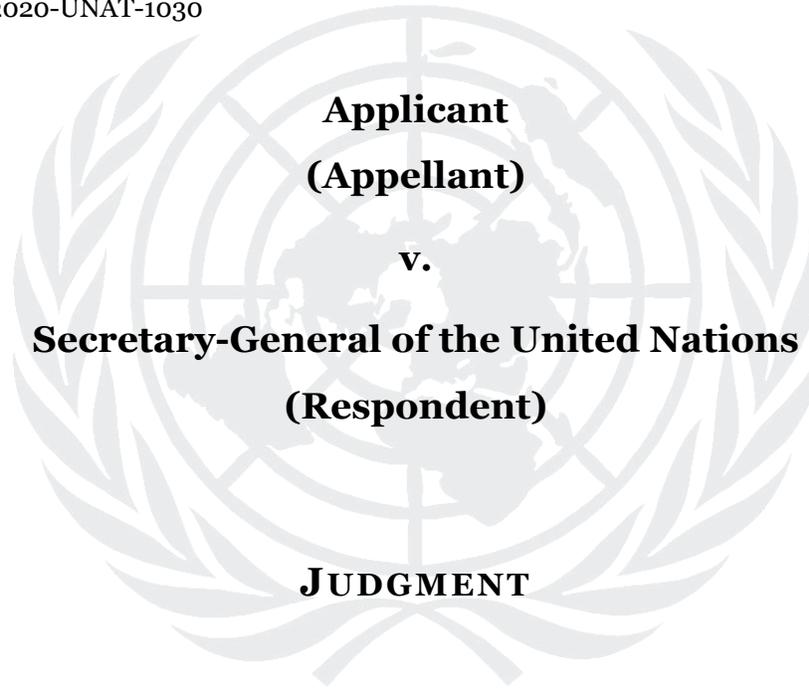




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1030



**Applicant
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Sabine Knierim Judge Jean-François Neven
Case No.:	2019-1330
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Applicant:	Self-represented
Counsel for Secretary-General:	Noam Wiener

Reissued for technical reasons on 25 August 2020

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2019/142, rendered by the United Nations Dispute Tribunal (UNDT) on 12 September 2019, in the case of *Applicant v. Secretary-General of the United Nations*. The Appellant filed an appeal on 11 November 2019, and the Secretary-General filed an answer on 10 January 2020.

Facts and Procedure

2. The Appellant joined the Organization in 2007 and currently serves as an Investigator, at the P-3 level, with the Office for Internal Oversight Services (OIOS) in Vienna.

3. On 18 March 2015, the Appellant filed a complaint with the Under-Secretary-General for OIOS (USG/OIOS) against the Deputy Director of the Investigation Division at OIOS (the Deputy Director) in terms of the Secretary-General's bulletin on the "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority" (ST/SGB/2008/5). The Appellant alleged in the complaint that the Deputy Director had behaved in a manner proscribed by ST/SGB/2008/5.

4. The USG/OIOS convened an investigation panel, which on 11 October 2016 presented an investigation report regarding the Appellant's complaint. The investigation panel found that on one occasion, the Deputy Director had addressed the Appellant in a manner that could have been perceived as an implicit threat of loss of his job in the context of a restructuring exercise being undertaken at the time by OIOS. The Deputy Director also confirmed that on another occasion he had said "jeez that's investigation 101" in response to a work-related idea expressed by the Appellant during a staff meeting. The investigation panel held further that it could not rule out that on two separate occasions the Deputy Director may have shown preferential treatment to candidates in a recruitment exercise. The investigation panel found that all other complaints made by the Appellant were unsubstantiated and were related to managerial decisions that the Deputy Director had taken within the ambit of his administrative authority and which had been made in response to exigent circumstances.

5. On 19 April 2017, the USG/OIOS informed the Appellant that the findings detailed in the investigation report confirmed some of the allegations he had made in the complaint. The USG/OIOS further informed the Appellant that following consultations with the Office for Human Resources Management, she had concluded that the Deputy Director's conduct did not amount to prohibited conducted within the meaning of ST/SGB/2008/5 and that, therefore, the Deputy Director's conduct would be addressed by managerial rather than disciplinary means. It was recorded that the Director of the Investigation Division at OIOS (the Director) had counseled the Deputy Director regarding his management style and team building efforts.¹

6. On 10 July 2018, the Appellant sent an e-mail to the Officer-in-Charge of OIOS asking that the Deputy Director be relieved "of any managerial responsibilities pertaining to any and all investigation cases assigned to [the Appellant], as well as any functions, administrative or otherwise, which may have any impact on [the Appellant] in any way." The Appellant maintains that despite the counseling provided to the Deputy Director, he had created a "toxic and hostile work environment".

7. In an e-mail dated 11 July 2018, the Director denied the Appellant's request (the "contested decision") and reminded the Appellant that the Deputy Directors of the Investigations Division, who all report to the Director, play a crucial role in ensuring the quality of the work-product of the Investigations Division. He pointed out that the Deputy Director, was responsible for ensuring "quality outputs in terms of investigations and the associated reporting" and that he would not remove the latter from his responsibility to review the Appellant's work because that "would provoke anarchy, threaten the quality of [their] work and undermine the employer-employee relationship". Thus, the Director's supervision and review of the Appellant's work was necessary to ensure the quality of investigations being undertaken and reports being produced.

¹ That decision became the subject of an application submitted by the Appellant to the UNDT, in which he (i) contested the decision of the Respondent to address the findings of the investigation report by managerial rather than disciplinary means and (ii) sought compensation for the amount of time it took the USG/OIOS to respond to his complaint. The UNDT rejected the Appellant's application regarding the use of managerial measures, but granted him compensation for the delay in response to his complaint. The Appellant's subsequent appeal to the Appeals Tribunal against the decision to address the findings of the investigation by managerial means was dismissed. See *Applicant v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1001.

8. On 17 July 2018, the Appellant requested management evaluation of the contested decision. The Appellant argued that because the Deputy Director was neither designated as the Appellant's first nor second reporting officer, as set forth in the Administrative Instruction on the Performance Management and Development System (ST/AI/2010/5), the Director was precluded from exercising any supervision over him. He contended also that because he had filed a harassment complaint against the Deputy Director, and because some of the allegations in his complaint had been supported by the findings of the investigation report, the Deputy Director should be precluded from supervising him. In addition, the Appellant alleged that the Deputy Director had engaged in retaliatory practices against him causing him medical harm. Thus, he argued that the Secretary-General's duty to provide him with a safe work environment required that the Deputy Director not have any supervisory capacity over him.

9. On 22 August 2018, the Under-Secretary-General for Management informed the Appellant that the Secretary-General had decided to uphold the contested decision. Consequently, on 9 October 2018, the Appellant filed an application challenging the contested decision with the UNDT.

10. The UNDT held case management discussions and hearings in February and March 2019, following which the parties attempted, but did not succeed, in informally resolving the case through mediation. On 22 July 2019, the Appellant filed a motion requesting to submit additional documents into the record. On 12 September 2019, the UNDT rendered its Judgment, upholding the contested decision. In its Judgment, the UNDT rejected the Appellant's request to submit additional documents.

11. Before the UNDT, the Secretary-General contended that the application was not receivable since the contested decision, the e-mail of 11 July 2018, was not an administrative decision. The UNDT rejected the submission and held that reporting lines relate directly to the core of the employee-employer relationship and have an impact not only on the daily functions that the staff member performs but also, on his or her evaluation and future career prospects. Hierarchy and reporting lines are an essential part of the normative framework for performance management and impact directly the staff member's terms of employment and constitute "a core element of the relationship between staff members and the Organization". Therefore, decisions taken in relation to reporting lines have an obvious impact on the daily performance and conditions of service of staff members. Consequently,

the UNDT held that the decision taken by the Director not to change the reporting lines in relation to the Appellant was an administrative decision and the application was receivable *ratione materiae*.

12. The UNDT then examined the organizational structure and reporting lines of OIOS and concluded that removing the Appellant from the reporting line would be disruptive to the work of the Investigations Division and ST/AI/2010/5 (Performance Management and Development System) did not prohibit the Deputy Director from supervising the Appellant, even though he did not serve as his first or second reporting officer for performance management purposes. Moreover, the Deputy Director had not been sanctioned for misconduct. Hence, the refusal to accede to the Appellant's request (the contested decision) was reasonable.

Submissions

The Appellant's Appeal

13. In his appeal brief, the Appellant makes a number of submissions with regard to the findings, orders, and directions of the UNDT concerning his motion to file additional documentary evidence (e-mail correspondence between himself and his lawyer) and the redaction of certain information in various documents admitted into evidence. He makes no request for relief in his appeal with regard to the motion for additional evidence, but requests the Appeals Tribunal to order that all public documents pertaining to his various cases before the UNDT, wherein reference is made to any medical information or medical condition, be redacted to censor such information.

14. Most relevantly, the Appellant submits that the UNDT failed to conduct a proper judicial review to determine if the contested decision was reasonable. He submits that the decision was unreasonable considering the findings in the report of the investigating panel in relation to his allegations of harassment and abuse.

15. The Appellant further takes issue with some of the factual findings of the UNDT pertaining to his contribution to the problem of incompatibility between himself and the Deputy Director.

The Secretary-General's Answer

16. The Secretary-General submits that the UNDT properly exercised its jurisdiction by addressing the evidence and applying the law appropriately. The Secretary-General was authorized to address the findings of the investigation report by managerial action rather than by imposing disciplinary measures and the managerial action taken by the Administration was a reasonable exercise of managerial discretion necessary to run, manage, and operate the Organization.

17. The Secretary-General submits further that the work processes and methodologies by which the Investigations Division at OIOS operates should determine whether the measures undertaken adequately addressed the findings of the investigations report.

18. The Director had a compelling, legitimate and rational reason to retain the organizational structure of the Investigations Division in light of the findings of the panel and the institutional requirements of the OIOS. The Deputy Director's conduct did not necessitate his removal from the Appellant's reporting line.

19. Accordingly, the contested decision was rational, reasonable and lawful, and the UNDT did not err in concluding that it was a proper and lawful exercise of discretion.

Considerations

20. The Secretary-General did not raise the issue of receivability in his answer to the appeal. The reservation he raised before the UNDT about whether the contested decision constituted an administrative decision is perhaps not misplaced. The UNDT's jurisdiction in terms of Article 2.1(a) of the UNDT Statute is, in relevant part, restricted to hearing applications against an administrative decision not in compliance with the contract of employment. An administrative decision is by definition a decision of an administrative nature having a direct legal effect which adversely affects the rights, legitimate expectations or direct and substantial interests of a staff member. Deciding what is and what is not an administrative decision is at times not straightforward and has to be done on a case-by-case basis.

21. Before the UNDT, the Secretary-General argued that the decision not to re-arrange the managerial role of the Deputy Director *vis-à-vis* the Appellant did not create any legal consequences regarding his terms of employment and was thus not an administrative decision with the result that the UNDT lacked jurisdiction *ratione materiae*. The Secretary-General contended that the applicable legal framework does not recognize a right by a staff member to choose his or her own reporting lines. The reporting line is a matter purely internal to or within the boundaries of the administration. While the Appellant has an interest in a favourable decision, it is perhaps doubtful that the Director's negative decision adversely affected the determination of the scope of his rights, legitimate expectations or a direct and substantial interest. However, the Secretary-General did not persist with the receivability issue on appeal and we have not had the benefit of full argument on this fine point. For that reason, and because in the end there is no practical difference in outcome, we proceed on the assumption that the contested decision was an administrative decision.

22. OIOS' institutional framework comprises a vertical hierarchy with different layers and reporting lines.

23. Article 97 of the Charter of the United Nations provides that the Secretariat shall comprise a Secretary-General and such staff as the Organization may require. Staff Regulation 1.2(c) provides in its relevant part that Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

24. The functions, responsibilities and competences of the United Nations are allocated to different agencies, organs and institutions with specific mandates. OIOS was established by the General Assembly in resolution 48/218 B of 29 July 1994. It plays an essential role assisting the Secretary-General in fulfilling his internal oversight responsibilities on resources and staff of the Organization. According to ST/SGB/2002/7 (Organization of the Office of Internal Oversight Services), OIOS' organizational structure includes an Internal Audit Division, a Monitoring, Evaluation and Consulting Division, and an Investigations Division.

25. Section 7 of ST/SGB/2002/7, provides that the Investigations Division has among its core functions the receipt and investigation of reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmitting to the

Secretary-General the results of such investigations, together with appropriate recommendations to guide the Secretary-General in deciding on managerial or disciplinary action to be taken. The Investigations Division is headed by a Director who is accountable to the USG/OIOS. The Deputy Director, in Vienna, is accountable to the Director.

26. The Appellant maintains that the Deputy Director is not formally assigned as an additional supervisor in terms of section 5.2 of ST/AI/2010/5 and that as a consequence his *de facto* supervision is unlawful. This is not correct. The fact that a manager does not serve as a staff member's first reporting officer (FRO) or second reporting officer (SRO) for performance evaluation purposes does not prohibit another manager from involvement in a staff member's outputs, particularly where the manager falls within the staff member's same line of supervision. According to section 5.1 of ST/AI/2010/5, the FRO is responsible merely for developing a workplan with the staff member, review and evaluation, providing feedback and supporting the staff member's professional development. In terms of section 5.3 of ST/AI/2010/5, the SRO, is the FRO's supervisor and is responsible for ensuring that the FRO understands and applies the performance management and development principles correctly.

27. The existence of these performance appraisal measures does not mean that the Appellant is exempt from the authority, instruction or supervision of more senior managers in the hierarchy. The job description of the Deputy Director submitted as evidence before the UNDT includes, *inter alia*: i) the responsibility to ensure that investigations are carried out in a timely fashion and coordinated within the work of the Service and with other organizations of the United Nations system, as appropriate; and ii) leading, supervising and carrying out investigations, especially on fraud and corruption, providing substantive reviews of the drafts prepared by others and, ensuring that reports are of a high quality and meet required standards. The evidence before the UNDT establishes that the Deputy Director has the overall responsibility to perform the "quality check" of the investigation reports to ensure that they comply with the required standards. It is indisputably part of the responsibilities of the Deputy Director to review investigation reports drafted by investigators, including the Appellant.

28. There is accordingly no legal basis to conclude that subjecting the Appellant to the managerial or supervisory authority of the Deputy Director was unlawful in terms of the prevailing statutory instruments.

29. The next question is whether the Director exercised his discretion reasonably when he refused the Appellant's request for a change in reporting lines.

30. The Appellant in his submissions has made much of certain findings of the UNDT that he bore some responsibility for the incompatibility and personality clash underlying it. The problem facing the Director in all likelihood is one of incompatibility arising from a clash of personalities. Difficulties arising from incompatibility in the workplace are difficult to resolve and can give rise to serious consequences. If the problem persists an operational requirements problem may arise justifying other solutions. The most that can be expected is that the issues causing the incompatibility are investigated and appropriate remedies be considered. The legal framework leaves a margin of appreciation for the Administration to act in the best interests of the institution.

31. Beyond refusing to accede to the Appellant's request to remove the Deputy Director from the line of supervision, management appears not to have directed its attention to resolving the operational requirements problem arising from incompatibility. The respective contribution of the parties to the problem, along with other factors such as seniority, will be relevant if it opts to pursue that course. However, such considerations weigh less when assessing the narrow issue of the rationality of the Director's decision refusing to alter the line of supervision.

32. As discussed, the investigation into the Appellant's complaint found that the evidence was not sufficient to justify the institution of disciplinary proceedings against the Deputy Director but merely warranted managerial action. The Appellant is not satisfied with that finding. The appeal in relation to the findings of the panel is not before us. The Appellant also alleges ongoing harassment. The UNDT found there was no substance in the Appellant's claims of further harassment and retaliation after the investigation. The Director clearly was also not persuaded.

33. While a change in reporting lines could foreseeably resolve the compatibility problem, there is no obligation on the Administration to yield to a request to do that. As the UNDT stated, changing reporting lines will often be undesirable due to its potential disruptive impact on workflow, the immediate work environment, and a staff member's performance management. The Director during his testimony reiterated that changing reporting lines to accommodate disgruntled staff members would provoke "anarchy" and would be disruptive

for the workflow and the quality output of OIOS. These are valid and relevant considerations. The Director's decision to refuse a proposed restructuring of the line of supervision to accommodate the Appellant therefore rests on rational and legitimate concerns about the managerial prerogative, structural coherence, and institutional integrity.

34. The fact that an investigation was conducted in accordance with ST/SGB/2008/5 cannot provide a right or a legitimate expectation to a staff member to be exempted from the authority of the Deputy Director. Carving out an area of exception for one aggrieved investigator will undermine the institutional hierarchy. The employee's duty to abide managerial instructions lies at the heart of the employment relationship. The power to prescribe the institutional hierarchy and performance standards is an integral part of the managerial prerogative and the Administration's broader right to manage. Moreover, Tribunals are expected to observe a measure of deference to managerial authority in setting organizational practices, work standards, and reporting lines. Any alleged abuse of authority by a manager in relation to a staff member is required to be dealt with appropriately under ST/SGB/2008/5. If there is insufficient evidence of an abuse requiring formal discipline, as happened here, there can be no justification for disciplining that manager or stripping him of his institutional authority over his subordinates on the basis of a residual incompatibility. As discussed, there are other options to deal with incompatibility. By the same token, the Appellant has a right to raise his concerns about alleged ongoing retaliation properly and within the process set out in ST/SGB/2008/5, which he has not done.

35. The Appellant in his submissions mentions the fact that the UNDT rejected his motion for the filing of additional evidence. However, he neglected to ask for any specific relief in that regard. One may assume that he contends that the lack of that evidence bears upon the UNDT's determination of the reasonableness of the contested decision. The documents concerned are annexed to his motion before the UNDT. They consist of e-mails addressed to the Appellant's former counsel pertaining to instructions and counsel's alleged failure to act in the Appellant's best interests. The UNDT correctly held in effect that such evidence was not relevant to any assessment of the rationality of the contested decision and not "determinative for the disposal of the case."

36. In the premises, the refusal of the Director to accede to the Appellant's request was reasonable. There was a rational relationship between the contested decision, the objects of the hierarchical reporting lines, the information before the Director and the reasons for the decision. There is accordingly no legal basis to set aside the contested decision.

37. Finally, the Appellant in his appeal brief seeks relief regarding the redaction of certain documents admitted into evidence before the UNDT in UNDT/GVA/2017/075, his appeal against the decision not to pursue disciplinary action against the Deputy Director which culminated in the UNDT's Judgment No. UNDT/2019/129 and the subsequent appeal to the Appeals Tribunal. The Appellant's motions in that regard are not associated with or do not form part of the Judgment No. UNDT/2019/142, which is the subject of this appeal, and have been addressed by this Tribunal in disposing of the Appellant's prior appeal in our Judgment No. 2020-UNAT-1001.

38. The UNDT therefore did not err in dismissing the application and the appeal too must be dismissed.

Judgment

39. The appeal is dismissed and Judgment No. UNDT/2019/142 is affirmed.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 4th day of August 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar