexual advances are unwanted but rather the responsibility of the perpetrator to ensure beforehand that their advances are welcome, which responsibility is all the greater when there is a power imbalance between the two parties.
- (3) The sanction was consistent with what applied in similar cases and that aggravating and mitigating factors had been duly taken into consideration. The administration has a broad discretion in selecting the sanction and considered separation from service neither excessive nor unreasonable.
- (4) Due process was observed.

UNDT Judgment No. UNDT/2024/100

Legal Principles: A victim of sexual harassment is entitled to know which sanction has been imposed on an offender but not to know whether the name of the offender has been included in the ClearCheck database. [ClearCheck is a UN-wide centralised database that permits sharing of information on personnel against whom allegations related to sexual harassment have been established or are pending investigation.]

There is no right to compensation for sexual harassment in the UN legal framework.

Facts: The applicant filed an application with the UNDT challenging UNHCR's handling of a disciplinary process where she was identified as a victim of sexual harassment. The applicant sought (1) confirmation of the disciplinary measures imposed on the offender; (2) confirmation of his inclusion in the ClearCheck database; and (3) moral damages for the health impact on her caused by the harassment.

UNDT held: UNHCR unlawfully denied the applicant's right to be informed about the disciplinary sanction that was imposed on the staff member who harassed her, which was contrary to paragraph 5.18(c) of ST/SGB/2008/5 and paragraphs 5.5(i) and (j) of ST/SGB/2019/8. These provisions of the Secretary-General's bulletins against sexual harassment provide that the victim should be informed of the outcome of the matter on a strictly confidential basis. The bulletins have the clear purpose of creating transparency, implementing the theory that "sunlight is an antiseptic" to the plague of sexual harassment. Informing a victim of sexual harassment that the organisation has decided to "impose an appropriate disciplinary measure" is opaque, not transparent, and an inadequate germicide for further sexual harassment. However, the Applicant had no express right to information about ClearCheck registration, as this is not addressed in the bulletins.

The Tribunal expressed its disagreement with the current legal framework but determined that it does not provide any rights to compensation for victims of harassment.

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