



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2025-UNAT-1563

Anthony O'Mullane
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

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| Before: | Judge Leslie F. Forbang, Presiding Judge Katharine Mary Savage Judge Gao Xiaoli |
| Case Nos.: | 2024-1936 & 2024-1944 |
| Date of Decision: | 27 June 2025 |
| Date of Publication: | 7 August 2025 |
| Registrar: | Juliet E. Johnson |

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|-------------------------|--------------------------------------|
| Counsel for Appellant: | Cristián Gimenez Corte |
| Counsel for Respondent: | Angélique Trouche & Agnieszka Martin |

JUDGE LESLIE F. FORBANG, PRESIDING.

1. Mr. Anthony O'Mullane, a Director in the Office of Information and Communications Technology (OICT) in the United Nations Secretariat, contested two administrative decisions of the Office of Internal Oversight Services (OIOS):

a) a decision to decline to open an investigation into possible non-compliance, by the United Nations Controller (at the Assistant Secretary-General level) in the Office of the Controller, Department of Management Strategy, Policy and Compliance (Controller), with the United Nations financial rules and regulations (first contested decision), and

b) a decision to decline to open an investigation into possible harassment and abuse of power by the Controller (second contested decision).

2. The United Nations Dispute Tribunal (UNDT) dismissed both applications: by Judgment No. UNDT/2024/025 (first impugned Judgment),¹ it dismissed the application filed in respect of the first contested decision as not receivable, and by Judgment No. UNDT/2024/036 (second impugned Judgment),² dismissed the application filed in respect of the second contested decision on the merits.

3. Mr. O'Mullane lodged an appeal of each of the impugned Judgments with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). Since both matters emanate from similar facts, the Appeals Tribunal by Order No. 599 (2025) of 10 April 2025 consolidated both appeals filed in Case Nos. 2024-1936 and 2024-1944 concerning the first and second contested decisions respectively.

4. For the reasons set out below, the Appeals Tribunal dismisses the appeals and affirms the impugned Judgments.

Facts and Procedure

5. Mr. O'Mullane joined the United Nations in August 1996. He is the Director of the Operations Support Division (OSD) within OICT and holds a continuing appointment at the D-2 level.³

¹ *O'Mullane v. Secretary-General of the United Nations*, Judgment dated 29 April 2024.

² *O'Mullane v. Secretary-General of the United Nations*, Judgment dated 19 June 2024.

³ Second impugned Judgment, para. 9.

6. Following the management reform introduced by the Secretary-General on 1 January 2019, budget and financial management for OICT was centralized and placed under the Enterprise Programme Management Section which reported directly to the Chief Information Technology Officer (CITO), at the Assistant Secretary-General level. This resulted in Mr. O'Mullane no longer having the responsibility to manage OICT's budgetary and financial issues.⁴

7. Amid rumors of a large deficit in OICT's finances estimated to be in the millions of dollars, a new CITO was appointed in August 2021, and various efforts were made to address the budget deficit.⁵

8. On 7 November 2022, Mr. O'Mullane submitted a complaint of prohibited conduct to the Under-Secretary-General of OIOS against the Controller (Report).⁶ In the Report, he asserted that the Controller had "said very bad things about [him]" on more than one occasion, including having made the following remarks about him to the CITO:⁷

[Mr. O'Mullane] cannot be trusted, and [he] had resisted efforts by the Controller to get the picture of OICT's finances.

[Mr. O'Mullane] had made superficial efforts to assist the previous acting CITO in addressing OICT's financial situation.

The Controller cannot expect support from [Mr. O'Mullane].

9. On 10 January 2023, in response to his complaint, Mr. O'Mullane received the contested decisions. The e-mail stated:⁸

The Investigations Division of the Office of Internal Oversight Services (OIOS) has carefully reviewed your report dated 7 November 2022.

(...) Your report related to a complaint of prohibited conduct, in the form of negative remarks made about you to your First Reporting Officer, as well as non-compliance with United Nations financial rules and regulations, implicating [the Controller].

(...) [T]he comments which have been attributed to [the Controller] occurred in the context of concerns regarding the handling of financial and budgetary matters in the Office of Information and Communications Technology (OICT). Applying the criterion set out in

⁴ *Ibid.*

⁵ *Ibid.*, para. 10.

⁶ Management Evaluation Unit's (MEU) 10 April 2023 response to Mr. O'Mullane's request for management evaluation (MER), p. 1.

⁷ Mr. O'Mullane's 7 November 2022 Report, pp. 2-4.

⁸ OIOS' 10 January 2023 e-mail.

Section 5.5 of [Administrative Instruction] ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), OIOS considers that, even if an investigation were to establish that the comments were made, it is unlikely that the remarks would (...) rise to the level of misconduct warranting disciplinary action. OIOS further considers that an informal resolution process would be more appropriate in the circumstances.

(...) OIOS therefore declines to open an investigation into your report of prohibited conduct against [the Controller]. (...)

(...) In so far as your report related to possible non-compliance with UN financial rules and regulations, please be assured that OIOS has taken appropriate action in respect of the concerns raised. (...)

10. On 7 March 2023, Mr. O'Mullane requested management evaluation of the contested decisions. In its response dated 10 April 2023, the MEU held that his MER in respect of the first contested decision was not receivable and upheld the second contested decision.⁹

11. On 9 July 2023, Mr. O'Mullane filed the applications with the UNDT.

12. On 4 August 2023, he filed a "Motion Reporting New Facts and New Instances of Retaliation" in both cases and, on 5 September 2023, a "Motion Reporting Further New Facts and Further New Instances of Retaliation" in the case concerning the first contested decision. On 26 September 2023, in the case concerning the first contested decision, he filed a motion requesting the UNDT to issue an order preventing the Controller and the CITO from taking any further retaliatory actions against him.

13. In Order No. 097 (NY/2023), issued on 3 October 2023 in the case concerning the first contested decision, the UNDT, dismissing Mr. O'Mullane's motion for interim measures, noted that the restructuring discussions had been initiated long before he filed the applications and it was therefore unlikely that the proposal to reassign him, in the context of the restructuring exercise, from one OICT Division to another OICT Division at the D-2 level had been retaliation for his filing of the applications.¹⁰

14. On 19 October 2023, in the case concerning the second contested decision, Mr. O'Mullane filed a "Rejoinder as per Order No. 099 (NY/2023)" that included allegations of new instances of retaliation.

⁹ MEU's 10 April 2023 response to Mr. O'Mullane's MER.

¹⁰ Second impugned Judgment, para. 12.

15. In Order No. 042 (NY/2024), issued on 4 April 2024 in the case concerning the second contested decision, the UNDT decided that Mr. O'Mullane's oral motion for interim measures was moot as the matter had already been resolved under Order No. 097 (NY/2023) in the related case.

The first impugned Judgment

16. The UNDT dismissed the application filed in respect of the first contested decision as not receivable *ratione materiae*.

17. The UNDT noted that Mr. O'Mullane had not cited any regulations or rules, and that neither could the UNDT find any, which afforded him the right to compel the Administration to conduct an investigation. Moreover, he is not the aggrieved party to any alleged misconduct with respect to any staff member's possible non-compliance with the United Nations financial rules and regulations. As he also does not have the right to any information about an investigation or action taken in relation to it,¹¹ Mr. O'Mullane lacks sufficient direct and substantial interest in the first contested decision necessary to confer standing.¹²

18. The UNDT further found that the 10 January 2023 statement by OIOS that it had "taken appropriate action in respect of the concerns raised" by Mr. O'Mullane did not represent a decision to decline to investigate his Report. There is, therefore, no basis for the assertion that OIOS declined to conduct an investigation into his Report.¹³

The second impugned Judgment

19. The UNDT dismissed on the merits the application filed in respect of the second contested decision.

20. The UNDT noted that OIOS had not dismissed Mr. O'Mullane's Report out of hand, but had reviewed the remarks attributed to the Controller as well as the circumstances under which those remarks had reportedly been made, and found no fault with the manner in which OIOS had handled his complaint.¹⁴

¹¹ Citing Section 4.7 of ST/AI/2017/1, the UNDT noted that Mr. O'Mullane's claim to the right to know whether OIOS would investigate his complaint was not legally founded.

¹² First impugned Judgment, paras. 11-13 and 15-16.

¹³ *Ibid.*, para. 14.

¹⁴ Second impugned Judgment, para. 27.

21. Citing Section 1.1 of the Secretary-General's Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), the UNDT held that it had been reasonable for OIOS to determine that the Controller's alleged comments had not amounted to prohibited conduct and that this was essentially a work-related matter that could be resolved through other processes than a formal investigation. The Controller is responsible for managing the Organization's budget and finances. As part of the management reform of January 2019, the Organization's leadership expressed a desire to achieve savings in many areas, including expenditures within OICT. The comments attributed to the Controller are directly related to his subjective observations about the performance of Mr. O'Mullane's duties in connection with the management of OICT's financial and budgetary resources, which are within the Controller's portfolio.¹⁵

22. The UNDT further noted that there was no indication that OIOS had ignored any relevant factors or took into consideration any irrelevant factors in taking the contested decision. Upon conclusion of a preliminary assessment, OIOS has the authority to decide not to initiate an investigation. The contested decision was a reasonable exercise of the Administration's discretion and lawful.

23. Lastly, the UNDT dismissed Mr. O'Mullane's requests for compensation.

Submissions

Mr. O'Mullane's Appeals

24. In each appeal, Mr. O'Mullane requests the Appeals Tribunal to reverse the impugned Judgment, rescind the contested decision and order compensation for harm.

25. In both appeals, Mr. O'Mullane argues that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, by ignoring entirely and therefore not considering a series of new facts that he had properly reported to it. In a motion filed in both of his cases before the UNDT, he reported that five days after filing the applications he had received an e-mail that 18 staff members had been removed from his supervision, depriving him of most of his functions and responsibilities as Director of OSD and constituting retaliation and abuse of power. In his 5 September 2023 motion filed in Case No. UNDT/NY/2023/019 and his 19 October 2023

¹⁵ *Ibid.*, paras. 28-29.

rejoinder filed in Case No. UNDT/NY/2023/020, he reported to the UNDT that on 24 August 2023 he had been ordered to change roles and functions with his colleague.

26. Mr. O'Mullane submits that in both impugned Judgments, the UNDT committed an error in procedure, which affected the decision of the case, by not addressing the parties' requests related to the newly reported facts. The UNDT should have issued a ruling on his motions. He was not granted the opportunity to file an interlocutory appeal.

27. In both appeals, Mr. O'Mullane contends that the UNDT erred on a question of law in considering that the contested decision did not have direct effects on his rights, in particular in light of the newly reported, but ignored, facts. The contested decision produced direct and harmful effects on his rights: the Controller pointed publicly to him being untrustworthy, blocked his access to information on OICT's finances and rejected his attempts to comply with the United Nations financial rules and regulations in preparation for the OICT budget; and the Second to the Controller (SC) warned him that he would be moved out of his office and subsequently confirmed the warning by depriving him of most of his functions and responsibilities and eventually moving him to a different position.

28. Lastly, in his appeal of the first impugned Judgment, Mr. O'Mullane submits that the UNDT erred on a question of law by qualifying the OIOS' reference to taking "appropriate action" as a decision to initiate an investigation. The ambiguity and elusiveness of the decision directly affects his rights, at least the right to know if OIOS would investigate the matter. The OIOS' decision does not meet the criteria of legality and rationality.

The Secretary-General's Answers

29. The Secretary-General requests the Appeals Tribunal to affirm both impugned Judgments and dismiss the appeals.

30. The Secretary-General submits that in the first impugned Judgment the UNDT correctly found that the application was not receivable. It is difficult to imagine how the reported violations of the United Nations financial regulations and rules could have been in non-compliance with O'Mullane's terms of appointment.

31. In both appeals, the Secretary-General argues that Mr. O'Mullane has failed to demonstrate any error on the part of the UNDT warranting the reversal of the impugned Judgment.

32. First, the Secretary-General submits that Mr. O'Mullane has not established his assertion that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, by ignoring entirely and therefore not considering new facts that he properly reported to it. The UNDT considered the alleged retaliatory actions in the impugned Judgments. The alleged facts were identical to those asserted in his 26 September 2023 motion for interim measures, on which the UNDT decided in Order No. 097 (NY/2023).

33. Second, the Secretary-General contends that Mr. O'Mullane has not established that the UNDT committed an error in procedure, which affected the decision of the case, by not addressing the parties' requests related to the newly reported facts. He was not denied the right to appeal; he was able to bring his arguments before the Appeals Tribunal against the impugned Judgments. Even if the UNDT did not address his motions, it addressed the alleged new facts. Moreover, the alleged retaliation was not relevant to the review of the lawfulness of the contested decision. The alleged retaliatory actions occurred on 14 July and 24 August 2023, after the contested decision. Investigating allegations of retaliation is the remit of the Ethics Office and OIOS, not the UNDT.

34. Third, the Secretary-General submits that Mr. O'Mullane has not established that the UNDT erred on a question of law in determining that the contested decision did not have direct effects on his rights. As regards the appeal of the first impugned Judgment, he is confusing the effects stemming from the Report and his applications with those arising from the first contested decision: the alleged retaliatory acts were not the subject of management evaluation and fall outside the scope of judicial review in the present case. As regards the appeal of the second impugned Judgment, Mr. O'Mullane appears to have misinterpreted the UNDT's finding and, in any event, he may not challenge the UNDT finding his application receivable.

35. As concerns the appeal of the first impugned Judgment, the Secretary-General also argues that Mr. O'Mullane has not established that the UNDT erred on a question of law by qualifying the OIOS' reference to take "appropriate action" as a decision to "initiate an investigation". His reference to Section 5.6 of ST/AI/2017/1, which lists the actions that a responsible official may take following the preliminary assessment of a report of unsatisfactory conduct, does not grant him with any right to be informed of the action taken.

Considerations

36. The issue before us on appeal is whether the UNDT erred in Judgment No. UNDT/2024/025 by dismissing the application filed in respect of the first contested decision as not receivable, and in Judgment No. UNDT/2024/036 by dismissing the application filed in respect of the second contested decision on the merits.

Request for an oral hearing

37. As a preliminary matter, we address Mr. O'Mullane's request for an oral hearing before the Appeals Tribunal. He submits that the Dispute Tribunal erred on a question of fact, resulting in a manifestly unreasonable decision, by ignoring entirely and therefore not considering a series of new facts that were properly reported by him and that the "discussion over these facts requires a hearing".¹⁶

38. Oral hearings are governed by Article 8(3) of the UNAT Statute and Article 18(1) of the UNAT Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties in their pleadings and there is no need for further clarification. Moreover, we do not find that an oral hearing would assist in the expeditious and fair disposal of the case, as required by Article 18(1) of the Rules.¹⁷ As a principle in cases turning on receivability, the substantive issue is stayed, including a request for an oral hearing, until the threshold issue of receivability is resolved.

39. Therefore, the request is denied.

Whether the UNDT erred in finding the application regarding the first contested decision not receivable

40. At the outset, Article 2(1)(a) of the UNDT Statute gives the UNDT jurisdiction to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. As we have held in *Adnan-Tolon*, the terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.¹⁸

¹⁶ First appeal form, Section VI.

¹⁷ *AAB v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1263, para. 33.

¹⁸ *Adnan-Tolon v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-970, para. 28.

41. In this regard, we have consistently held that the key characteristic of an administrative decision subject to judicial review is that it produces direct legal consequences affecting a staff member's terms and conditions of appointment.¹⁹

42. In *Reilly*, we further explained:²⁰

(...) a staff member's concern with [the] legality of administrative action is not regarded as an interest that is worth protecting in itself. Judicial review applications should be restricted to persons with direct and sufficient interest and should not be turned into *actio popularis* which allow any person to bring an action to judicially review the legality of the Administration's behavior. (...)

(...) the threshold for instituting an application for judicial review is for the applicant to show, *inter alia*, that the object of his/her challenge is an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant's contractual rights. (...)

43. As a general principle, the institution of disciplinary charges against a staff member is the prerogative of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.²¹ Likewise, regarding the investigation, we reiterated in *Auda* that the Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.²²

44. Ordinarily, the decision of whether to initiate an investigation, in itself, will not be of direct legal effect to the complainant. A refusal of a request to open an investigation does not constitute an appealable administrative decision unless the staff member has a direct and substantial interest in the decision.²³

45. Therefore, we agree with the UNDT's distinction of this case from *Ross*, which related to the OIOS' decision not to investigate the applicant's complaint of retaliation and abuse of authority in the form of an alleged improper termination of his employment.²⁴ Unlike in the present case,

¹⁹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49 (internal citation omitted); *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460, paras. 26-27 (internal citations omitted).

²⁰ *Emma Reilly v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1309, paras. 92-93.

²¹ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr.1, para. 31 (internal citation omitted).

²² *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 30 (internal citations omitted).

²³ *John O'Brien v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1313, para. 26.

²⁴ *Felix Ross v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1336, para. 24.

OIOS' refusal to investigate the complaint in *Ross* directly concerned the applicant's rights and affected his terms of appointment.

46. We recall that under Staff Rule 1.2(c), staff members have a duty to report any breach of the Organization's regulations and rules to the officials who are responsible for taking appropriate action, and they shall not be retaliated against for complying with these duties. In the instant case, Mr. O'Mullane fulfilled this duty by reporting the possible prohibited conduct of the Controller to OIOS. Beyond that, he had no further interest in law in the conduct of the investigation or its outcome. The responsibility shifted to OIOS to take appropriate action, and notify the relevant officials of the Organization of its findings (if any). And if there was any form of retaliation against him for making the Report, the Secretary-General's Bulletin ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) provided a mechanism for requesting protection against retaliation, which he did not pursue. Neither the Dispute Tribunal nor the Appeals Tribunal is the proper forum to investigate or determine issues of retaliatory actions at first instance.

47. Therefore, we agree with the UNDT's finding that Mr. O'Mullane lacked "sufficient direct and substantial interest in the decision necessary to confer standing" on him.²⁵

48. Further, in finding Mr. O'Mullane's application not receivable, the UNDT concluded that, based on OIOS' reply that it had "taken appropriate action in respect of the concerns raised" by Mr. O'Mullane, there was no basis for his assertion that OIOS had declined to conduct an investigation into his report.²⁶

49. We agree with the Dispute Tribunal that "appropriate action" in this context could reasonably include instituting an investigation. Moreover, Section 4.7 of ST/AI/2017/1 which is the applicable legal framework here, provides that staff members and third parties are not entitled to information about an investigation or action taken. Thus, not being the victim, there were no grounds for Mr. O'Mullane to become aware of whether an investigation had been opened, was underway or other action had been taken.

50. Mr. O'Mullane further contends that declining to open an investigation into his Report had "direct and harmful effects" on his rights.²⁷ He specifically argues that since he submitted his

²⁵ First impugned Judgment, para. 13.

²⁶ *Ibid.*, para. 14.

²⁷ First appeal brief, para. 64.

Report to OIOS, he has been continually harassed, subjected to abuse of power, and is being retaliated against.²⁸ He also asserts that the situation “worsened after he submitted his claim before the [Dispute] Tribunal” and, therefore, the UNDT erred in law in determining that the contested decision did not have direct effects on his rights.²⁹

51. We do not find merit in these arguments either. Mr. O’Mullane’s submission on the alleged acts of retaliation, harassment, and abuse of power were not part of his application challenging the first contested decision nor were they the object of his request for management evaluation. Consequently, we agree with the Secretary-General that such submissions are beyond the scope of judicial review with regard to the first contested decision.

52. We recall that Staff Rule 11.2(a) provides:

Staff members wishing to formally contest an administrative decision alleging non-compliance with their contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

53. Moreover, alleged retaliatory actions are not contestable in and of themselves, unless they constitute administrative decisions capable of being subject to judicial review. Under Section 10.1 of ST/SGB/2017/2/Rev.1, an action or non-action of the Administration on a recommendation from the Ethics Office will constitute a contestable administrative decision under chapter XI of the Staff Rules only if it has direct legal consequences affecting the terms and conditions of appointment of the complainant.

54. From the foregoing, we find that the UNDT did not err in finding the application regarding the first contested decision not receivable.

55. We note further that we find no merit to Mr. O’Mullane’s arguments with respect to the UNDT having ignored a series of new facts adduced by him. The UNDT would have exceeded its competence were it to have ruled on the merits of an application that was found to be not receivable.³⁰ As we have held in *Kasmani*, citing General Assembly resolution 63/253, paragraph

²⁸ *Ibid.*, para. 67.

²⁹ *Ibid.*

³⁰ *Faye v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-657, para. 19.

28, “the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes”.³¹

56. It is settled law that the non-receivability of an action is a threshold issue which, once declared, renders a judgment on the merits immaterial,³² because there is nothing before the court to adjudicate. Where the UNDT finds an application not receivable, it has no jurisdiction or competence to assess any evidence or argument regarding the merits of the claim or to rule on the merits of the application, since those claims are not properly before the Tribunal for consideration.³³ The Appeals Tribunal has held that “[a]ddressing the merits of an application which is not receivable is an error of law and such comments are *obiter dicta*, which should be stricken”.³⁴

Whether the UNDT erred in finding the second contested decision lawful

57. The issues underlying the second contested decision relate to Mr. O’Mullane’s report of possible harassment and abuse of power by the Controller. He alleges that the Controller had “said very bad things about [him]” on more than one occasion, specifically making remarks about him to the CITO.

58. The question is, first, whether the remarks complained of by Mr. O’Mullane amounted to a disagreement about work performance or other work-related issues. As we stated in *Nastase*: “If it did, then it would not ‘normally’ be considered prohibited conduct. This leaves open that some conduct in relation to such matters may nevertheless be prohibited, but requires an assessment of all relevant evidence on a case-by-case basis.”³⁵ Ultimately, the determination of the lawfulness of the second contested decision turns on the issue of whether the Administration lawfully exercised its discretion not to initiate an investigation into the allegations.

59. Section 1 of ST/SGB/2019/8 qualifies harassment and abuse of authority as forms of prohibited conduct and defines them, respectively, as follows:

³¹ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011, para. 7.

³² *John Njuguna Bernard v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1422, para. 39.

³³ *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306/Corr.1, para. 27.

³⁴ *Khan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-727, para. 30 (internal citation omitted).

³⁵ *Mihai Nastase v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1373, paras. 47.

Harassment

1.3 Harassment is any unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment.

1.4 Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another. Harassment may be directed at one or more persons based on a shared characteristic or trait as set out in section 1.2 above. Harassment normally implies a series of incidents.

...

Abuse of authority

1.8 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses their influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation, working conditions or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

60. We note that, to determine whether the remarks attributed to the Controller fell within the scope of harassment and abuse of power under ST/SGB/2019/8, the context in which the remarks were made must be taken into consideration. The evidence on record shows that the remarks were made in the course of a general restructuring exercise amidst rumors of a large deficit in OICT's finances estimated to be in the millions of dollars and related to the handling of financial and budgetary matters in OICT.

61. In light of the Controller's responsibility for managing the OICT's budget and finances,³⁶ and Mr. O'Mullane's position as a Director in OICT, we find that the Controller's remarks were work-related. Therefore, we agree with the UNDT that the comments attributed to the Controller were directly related to his subjective observations about the performance of Mr. O'Mullane's duties in connection with the management of OICT's financial and budgetary resources, which are within the Controller's portfolio.³⁷

³⁶ Second impugned Judgment, para. 28.

³⁷ *Ibid.*, para. 29.

62. Therefore, the UNDT correctly observed that OIOS had reasonably determined that the Controller's alleged comments had been essentially a work-related matter.

63. Turning to the Administration's exercise of discretion, we reiterate the standard of judicial review:³⁸

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The [Dispute] Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the [Dispute] Tribunal to substitute its own decision for that of the Secretary-General.

64. We recall that Section 5.5 of ST/AI/2017/1 establishes the criteria guiding the Administration's exercise of discretion in conducting a preliminary assessment to open an investigation. This provision provides:

5.5 In undertaking the preliminary assessment, the following factors may be considered:

- (a) Whether the unsatisfactory conduct is a matter that could amount to misconduct;
- (b) Whether the provision of the information of unsatisfactory conduct is made in good faith and is sufficiently detailed that it may form the basis for an investigation;
- (c) Whether there is a likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case;
- (d) Whether an informal resolution process would be more appropriate in the circumstances;
- (e) Any other factor(s) reasonable in the circumstances.

65. In the instant case, we find that OIOS in issuing the second contested decision correctly applied the criteria established in Section 5.5 of ST/AI/2017/1. Specifically, we find that OIOS' consideration that it was "unlikely that the remarks would (...) rise to the level of misconduct warranting disciplinary action", as well as its suggestion of an informal dispute resolution procedures were a correct application of Section 5.5.

³⁸ *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 45 (internal citation omitted).

66. Considering that upon conclusion of a preliminary assessment, the ultimate decision to initiate or decline to open an investigation on the unsatisfactory conduct rested with OIOS pursuant to Section 5.6 of ST/AI/2017/1, we find no error in the Administration's exercise of its discretion not to open an investigation in the circumstances.

67. Moreover, as we have held in *Nadeau*:³⁹

[A] fact-finding investigation may only be undertaken if there are "sufficient grounds" or (...) "reason[s] to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". Consequently, if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation (...) can have a negative impact on the staff member concerned.

68. We have examined the alleged remarks made by the Controller concerning Mr. O'Mullane and find nothing in them that would, considered objectively, constitute prohibited conduct. The remarks may have disturbed Mr. O'Mullane subjectively. However, objectively assessed, they did not amount to prohibited conduct. After OIOS carried out a preliminary assessment as required, there was nothing unlawful about the decision to decline to open an investigation.⁴⁰

69. Thus, the UNDT did not err in finding the second contested decision lawful.

Remedies

70. In both appeals, Mr. O'Mullane requests rescission of the contested administrative decisions and seeks compensation in the sum of two years' net base salary for harm suffered as a consequence of the unlawful retaliatory measures taken against him.

71. In light of our finding that the second contested decision was lawful, and there were no sufficient grounds to open an investigation in relation to it, there is no legal basis for ordering rescission.⁴¹

72. Regarding Mr. O'Mullane's request for compensation, our finding that the second contested decision was lawful precludes an award of compensation. Per our consistent

³⁹ *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, paras. 34-35.

⁴⁰ See *Nastase* Judgment, *op. cit.*, para. 56.

⁴¹ *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 44.

jurisprudence, there can be no compensation in the absence of an illegality⁴² or actual prejudice.⁴³ Consequently, Mr. O'Mullane's request for compensation is rejected.

⁴² *Elmira Ela Banaj v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1357, para. 118.

⁴³ *Oummih* Judgment, *op. cit.*, para. 41.

Judgment

73. Mr. O'Mullane's appeals are dismissed, and Judgment Nos. UNDT/2024/025 and UNDT/2024/036 are hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of June 2025 in New York, United States.

(Signed)

Judge Forbang, Presiding

(Signed)

Judge Savage

(Signed)

Judge Gao

Judgment published and entered into the Register on this 7th day of August 2025 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar