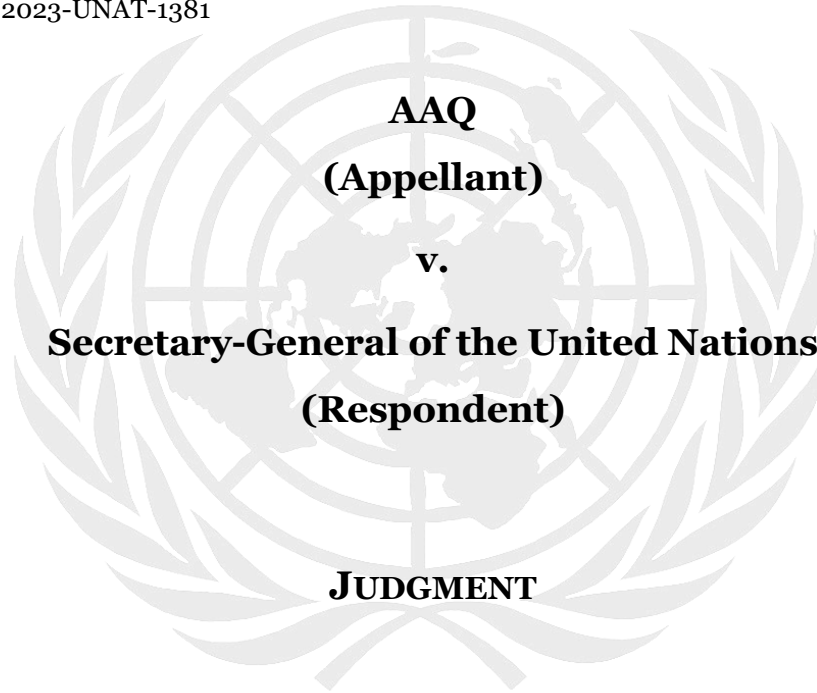




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2023-UNAT-1381



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Before:	Judge Graeme Colgan, Presiding Judge Kanwaldeep Sandhu Judge Katharine Mary Savage
Case No.:	2023-1783
Date of Decision:	27 October 2023
Date of Publication:	9 November 2023
Registrar:	Juliet E. Johnson

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Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Francisca Lagos Pola

**JUDGE GRAEME COLGAN, PRESIDING.**

1. The Appellant, to whom we will refer as AAQ, is a United Nations staff member. AAQ contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the Organization’s decision denying their request to have their preferred gender identity, which is different from their sex at birth, recorded in Umoja, the United Nations’ human resource management system. In Judgment No. UNDT/2022/129 issued on 6 December 2022 (impugned Judgment), the UNDT declined to rescind this decision.<sup>1</sup> AAQ appealed. The case raises apparently novel issues for decision by the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).

2. For the reasons set forth below, we allow the appeal, but only to the extent and so as to enable us to set aside the UNDT’s Judgment as having been unreceivable at first instance.

**Facts and Procedure**

3. AAQ is a citizen of Denmark and was born a biological male and was so recorded officially in Denmark. Because this case examines the differences between the terms “sex” and “gender”, we will refer to this as AAQ’s “sex”, as did the UNDT. AAQ now identifies as female, this being what they describe as their gender. Given the legal issues around gender and sex involved in this case, we will use gender neutral pronouns of they/them when referring to AAQ in this decision.

4. On 25 September 2021, AAQ wrote to the Officer-in-Charge of their Mission and made a “request for registration of change of gender”.<sup>2</sup> In this memorandum, AAQ advised that in accordance with Danish law, the registration of gender identity is regulated by the law on issuance of passports, which permits the indication of “X” for “sex” on a passport if the applicant has submitted a written declaration that their wish to use “X” is “founded in the experience of belonging to the other sex”.

5. AAQ advised that they identified as female, had executed a solemn declaration to this effect, engaged in another process under Danish law relevant to effecting this change and sought a new Danish passport. This new passport was issued to AAQ on 17 May 2021, referring to their “sex” as “X”. This letter “X” classification is said, at least at the time these events occurred, to have been an

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<sup>1</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/129.

<sup>2</sup> Appellant’s Annex 2.

indication that the passport holder identified as the “opposite” sex to the one assigned at birth.<sup>3</sup> It is unclear whether this passport categorisation “X” applied to persons who had undergone relevant surgical or other medical changes, and/or to those like AAQ who had not undergone such procedures but identified as being of the other gender.

6. AAQ subsequently submitted their new passport to the Organization and requested the Respondent to recognize their gender identity as female in Umoja. In light of this request, the Office of Legal Affairs (OLA) made enquiries to the Permanent Mission of Denmark to the United Nations in New York (Permanent Mission of Denmark), including specifically whether AAQ had changed their gender to female under Danish law.

7. The Permanent Mission of Denmark had lengthy e-mail correspondence with OLA, and AAQ also corresponded with the Danish Ministry of Foreign Affairs. Significant confusion arose about the applicable legislation and its translation. At this time, however, it is not disputed that the applicable Danish legislation was Proclamation No. 1337 of 28 November 2013, as amended by Proclamation No. 953 of 28 August 2014. The non-official translation of the relevant Paragraph 4, Section 5 provided by the Permanent Mission of Denmark<sup>4</sup> and the Ministry of Foreign Affairs<sup>5</sup> was:

(5) The Local Council may give permission to use the gender designation “X” if a passport applicant who has reached the age of 18 submits a written declaration to the effect that the wish to use the gender designation “X” is based on the experience of belonging to the other gender, or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3(6) of the Danish Act on the Civil Registration System.

8. The relevant Danish legislation was subsequently amended in December 2021, which is after the date when AAQ received their new passport. The Permanent Mission of Denmark provided OLA a non-official translation of the revision, being:<sup>6</sup>

(5) The Local Council may give permission to use the gender designation “X” if a passport applicant submits a written declaration to the effect that the wish to use the gender designation “X” is based on the experience of belonging to the other gender, the person in

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<sup>3</sup> Whether the reference to “opposite” indicates only a binary definition or whether it admits of multiple sexes, is unclear.

<sup>4</sup> Secretary-General’s Request for Leave to File Supplemental Response to Order No. 156 (NBI/2022), submitted on 1 December 2022 (Secretary-General’s Supplemental Response).

<sup>5</sup> AAQ’s UNDT Application, Annex 4.

<sup>6</sup> Secretary-General’s Supplemental Response.

question being intersexed, not identifying as male or female or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3(7) of the Danish Act on the Civil Registration System.

9. The Permanent Mission of Denmark also provided information on the Danish rules concerning gender, specifically:<sup>7</sup>

In Denmark the civil registration numbers express a person's gender in the sense that numbers with odd digits are allocated to men and numbers with even digits are allocated to women. Persons who experience that they belong to the opposite gender can be allocated a new civil registration number in accordance with the experienced gender. In order to be allocated a new civil registration number the person in question will have to submit a written statement that the wish for a new civil registration number is due to an experience of belonging to the opposite gender. After a reflection period of 6 months the applicant will need to confirm the application in writing. (...)

10. In its correspondence with the Permanent Mission of Denmark, OLA sought confirmation that because AAQ had changed their "sex" in their passport from "M" to "X", that AAQ was not recognized as female, which would have been indicated as "F". On 11 March 2022, the Permanent Mission of Denmark confirmed that this was correct.

11. On 29 March 2022, the Head of the Mission for which AAQ works advised that the Permanent Mission of Denmark had confirmed that AAQ was not recognized as female under Danish passport law because their passport contained an "X" not an "F" to indicate "sex" in their passport. Therefore, AAQ's request to change their gender in Umoja to female could not be accommodated. AAQ was also informed that there was a working group in the Organization that was looking into how the Organization could equip its systems to accommodate a staff member with a gender marker other than male or female, but there was not yet a current mechanism for this.

12. On 26 April 2022, AAQ filed a request for management evaluation concerning the decision not to reflect as female their gender identity in Umoja. The Management Evaluation Unit (MEU) upheld the contested decision. The MEU assessed that under the Organization's legal framework the personal status of staff members is determined by reference to the law of the competent authority under which the personal status has been established, which in AAQ's case was the law of Denmark. The MEU referenced the consultation between OLA and the Permanent Mission of

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<sup>7</sup> *Ibid.*

Denmark, which resulted in a determination that AAQ was not recognized as female under the laws of Denmark. The MEU concluded that the Organization had acted in accordance with applicable rules in not approving AAQ's request to change their gender identity to female in Umoja.

13. On 20 August 2022, AAQ filed an application with the UNDT contesting the decision denying their request to have their gender reflected in United Nations administrative systems to reflect their gender identity as female.

*The UNDT Judgment*

14. The UNDT's essential conclusions were as follows. It decided that although AAQ's biological "sex" is admittedly male, their "gender identity" based on self-identification (a personal concept of self) is female, but that this is not the same concept as their "legal gender" (being described as "a legal category belonging to personal status").<sup>8</sup>

15. The UNDT identified the impugned decision as the Organization's refusal to change AAQ's gender designation from "male" to "female" in the Umoja database. The Dispute Tribunal posed for itself two questions: first, what was AAQ's "legal gender" in their country of nationality; and second, what was intended to be meant by the use of the word "gender" in Umoja. It declined to apply its decision to any United Nations databases or administrative systems other than Umoja.<sup>9</sup>

16. Answering the first self-imposed question above, the UNDT held that AAQ's "legal gender" was to be determined by reference to the description of the staff member's gender in their passport, recognizing that this may differ from a staff member's biological sex. This was illustrated in AAQ's case, by the assignment of the letter "X" for "sex" in their passport rather than "M". The UNDT was satisfied that the Danish word "kon" referenced in Danish passport law and in the passport itself, translates to the word "sex" in English, or "sexe" in French. It concluded that both AAQ's Danish passport and the reference to sex therein, reflected personal status for the purpose of affirmation of identity and citizenship and was not a pronouncement about the passport holder's gender. Therefore, the "X" did not indicate the existence of another category sometimes described as "intersex", beyond those of "M" (male) or "F" (female).<sup>10</sup> The UNDT concluded that the designation of an "X" in AAQ's passport meant only that they were not being allocated to the "M" or "F" categories due to gender identity and gender expression issues of concern to AAQ. In other

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<sup>8</sup> Impugned Judgment, para. 32.

<sup>9</sup> *Ibid.*, para. 33.

<sup>10</sup> *Ibid.*, para. 41.

words, the passport categories for “sex” were based only on the biological sex of the holder in the cases of M and F and, where X was marked, the holder fell into neither category. AAQ was not recognised as female by Denmark by virtue of non-assignment of an “F” in their passport as AAQ wished to be shown in Umoja.

17. The UNDT found, indeed, that AAQ was still recognized as male by Denmark’s Civil Registration System (known by the abbreviation CPR) and as confirmed by the fact that they were, as are all males in that country, allocated an odd numbered social security number, while females were allocated even numbers. The UNDT noted that AAQ could have changed their registration in CPR to “female” but had elected not to take this step, at least not yet.<sup>11</sup>

18. Having thus addressed the position under Danish domestic law, the UNDT turned to the relevant designation of individuals in Umoja. It concluded that this was determined by the relevant national passport or other identity document information and that the concepts of “gender” and “sex” were used interchangeably. It noted, however, that although Umoja allocated AAQ to the male category, this was in fact not reflected in their passport. However, there was no basis on which the passport could be said to have recorded AAQ as female so as to allow this to be reflected in Umoja as AAQ wished.<sup>12</sup> The UNDT concluded that while AAQ had the right to an outward expression of gender identity, this did not translate to automatic access to entitlements or policies of the Organization that attach to the female sex or legal gender.<sup>13</sup> Accordingly, AAQ’s application was dismissed in these circumstances.

#### *Procedure before the UNAT*

19. AAQ appealed the impugned Judgment on 2 February 2023. In their appeal brief, AAQ included a motion for anonymity and a motion to adduce additional evidence of the harm that they suffered through the contested decision.

20. In Order No. 528 (2023), the UNAT granted the request for anonymity, and advised that the Appellant would be referred to as AAQ in any Orders or Judgments issued in this case.<sup>14</sup> The UNAT also granted the Appellant’s motion to submit evidence of their claim to moral damages and set forth a timetable for doing so. Subsequently, due to extenuating personal circumstances, the

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<sup>11</sup> *Ibid.*, para. 42.

<sup>12</sup> *Ibid.*, para. 46.

<sup>13</sup> *Ibid.*, para. 47.

<sup>14</sup> *AAQ v. Secretary-General of the United Nations*, Order No. 528 (2023), para. 4.

UNAT granted the Appellant's motion for an extension of time to submit this evidence.<sup>15</sup> Submissions on this issue were completed by 13 October 2023.

21. AAQ provided a sworn statement addressing this issue. They deposed to finding the situation addressed by this case as extremely stressful and causative of symptoms including sleeplessness, resultant constant fatigue with consequent adverse effects on their work performance, including apathy and procrastination. AAQ also deposed to a withdrawal from social interactions and loss of appetite resulting in significant weight loss during the past 18 months. Some of these problems which AAQ attributes to the refusal by the Organization to record their gender as female have been ameliorated with the assistance of a United Nations Staff Counsellor. AAQ nevertheless says that medical treatment is difficult to access in the country in which they are posted or in surrounding nations and leave from work is insufficient to obtain medical assistance in their home nation. AAQ has been unable to obtain a written statement of support for their appeal from their Staff Counsellor, who reportedly advised AAQ that their symptoms are subjective and that it was impossible to confirm professionally and objectively.

22. In reply, the Secretary-General has submitted that there being no unlawfulness attaching to his actions in this matter, no compensatory award for any loss, even if established, can be ordered. More particularly the Respondent submits that this is reinforced by AAQ's failure to present independent corroborative evidence of the losses for which they seek moral damages. Referencing Appeals Tribunal jurisprudence,<sup>16</sup> the Respondent argues that an award for moral damages for consequences such as AAQ asserts they have suffered cannot be made without independent verification including, ideally, expert opinion. We note that this has been and is a controversial rule and we do not believe that this is the case to re-consider it. The Secretary-General also submitted that even if the Appellant has suffered the consequences they have asserted, that AAQ has not established the necessary constituent of cause and effect between the Organization's decision and those harms or losses that might be established. In these circumstances the Respondent says that the claim for moral damages should be rejected.

23. On 6 September 2023, on its own initiative, the UNAT issued Order No. 531 (2023),<sup>17</sup> requesting that the Secretary-General provide an update on the Administration's working group

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<sup>15</sup> *AAQ v. Secretary-General of the United Nations*, Order No. 528 (2023), amend. 1.

<sup>16</sup> See, e.g., *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 74.

<sup>17</sup> *AAQ v. Secretary-General of the United Nations*, Order No. 531 (2023), paras. 3-4.

activities on how gender and/or sex is recorded in Umoja. This was responded to on 3 October 2023, and we are grateful to counsel for the Secretary-General for enquiring of the Administration and reporting to us. Those enquiries establish:

In 2022, the Administration established a working group to consider, among other things, how to reflect gender markers other than female and male in UMOJA. Based on the recommendations of the working group, the Administration has determined that the non-binary gender marker “X”, in addition to female or male, will be added to UMOJA.

24. The Administration further advised that this requires technical changes that have not yet been implemented and that the Administration is still evaluating the impact of the addition of “X” as a gender marker on various policies and systems. Unfortunately, there was no information about what “X” means in practice, but it appears that the working group’s focus may not address AAQ’s situation which is their wish to be recognised as female. As we noted in requesting the administrative update, it is for informational purposes only and what has been disclosed does not affect our determination of the legal issues in AAQ’s case.

25. We record also that, on 20 October 2023, the Respondent filed a second response to our Order as had been timetabled for, addressing the Appellant’s submissions in support of their claim to compensation. In view of the outcome of the appeal we need not now address these as, absent a finding of liability, there can be no compensation ordered. We are nevertheless grateful to counsel for the Respondent for having made these additional submissions to us.

### **Submissions**

#### **AAQ’s Appeal**

26. AAQ requests that the Appeals Tribunal vacate the impugned Judgment and order the recognition of AAQ’s preferred gender identity in Umoja and other United Nations administrative systems. AAQ also requests moral damages for breach of human rights and psychological harm.

27. AAQ first sets forth their view of the terms “sex” and “gender”, which they say have been erroneously conflated by the Respondent and the Permanent Mission of Denmark. AAQ states that the UNDT was correct to find that they are different terms but argues that the UNDT erred by creating a new term “legal gender” as being the gender in their Danish passport.



28. AAQ submits that the UNDT found “without basis” that the designation “X” in the Appellant’s passport was not a pronouncement on gender. The Appellant maintains that an official pronouncement that an individual has “the experience of belonging to the other sex” cannot be anything other than a pronouncement on gender. Since female is the other sex that the Appellant has the experience of belonging to, AAQ states that the Danish authorities have officially recognized their gender as being female.

29. AAQ submits that the three reasons that the UNDT gave for finding that the Danish authorities’ recognition of their gender did not have a legal quality, were erroneous.

30. First, AAQ argues that the UNDT’s suggestion that because the concept of gender identity is subjective in nature, it should have less legal weight, has no basis in law. The experience of a staff member of male sex who identifies as female cannot be anything other than subjective.

31. AAQ submits that to decline to legally recognize transgender individuals on the basis of the subjective nature of their experience is contrary to the mission of United Nations entities that campaign for legal recognition of transgender identities and self-determination in gender recognition.

32. AAQ also refutes the UNDT’s suggestion that the concept of transgender identity is one that has varied over time. The UNDT referenced the change in Danish law that broadened the categories of individuals who might receive the designation “X” in a passport, thereby suggesting that gender identity as recognized by the Danish state was somehow fluid. The Appellant argues that they received the designation “X” because they “had the experience of belonging to the other sex”, which, for the Appellant, is the female gender.

33. With respect to what the UNDT termed the “on-demand procedure for obtaining the X designation in the passport”, AAQ says that this is best practice established by the Council of Europe and that this should not militate against legal recognition of the Appellant as a transwoman.

34. AAQ submits that the UNDT erred in fact and law by relying on the fact that AAQ is still recognized as male in the Danish Civil Registration System. AAQ avers that if they were to change their civil registration to female, they would be offered medical services for individuals who were born women (such as gynecological services) and be denied medical services that would be more appropriate for them, such as screening for prostate cancer, given that AAQ is still a biological male.

35. AAQ submits that it is not necessary for them to be designated as female in the Danish Civil Registration System for the purposes of the United Nations, because the United Nations classifies staff by gender, not sex.

36. AAQ submits that the UNDT and the Administration recognize that the Appellant's gender designation as male is inaccurate. The UNDT has erred by failing to consider the damage done to AAQ by being under "continued assault" by the Organization's designation of them as male. AAQ argues that the UNDT should have considered which option – designation of male or female – would cause AAQ the least harm. AAQ submits that according to the United Nations Independent Expert on Sexual Orientation and Gender Identity (IE SOGI):

The right to effective recognition of one's gender identity is linked to the right to equal recognition before the law established in article 6 of the Universal Declaration of Human Rights (...) Self-determined gender is a fundamental part of a person's free and autonomous choice in relation to roles, feelings, forms of expression and behaviors, and a cornerstone of a person's identity. The resulting obligation of States is to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression.

37. AAQ submits that according to the foregoing international norms, the option that would cause them the least harm would be designation as female, at least until the United Nations updates its systems.

38. AAQ submits that their understanding of Secretary-General's bulletin ST/SGB/2004/13/Rev. 1 (Personal status for the purposes of United Nations entitlements) is that the determination of a staff member's personal status under the "law of the competent authority under which the personal status has been established" was intended to be broad. That is because, if a staff member was obliged to refer to the laws of the country of nationality, some types of status, such as same-sex marriages, might not be recognized in all countries. AAQ argues that if the only way a staff member can achieve gender recognition is through a passport, the inevitable consequence is that recognition of gender other than biological sex will only be available to staff who are nationals of countries with progressive laws that allow this. This moves the United Nations in the opposite direction from promotion of self-determination and recognition of gender identities.

39. AAQ seeks an award of moral damages for psychological harm, including for the reason that the Administration fails to use pronouns matching AAQ's gender identity and repeatedly addresses them with male pronouns.

40. In reply to the Respondent's assertion that their claim to moral damages must fail because there is no independent evidence of harm, they say that such corroboration is unnecessary. AAQ submits that the Organization's continued application over the last two years of an admittedly inappropriate gender marker ("M") represents evidence of harm in and of itself. AAQ states that the Organization has harmed them by denying them one of the most fundamental aspects of their identity.

41. AAQ expresses their desperation to resolve this gender identity issue without delay noting that they have received appropriate legal recognition in the form of a New York Identity Card showing their sex as "F". AAQ discloses that this legal recognition is the subject of a separate case pending before the Dispute Tribunal.

### **The Secretary-General's Answer**

42. The Secretary-General submits that the UNDT correctly dismissed AAQ's application because the UNDT correctly found that AAQ is not recognized as female under Danish law.

43. The Secretary-General submits that the legal framework governing the determination of personal status of staff members is set forth in ST/SGB/2004/13/Rev. 1, where it states that the personal status of a staff member is determined "by reference to the law of the competent authority under which the personal status has been established". The Secretariat verifies personal status of staff members under this Bulletin through the Permanent Mission to the United Nations of the country of that competent authority.

44. The Secretary-General submits that the UNDT properly dismissed AAQ's application because the Permanent Mission of Denmark verified that under the laws of Denmark, AAQ is not recognized as female.

45. The Secretary-General submits that AAQ's arguments that the Danish authorities have pronounced on their gender are not in line with the verification from the Permanent Mission of Denmark. The UNDT properly considered the question of what was AAQ's legal gender

under Danish law if AAQ's biological sex is male and gender identity is female and concluded that the response of the Permanent Mission of Denmark indicated that AAQ is not female.

46. The Secretary-General reminds us that notwithstanding the fact that the "X" marker in AAQ's passport indicates that AAQ has "the experience of belonging to the other sex", the Permanent Mission of Denmark has repeatedly confirmed that AAQ is not female. Moreover, the Permanent Mission has advised that if AAQ wishes to be recognized as female under Danish law, this can be done through the Danish Civil Registration System, an option that AAQ has not pursued.

47. The Secretary-General contests AAQ's argument that the United Nations classifies staff members by gender in Umoja, rather than by sex. The Secretary-General submits that status in Umoja is based on the personal status as verified by the relevant Member State, which for AAQ is not female, according to the Permanent Mission of Denmark.

48. The Secretary-General disputes AAQ's argument that the UNDT concluded that neither designation of male nor female was accurate. To the contrary, the Secretary-General submits that the UNDT correctly concluded that even though AAQ's passport does not record them as being male, there is also no basis to record AAQ as female, which was the request underlying the contested decision.

49. The Secretary-General reiterates that AAQ is capable of making a request to the Danish Ministry of Interior and Housing to have their gender status recognized as female, but AAQ is not willing to do so. The Organization should not be held liable in these circumstances.

50. The Secretary-General avers that as AAQ has not established any harm, or any error by the UNDT, AAQ is not entitled to any compensation. Based on the Appeals Tribunal's Judgment in *Dieng*<sup>18</sup> an entitlement to moral damages may arise where there is a psychological report that makes a causal link between the harm to the staff member and the Administration's breach of a procedural or substantive right or obligation. There is no such report in this case.

51. The Secretary-General also submits that the UNAT made clear in *Kebede*<sup>19</sup> that a staff member's personal statement of psychological harm alone is insufficient.

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<sup>18</sup> *Boubacar Dieng* Judgment, *op. cit.*

<sup>19</sup> *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874.

52. The Respondent also advises that, based on the working group's recommendations, a non-binary gender marker "X" will be added to Umoja, although requiring a technical change to the Umoja software, this is yet to be fully implemented. The Administration is still considering the effect of extending this to the Inspira programme, the staff selection system and the Organization's commitment to gender equality. The Secretary-General notes, however, that these changes are not what is sought by AAQ who wishes their gender to be marked at "F" in Umoja.

### Considerations

53. We start with an issue that appears not to have been raised either before the UNDT or as part of this appeal, namely, whether AAQ's application to the UNDT was receivable jurisdictionally. Because this issue goes to the Dispute Tribunal's jurisdiction, we can and indeed must address this question to first determine if the Dispute Tribunal was, and now the Appeals Tribunal is, empowered to review the merits of the case. That includes where it appears that, even despite the parties not having raised receivability, there is doubt about this. The Appeals Tribunal is entitled to, and indeed must, consider this jurisdictional issue on its own motion if required.<sup>20</sup>

54. The statutory basis for a staff member to initiate an application before the UNDT is that pursuant to Article 2(1)(a) of the UNDT Statute, s/he or they are appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". While we accept that there was an administrative decision refusing AAQ's request to have their status recognised in a certain way in Umoja, longstanding case law has added to that statutory requirement that such a decision must have both a direct and adverse effect on the employment of the applicant (before the UNDT) staff member. Further, such an effect must be an actual past, as opposed to a potential future, effect. The leading case dates from the former Administrative Tribunal, the oft-quoted *Andronov*:<sup>21</sup>

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative

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<sup>20</sup> See *Shehadeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-689, para. 17 (acknowledging the Appeals Tribunal's competence to review its own jurisdiction *sua sponte*).

<sup>21</sup> UNaDT Judgment No. 1157, *Andronov* (2003) para. V.

decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

55. An early decision of the Appeals Tribunal, *Andati-Amwayi*,<sup>22</sup> acknowledged that “[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”. However, a consistent theme in the case law is that for an administrative decision to be considered as such, there needs to be a *direct* impact or consequence on the staff member’s terms of appointment. For example, in *Lee*,<sup>23</sup> the staff member attempted to challenge a proposal made to the General Assembly to abolish her post. We affirmed the UNDT’s finding that her application was not receivable because there was not yet an administrative decision that produced direct legal consequences to her. We held that she had to wait until there was an administrative decision resulting from the restructuring that concretely affected her.<sup>24</sup> Notably, the staff member also claimed that the definition of an administrative decision subject to judicial review, as set forth in *Andronov*, “does not define whether the direct legal consequence needs to be considered as ‘open’ or not in order to be considered an administrative decision”. We found this argument to be of no avail. We affirmed that “Appeals Tribunal jurisprudence requires that an administrative decision must have a ‘direct’ impact *and not a future injury*”.<sup>25</sup>

56. The Appeals Tribunal has since confirmed *Lee*’s holding that potential future and potential adverse consequences of an administrative decision are an insufficient basis for UNDT jurisdiction. In both *Kennes*<sup>26</sup> and *Mugo*<sup>27</sup>, we held that the former staff members could not challenge the Administration’s decision not to complete a disciplinary process against them. In these cases, the Administration placed notes in their “Official Status File” stating that, if at some point in the future they returned to the Organization, a disciplinary process against them would resume. Both former staff members wanted their names cleared at the time, rather

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<sup>22</sup> *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 19.

<sup>23</sup> *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

<sup>24</sup> *Ibid.*, para. 51.

<sup>25</sup> *Ibid.*, para. 52 (emphasis added).

<sup>26</sup> *Erik Kennes v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1073.

<sup>27</sup> *Nancy Mugo v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1314.

than later. We affirmed the UNDT's finding that both of these applications were non-receivable, reasoning in *Kennes*:<sup>28</sup>

... In terms of the decision by the Administration not to complete the disciplinary process, we recall that, as per the settled jurisprudence, an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. (...)

... In the case at hand, the UNDT Judge, based on the Appeals Tribunal's ruling in *Lee*, that a decision must have a direct impact and not the potential of a future injury to be considered as an appealable administrative decision, held that the contested decision not to complete the disciplinary process against Mr. Kennes was not an appealable administrative decision as it had no direct legal consequences affecting the terms and conditions of his appointment. In further assessing the various arguments made by Mr. Kennes that the decision had direct legal consequences because it (a) would affect his right to be reemployed with the Organization in the future, (b) placed an indefinite duty to cooperate with the Organization, and (c) would result in placing him on administrative leave immediately following any future reemployment, the UNDT concluded that all these were only potential consequences that might arise in the future if Mr. Kennes sought employment with the Organization or was selected for a job and became a staff member again.

... We do not find merit in these arguments either. Under the specific circumstances of the case at bar and the nature of the decision, we agree with and uphold the UNDT's findings that the decision of the Administration not to complete the disciplinary process and instead resume it, should Mr. Kennes become staff member again in the future, did not constitute an appealable administrative decision for the purpose of Article 2(1) of the UNDT Statute, as it did not have a present and direct adverse impact on the terms and conditions of Mr. Kennes' employment.

57. In another context which perhaps has greater relevance to AAQ's case the Appeals Tribunal held (by a majority) that a decision which arguably impacted a staff member's potential job applications was not receivable. In *Fairweather*,<sup>29</sup> the staff member attempted to challenge the Administration's failure to respond timeously to the rebuttals of her performance appraisals. She claimed that the fact that these negative performance appraisals remained on her record, due to the Administration's inaction, made her ineligible for a "long service step" or to sit for the Young Professionals Program (YPP) exam. The UNDT held that

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<sup>28</sup> *Kennes Judgment, op. cit.*, paras. 40, 42, and 44.

<sup>29</sup> *Fairweather v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1003.

the inordinate delay in the rebuttal process was not an administrative decision “unless it was shown that it had, by itself, a direct and negative impact on [her] conditions of service”.<sup>30</sup> We affirmed, reasoning:<sup>31</sup>

... On appeal, Ms. Fairweather did not provide any evidence that she had applied for the long-service step or for taking the YPP exam. She only alleges that the possibility of applying for the long-service step or taking the YPP exam would have been denied due to the delay in the rebuttal process of her performance appraisals.

... We do not agree with the Appellant’s reasoning. It is now clear that the Appellant did not apply for the long-service step or for taking the YPP exam.

... In the absence of applications for the long-service step or the YPP exam, the Appellant cannot seek to backtrack and presume the direct negative legal consequences of a decision that might have existed but never did.

... Consequently, the absence of a decision in response to a request for a rebuttal of performance appraisals had no direct legal effect and was neither an administrative decision nor an implied decision.

58. In AAQ’s submissions to the UNDT, they argued that if they were recorded in Umoja as male as they currently are, then pursuant to the Temporary Special Measures on Gender Equality,<sup>32</sup> if they were to apply for a role within the Organization they would be held to a tougher standard to be considered for promotion, and possibly unfairly denied an appointment they might have received if they had been considered a female.<sup>33</sup> Such a scenario involving an actual outcome of a selection process would produce a direct and adverse effect meeting the jurisdictional criteria for the Tribunals to consider the lawfulness of the refusal to record them as female. But such a scenario was, at the time of AAQ’s challenge to the decision refusing to change their gender in Umoja, a hypothetical and future possibility. As in *Fairweather*, we cannot presume direct negative legal consequences from selection processes that have not yet occurred.

59. The Appeals Tribunal has also found non-receivable administrative decisions that had no direct impact on the benefits and entitlements of the staff member. In *Avramoski*,<sup>34</sup> we held that the staff member could not challenge decisions that might impact them in the future, but needed to wait for an administrative action that actually affected them. In that case, the

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<sup>30</sup> *Ibid.*, para. 8.

<sup>31</sup> *Ibid.*, paras. 40-43.

<sup>32</sup> Administrative Instruction ST/AI/2020/5.

<sup>33</sup> Impugned Judgment, para. 22(c).

<sup>34</sup> *Avramoski v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-987.



staff member disputed the “Entry on Duty” date in Umoja with respect to her appointment (which was noted as 2008), wished to amend the date (to 2000), and challenged the refusal by the Administration to do so. The UNDT had found the application receivable on the grounds that the refusal to amend the EOD date in Umoja was an “administrative decision” pursuant to Article 2(1)(a) of the UNDT Statute. However, we disagreed, stating:<sup>35</sup>

... [W]e are concerned that the Dispute Tribunal incorrectly found that the refusal to amend the EOD date was an “administrative decision”, and consequently, incorrectly determined the application was receivable. (...)

... Here, there was no evidence before the Dispute Tribunal that the EOD date or the refusal to amend it had a direct impact or legal consequences on the Appellant’s terms of appointment or contract of employment. The Dispute Tribunal stated that there “may be numerous” benefits that could be negatively affected “including: eligibility for continuous appointment, accrual of various entitlements, regime determining retirement age and access to after service health insurance”. *However, the Dispute Tribunal did not reference what benefits were specifically affected in this case nor what evidence substantiated the direct impact or legal consequences to these benefits.* (...)

... As a result, we are unable to follow the Dispute Tribunal’s rationale that the refusal to change the EOD date was an administrative decision because if the EOD date entry in 2008 had “no unlawful impact on the Applicant’s terms of appointment including all her benefits and entitlements”, it follows that the refusal to amend that date would also have no impact. As there was no direct impact or legal to either the EOD date or the refusal to amend it, neither can be an “administrative decision” as per *Lee* (...)

... Consequently, we find the Dispute Tribunal erred in finding the application was receivable based on the relevant administrative decision being the refusal to amend the EOD entry.

60. For AAQ, although not being considered female in Umoja might arguably impact potentially some benefit to them, pursuant to *Avramoski* AAQ would need to wait for a decision denying an actual and specific benefit on this basis in order to challenge it. At the time this proceeding arose, the decision not to record them as female in Umoja was not directly impacting any actual specific benefit or entitlement or other incidence of their employment.

61. There is some suggestion (we can put it no higher than this) from AAQ’s submissions to us that AAQ now has such a claim of unlawful discrimination affecting adversely their

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<sup>35</sup> *Ibid.*, paras. 38, 41-43.

employment but, if so, it is not before us on appeal nor was it before the UNDT from whose Judgment this is an appeal. While it may be open to AAQ to argue such grounds in subsequent litigation, the jurisdictional constraints on the UNDT and on the UNAT do not allow the issue to be heard and decided hypothetically, that is in the absence of a particular facts-based case.

62. In these circumstances we have no alternative but to conclude that the UNDT was without jurisdiction to decide the case on the merits and, by purporting to exercise a jurisdiction it did not have because AAQ's application was unreceivable, it erred in law.

63. We have considered whether we should go on to opine on the merits of the appeal given the unfortunate personal effects of the litigation on AAQ and the fact that the Secretary-General has a working group examining the issue. Because, however, of the suggestion that the issue may emerge or arise in another case brought by AAQ, we think it preferable to leave any consideration of the merits of AAQ's claims for consideration against the facts of any appeal that may come before us.

64. We appreciate that this Judgment may be disappointing for AAQ. For the reasons given, our hands are tied. To decide the appeal as we have, however, allows both parties the opportunity to address the issues again if and when a justiciable opportunity arises.

**Judgment**

65. The Appellant's appeal is granted but only to the extent of setting aside the UNDT's Judgment for absence of jurisdiction. Judgment No. UNDT/2022/129 is hereby reversed.

Original and Authoritative Version: English

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

*(Signed)*

Judge Colgan, Presiding

*(Signed)*

Judge Sandhu

*(Signed)*

Judge Savage

Judgment published and entered into the Register on this 9<sup>th</sup> day of November 2023 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar