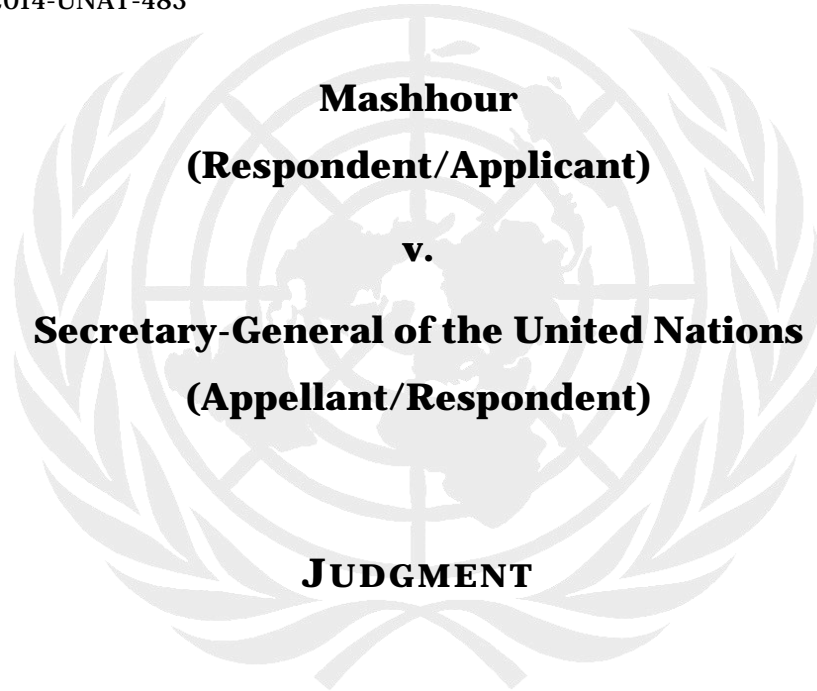




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-483



**Mashhour  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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|            |                                                                                    |
|------------|------------------------------------------------------------------------------------|
| Before:    | Judge Sophia Adinyira, Presiding<br>Judge Richard Lussick<br>Judge Rosalyn Chapman |
| Case No.:  | 2014-557                                                                           |
| Date:      | 17 October 2014                                                                    |
| Registrar: | Weicheng Lin                                                                       |

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|--------------------------------|------------------|
| Counsel for Ms. Mashhour:      | George G. Irving |
| Counsel for Secretary-General: | Wambui Mwangi    |

**JUDGE SOPHIA ADINYIRA, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/133, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 30 October 2013. The Secretary-General appealed on 6 January 2014 and Ms. Sahar Mashhour answered on 3 March 2014.

**Facts and Procedure**

2. The facts established by the Dispute Tribunal in this case read as follows:<sup>1</sup>

... On 17 February 2008, the Applicant commenced employment with [the United Nations Children’s Fund (UNICEF)] as a Child Protection Officer in the Egypt Country Office. Prior to joining UNICEF she had held various roles in the [non-governmental organization] sector in Egypt, mainly in the field of development, over a period spanning approximately 20 years.

... On 24 February 2009, the Applicant received her first performance evaluation report (“PER”) covering the period from when she commenced employment with UNICEF to 31 December 2008 (“2008 PER”). The Applicant received a rating of “2” for three of the five competency areas and a rating of “1” for the other two. The key on the PER described a rating of “2” as “met most expectations, however, there is room for improvement” and a rating of “1” as “met few expectations”. In the 2008 PER the Applicant noted her objection to the ratings, stating that she did not agree with the supervisor’s ratings in all five competency areas.

... On 22 March 2009, the Applicant submitted a formal rebuttal of her 2008 PER on all three grounds listed in section 2 of Chapter 7 of the UNICEF Human Resources Handbook (“Handbook”).

... On 2 April 2009, Mr. Steven Allen, Director of the Human Resources Division, replied to the Applicant on behalf of the Deputy Executive Director informing her that it was not acceptable to make a formal rebuttal on all three grounds and that she was required to elect between basing her rebuttal on discrimination alone or basing it on other grounds.

... On 7 April 2009, the Applicant replied to Mr. Allen requesting clarification of the terms “discrimination” and “abuse of authority” and what the implications were of submitting a formal rebuttal based on discrimination versus a formal complaint of harassment and abuse of authority.

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<sup>1</sup> The following text is taken from Judgment No. UNDT/2013/133, paragraphs 4-28 (internal citation omitted).

... On 12 April 2009, the Applicant wrote to Mr. Peter Frobel again requesting clarification of the term “discrimination” and her rebuttal rights. She stated:

I have asked Mr. Steven Allen several questions which **were not answered** like what’s the difference between filing a complaint for harassment and abuse of authority AND a formal rebuttal on the grounds of discrimination. I have also asked for a specific distinction between discrimination and abuse of authority especially in the context of PAS. [Emphasis in original]

She did not receive a response from either Mr. Allen or Mr. Frobel.

... On 4 May 2009, after consulting with the joint ombudsperson’s office, the Applicant submitted an amended rebuttal statement of the 2008 PER formally on the grounds of discrimination only but nevertheless cited concerns about abuse of authority and harassment.

... In the rebuttal statement to her 2008 PER, the Applicant claimed that she had come to UNICEF highly recommended by ex-supervisors and ex-employers for technical expertise, results-oriented management skills, leadership skills and maintaining positive communication relationships with partners and colleagues. She annexed performance reviews by former employers as evidence that she had been rated highly in previous positions. Among a range of other grievances, she claimed that the “very specific manner” in which the supervisor stated her comments in the 2008 PER gave a “very strong indication of a discrimination and abuse of authority case.” The Applicant’s rebuttal statement went on to describe a number of specific incidents of alleged discrimination and abuse of authority and a history of complaints against the supervisor.

... By letter dated 8 June 2009, the UNICEF Deputy Executive Director, Mr. Omar Abdi, rejected the Applicant’s rebuttal, finding that the Applicant had not proved discrimination. The letter included the following comments in relation to discrimination:

That you disagree with particulars of your supervisor’s management style, however, does not qualify these interactions as “discrimination,” which would have to be based on specific grounds of a discriminatory nature such as, for example, gender, religion, sexual orientation, nationality or ethnicity.

... On 9 September 2009, the Applicant filed an application to appeal the Deputy Executive Director’s decision to this Tribunal. The Applicant claimed that the 2008 PER and the rebuttal procedure violated her right to due process and requested that the 2008 PER be expunged from her person[ne] file.

... On 28 September 2009, the Applicant completed her second PER for the period 1 December 2008 to 15 September 2009 (“2009 PER”). She received a rating of “2” in all competency areas. Her immediate supervisor, Ms. Nadra Zaki, testified that

overall there had been an improvement in the Applicant's performance since the previous review period but there was still room for improvement.

... On 8 October 2009, the parties filed a joint submission with the Tribunal stating that the parties were negotiating a settlement agreement and requested, pursuant to article 19 of the Rules of Procedure, suspension of the proceedings.

... On 27 October 2009, the Applicant submitted a formal rebuttal of the 2009 PER on the grounds of discrimination but made references to issues of harassment and abuse of authority.

... On 3 November 2009, Counsel for the Respondent submitted a settlement agreement between the Respondent and the Applicant to the Tribunal ("Settlement Agreement").

... The Applicant consented to the Settlement Agreement on the condition that she maintained the right to appeal the decision of the ad-hoc panel.

... In accordance with the settlement agreement, an ad-hoc panel was set up consisting of two members from the Middle East and Northern Africa Regional Office and one member from the Jordan Country Office ("Panel").

... On 19 November 2009, the Registrar of the Tribunal informed the parties that based on the Settlement Agreement the Applicant's case (UNDT/NBI/2009/45) was closed.

... The Panel conducted a substantive review of the documentation, including statements submitted by the Applicant, the Applicant's supervisor, the second reporting officer, the Representative, the chief of operations and members of the Egypt Country Office[s] child protection service, as well as additional documentation relating to the Applicant's work relevant to the performance assessment. The Panel also conducted interviews with UNICEF staff members (including former staff members), government partners, staff of other United Nations agencies and the Applicant over the period 16 to 18 February 2010. In total, seventeen persons were interviewed by the Panel's three days in Egypt.

... The Panel stated that its mandate and scope "includes the review of rebuttal statements issued by [the Applicant] for 2008 and 2009, with specific focus on allegations of discrimination, as well as other factors therein that may have impacted on [the Applicant's] performance, as highlighted in respective PER rebuttal documents for both years."

... By memorandum dated 25 January 2010, the Applicant was informed that her fixed-term employment contract would be renewed until 31 March 2010 to allow the completion of the PER rebuttal procedures but that there was no expectancy of renewal beyond that date.

... On 10 March 2010, the Chairperson of the Panel submitted to the Deputy Executive Director the “Report of the Ad-hoc panel constituted by UNICEF to review the Performance Evaluation Rebuttal Statements of [the Applicant], Child Protection Officer, Egypt Country Office in line with Settlement Agreement UNDT/NBI/2009/45” (“Report”).

... By letter dated 30 March 2010, the Deputy Executive Director wrote to the Applicant attaching the Report.

... Based on its review, the Panel concluded that the grounds of discrimination were not substantiated. It stated at paragraph 4.2 of the Report:

[G]iven that due to personal circumstances wherein there has actually recently been a change in supervisor for [the Applicant], it has been confirmed that in relation to output and capacity, concerns related to the staff member’s work vis-à-vis UNICEF reasonable expectation of deliverables of an NOB officer remain; it therefore suggest [sic] that the issues at hand go beyond personality differences and are indeed mainly grounded in performance related issues. The panel has concluded therefore that despite the staff member’s perceptions that discrimination has been at play and has impacted her performance in both reporting periods, the grounds of discrimination as articulated by the staff member and based on the panel’s own understanding of the term discrimination ... are not substantiated.

... The Panel made seven recommendations, including that the rating for the competency of “drive for result” be raised from “1” to “2” in the 2008 PER but that all other ratings remain unchanged. [The Ad-hoc Panel’s recommendations were accepted by UNICEF’s Deputy Executive Director on 30 March 2010.]

... On 31 March 2010, the Applicant was separated from service.

3. In Judgment No. UNDT/2013/133, the Dispute Tribunal found that Ms. Mashhour was “denied due process when she sought to rebut her 2008 PER and 2009 PER” in two aspects. First, “the UNICEF Handbook unduly restricted the grounds on which [Ms. Mashhour] could rebut her performance appraisal in a way not envisaged by ST/AI/2002/3, which merely requires a staff member to set forth briefly the ‘specific reasons why a higher rating should have been given’. It does not limit the reasons that may be put forward.”<sup>2</sup> “By restricting the grounds on which a staff member could rebut a performance appraisal, UNICEF unlawfully circumscribed its staff members’ rights, including those of [Ms. Mashhour].”<sup>3</sup> Secondly, by misinforming Ms. Mashhour that she could not challenge her PER ratings on grounds other than discrimination, the Director of the Human Resources Division, UNICEF, “prevented her from

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<sup>2</sup> Impugned Judgment, para. 41.

<sup>3</sup> *Id.*, para. 42.

exercising her fundamental right to place before the Rebuttal Panel all her grievances flowing from harassment, discrimination and abuse of authority” and “flawed the whole rebuttal process”.<sup>4</sup> In addition, the Dispute Tribunal found the rebuttal process “flawed” as the Ad-hoc Panel failed to address the issue of discrimination, the sole ground of Ms. Mashhour’s rebuttal. The Ad-hoc Panel did not refer to any definition of discrimination or that of harassment or abuse of authority in any UNICEF document or seek guidance as to UNICEF’s policy in that regard. It came up with its own vague definition of discrimination and then based its report on that. The Dispute Tribunal found that in view of the serious flaws in the rebuttal process, the UNICEF Deputy Executive Director’s acceptance of the recommendations of the Ad-hoc Panel represented “an invalid exercise of his discretionary authority”. Having determined that Ms. Mashhour had been subjected to a “hostile and harassing” work environment and “poor and objectionable” management on the part of her first reporting officer, the Dispute Tribunal ordered the Secretary-General to pay Ms. Mashhour six months’ net base salary for material damages and USD 10,000 for moral damages, and moreover, to expunge the 2008 and 2009 PERs from Ms. Mashhour’s personnel records.

### **Submissions**

#### **The Secretary-General’s Appeal**

4. The UNDT erred in finding that the Ad-hoc Panel failed to properly address Ms. Mashhour’s claims of discrimination. The Dispute Tribunal’s reliance on ST/AI/2002/3 is misplaced, as it does not provide any definition of discrimination. The definition of discrimination adopted by the Ad-hoc Panel was not vague or legally incorrect but consistent with internationally accepted definitions of discrimination. Nor did it adversely affect the Ad-hoc Panel’s assessment of Ms. Mashhour’s allegations of discrimination. It demonstrated that the Ad-hoc Panel had properly addressed Ms. Mashhour’s allegations of discrimination.

5. The Dispute Tribunal erred in concluding that Ms. Mashhour was subject to harassment. The Secretary-General notes that Ms. Mashhour did not pursue her complaints of harassment or abuse of authority in accordance with the relevant procedures, and that no investigation was subsequently initiated by the Administration. Under the circumstances, the Dispute Tribunal did not have the competence to conduct a *de novo* investigation of

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<sup>4</sup> *Id.*, para. 43.

Ms. Mashhour's harassment complaint, and exceeded its competence and erred in law in concluding that Ms. Mashhour was subjected to a "hostile and harassing" work environment.

6. The Dispute Tribunal erred in fact and in law in awarding compensation in the absence of procedural irregularities in the present case and on the basis of its erroneous finding of a "hostile and harassing" work environment.

7. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

**Ms. Mashhour's Answer**

8. There is no refutation of the UNDT's finding that UNICEF's restrictions on the grounds that could be invoked to challenge her PER were fundamentally flawed and unfair, regardless of whether ST/AI/2002/3 was applicable to UNICEF staff members. In this connection, Ms. Mashhour maintains that she never relied solely on ST/AI/2002/3 to make the argument that Chapter 7 of the UNICEF Handbook was both unclear and unwarranted.

9. UNICEF did not have a clearly articulated non-discrimination policy related to the issue of performance appraisal. Consequently, the Ad-hoc Panel came up with its own restrictive definition of the term discrimination, without any source cited.

10. Contrary to the Secretary-General's assertion, the UNDT did not exceed its competence in concluding that Ms. Mashhour was subject to a hostile and harassing work environment created by her supervisor, as this finding was based on the substantive evidence and witness testimony that the Ad-hoc Panel had failed to take into account.

11. The breaches cited by the Dispute Tribunal are more than procedural in nature. They affected the outcome of the process and resulted in denial of Ms. Mashhour's most basic rights as an employee of the United Nations to be free of discriminatory treatment. The UNDT correctly recognized the consequences that those breaches had on Ms. Mashhour through an award of compensation.

**Considerations**

12. Pursuant to Article 2 of the Statute, “[t]he Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.”

13. The Secretary-General appeals on the grounds that the UNDT i) erred on questions of law and fact; and ii) exceeded its competence.

14. The underlying claim of Ms. Mashhour was that her performance evaluation reports were improperly motivated by the hostile and discriminatory atmosphere created by her supervisor and endorsed by the Egypt Country Office Management.

15. The Ad-hoc Panel set up to examine the claims of Ms. Mashhour found that the claims of discrimination were not substantiated. It recommended that for Ms. Mashhour’s 2008 PER, the rating of 1 should be raised to 2, but all other ratings in both the 2008 and the 2009 PERs should remain the same.

16. The issue before the UNDT was whether the administrative decision taken by the Deputy Executive Director to accept the findings of the Ad-hoc Panel constituted to review the performance evaluation reports and rebuttal statements of Ms. Mashhour was a valid exercise of his discretionary authority.

*Appeal as to error on questions of law and fact*

*Did the UNDT err in concluding that ST/AI/2002/3 applied to Ms. Mashhour and that her rights to a rebuttal as set out in ST/AI/2002/3 were unduly restricted by UNICEF?*

17. The Secretary-General submits that the UNDT erred in concluding that ST/AI/2002/3 applied to UNICEF and that the UNICEF Handbook unduly restricted the rights of Ms. Mashhour to a rebuttal process as set forth in ST/AI/2002/3.



18. The Secretary-General submits further that while the United Nations Staff Regulations and Rules apply to UNICEF staff members, administrative issuances issued by the United Nations do not apply to UNICEF staff members unless their applicability is expressly accepted.

19. The Secretary-General refers to the Secretary-General's Bulletin on the "Procedures for the promulgation of administrative issuances" (ST/SGB/2009/4), which expressly provides, in Section 2.3, that: "[a]dministrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability".

20. ST/AI/2002/3 on the "Performance Appraisal System" does not contain any text indicating the express acceptance of the applicability of that administrative issuance by the separately administered funds, organs or programmes.

21. We note further that UNICEF had not promulgated any administrative issuance incorporating ST/AI/2002/3 until it promulgated in 2011 its own separate UNICEF administrative instruction on performance appraisal, CF/AI/2011-001. Until then, UNICEF's performance appraisal system was established pursuant to Chapter 7 of the UNICEF Handbook, which was abolished and replaced by CF/AI/2011-001.

22. The UNDT, relying on *Villamoran*<sup>5</sup> setting out the legislative hierarchy within the United Nations, held that administrative issuances have greater legal authority over manuals such as the UNICEF Handbook. Consequently, to the extent that the UNICEF Handbook and ST/AI/2002/3 were inconsistent, ST/AI/2002/3 prevailed.

23. As the Secretary-General rightly points out, the principle articulated in *Villamoran* is applicable only where there is a conflict between guidelines and manuals and a properly promulgated administrative issuance. However, this was not the case here.

24. Within UNICEF, Chapter 7 of the Handbook entitled "UNICEF Manuals: Policies and Procedures" governs how UNICEF has to conduct a staff member's performance appraisal. In addition to establishing the obligations that UNICEF has towards its staff members, the

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<sup>5</sup> *Villamoran v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/126. On appeal, the Appeals Tribunal affirmed that judgment in Judgment No. 2011-UNAT-160.

Handbook, from para. 7.2.36 and para. 7.2.41, establishes the procedure that a staff member must follow should he or she wish to rebut the content of his or her performance report.<sup>6</sup>

25. Accordingly we hold that the UNDT erred on a question of law and fact by concluding that ST/AI/2002/3 applied to UNICEF.

26. The Secretary-General submits further that the UNDT erred by concluding that the rights of Ms. Mashhour to a rebuttal, as set out in ST/AI/2002/3, were unduly restricted by UNICEF.

27. Ms. Mashhour submits that regardless of whether ST/AI/2002/3 was applicable or not the restrictions on the grounds for challenging her performance evaluation were fundamentally unfair, especially in the light of the prevarication over a claim of discrimination regarding performance evaluation, and that the inquiry into her claim of unfair treatment was flawed.

28. This Tribunal recalls its jurisprudence that neither the UNDT nor the Appeals Tribunal has the authority to amend any regulation or rule of the Organization which it finds restrictive, though it may comment on it.<sup>7</sup>

29. The duty of the Tribunals is to determine whether the legal framework applicable to the present case was properly explained to Ms. Mashhour.

30. We find from the contents of e-mails exchanged between the parties that the legal framework applicable to the rebuttal process was properly explained to Ms. Mashhour and she was also advised to file a separate complaint for harassment and abuse of authority to UNICEF's Executive Director or Director, Office of Internal Audit. Ms. Mashhour elected not to file a formal complaint of harassment and/or abuse of authority. The conduct of the Administration in this respect was therefore legal, rational and correct.

31. Accordingly, we hold that, even though the procedure in the UNICEF Manuals may seem restrictive, it did not in any way violate the due process of Ms. Mashhour's right to rebuttal.

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<sup>6</sup> See *Samuel Thambiah v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/063, para. 45, affirmed on appeal in Judgment No. 2013-UNAT-385.

<sup>7</sup> See *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033, para. 11.

32. The appeal succeeds on this ground.

*Did the UNDT err in law and fact in finding that the Ad-hoc Panel failed to properly address Ms. Mashhour's claim of discrimination?*

33. The UNDT was of the view that:

As discrimination was the key ground of the Applicant's rebuttal, it was vital that the Panel defined the concept clearly and examined the facts of the case in light of that definition. It should also have referred to the definitions of "harassment" and "abuse of authority" in CF/EXD/2008-004 (Prohibition of harassment, sexual harassment and abuse of authority) as it purported to address these allegations in its review. Absent any evidence of a proper understanding of these concepts on the part of the Panel, the Tribunal has serious doubts about whether these allegations were properly addressed with the result that the findings of the Panel cannot be relied on.<sup>8</sup>

34. We find the above sentiments expressed by the UNDT unreasonable as there is no definition of discrimination in either the UNICEF Manuals or in ST/AI/2002/3 for the Ad-hoc Panel to adopt or apply.

35. On the definition of discrimination, the Secretary-General referred to Article 26 of the International Covenant on Civil and Political Rights, which provides for "protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

36. The Appeals Tribunal recalls the Discrimination (Employment and Occupation) Convention, which entered into force in 1960. That Convention defines "discrimination" as including:

... [A]ny distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

... [S]uch other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

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<sup>8</sup> Impugned Judgment, para. 49.

... Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

37. In comparison, the Ad-hoc Panel in its report said<sup>9</sup>:

... [T]he issues at hand go beyond personality differences and are indeed mainly grounded in performance related issues. The panel has concluded therefore that despite the staff member's perceptions that discrimination has been at play and has impacted her performance in both reporting periods, the grounds of discrimination as articulated by the staff member and based on the panel's own understanding of the term discrimination which would require a demonstration of behavior on the part of the supervisor which is different either on grounds o[f] gender, religion, sexual orientation, ethnicity, or applying different standards in assessing performance among team members are not substantiated.

38. The Secretary-General rightly submits that the Ad-hoc Panel's "understanding" of the term discrimination was not vague or legally incorrect but consistent with internationally accepted definitions of discrimination referred to above, and that "[d]iscrimination is commonly defined as unequal treatment on the basis of a prohibited ground".

39. The underlying claim of Ms. Mashhour was that her performance evaluation reports were improperly motivated by the hostile and discriminatory atmosphere created by her supervisor and endorsed by the Egypt Country Office Management. The Ad-hoc Panel Members, guided by their understanding of discrimination, set out to investigate issues related to the allegation of discrimination, harassment and abuse of authority.

40. This was done by reviewing documentation such as e-mail exchanges, testimonies of staff and by understanding the work process within the Child Protection Section.<sup>10</sup>

41. In the circumstances, we find that the allegations were properly investigated.

42. We accordingly hold that the UNDT erred in finding that the Ad-hoc Panel failed to properly address Ms. Mashhour's claims and uphold the appeal on this ground of discrimination.

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<sup>9</sup> Report of the Ad-hoc Panel, para. 4.2.

<sup>10</sup> *Id.*, para. 3.17.

*Excess of jurisdiction or competence*

*Did the UNDT exceed its competence in concluding that Ms. Mashhour was subjected to a hostile and harassing workplace environment?*

43. The Secretary-General submits that Ms. Mashhour did not pursue her complaints of harassment or abuse of authority in accordance with the relevant procedures and that no investigation was subsequently initiated by the Administration. Under the circumstances, the Dispute Tribunal did not have the competence to conduct a *de novo* investigation into Ms. Mashhour's harassment complaint, and therefore exceeded its competence and erred in law in concluding that Ms. Mashhour was subjected to a "hostile and harassing" workplace environment.

44. Ms. Mashhour responds that, contrary to the Secretary-General's assertion, the UNDT did not exceed its competence in concluding that she was subject to a hostile and harassing workplace environment created by her supervisor, as this finding was based on the substantive evidence and witnesses testimony which she claims the Ad-hoc Panel had failed to take into account.

45. We recall the case of *Messinger*, where the Appeals Tribunal held:<sup>11</sup>

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

46. In our view, the exercise the UNDT undertook was not to conduct a fresh investigation into Ms. Mashhour's allegation of harassment but to draw its own conclusions from the Ad-hoc Panel Report, which is a legitimate exercise.

47. However, we think that the UNDT's conclusion that the evidence "overwhelmingly shows that the Applicant was subjected to a work environment that can only be described as hostile and harassing in view of the attitude of her supervisor towards her" is not supported by the evidence.

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<sup>11</sup> *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 25.

48. Nonetheless, we do not see the complaint of harassment as a separate claim. It should be noted that Ms. Mashhour's rebuttal statements were replete with "incidents" of discrimination, harassment and abuse of authority.

49. After investigating allegations of discrimination, harassment and abuse of authority in the incidences cited by Ms. Mashhour in her 2008 and 2009 rebuttals, the Ad-hoc Panel found:

... [T]hese incidences reflect disagreements between the supervisor and supervisee on management style, disaffection by the supervisor of the performance of the supervisee and differences in the personalities and communication style of both the supervisor and supervisee.

...

... When staff in the section were asked about incidences of discrimination, harassment and abuse of authority that they have witnessed between the supervisor and supervisee, they confirmed that they have observed disagreements in opinions and views which were expressed strongly by both the supervisor and supervisee, but not in a discriminatory, humiliating or abusive manner.

...

... Additionally when exploring the work processes within the Child Protection Section, it was found that the management style of the supervisor and the work processes followed within the section were consistent with all of the supervisees without any discrimination against the supervisee submitting the rebuttal[.]<sup>12</sup>

50. In view of the above findings by the Ad-hoc Panel, we find that the UNDT erred in concluding that Ms. Mashhour was a victim of workplace harassment.

51. In the absence of procedural flaws in the rebuttal process and in light of the findings of the Ad-hoc Panel, we conclude that UNICEF's Deputy Executive Director properly exercised his discretion to accept the recommendations of the Ad-hoc Panel.

52. The appeal succeeds.

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<sup>12</sup> The Ad-hoc Panel report, paras. 3.18, 3.19 and 3.21.

**Judgment**

53. The appeal against UNDT Judgment No. UNDT/2013/133 succeeds. The impugned Judgment is therefore vacated.

54. The order by the UNDT that Ms. Mashhour's 2008 PER and 2009 PER be expunged from her personnel file is set aside.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 22<sup>nd</sup> day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar