



Office of Administration of Justice 2018 Activity Report

The Office of Administration of Justice

The Office of Administration of Justice (OAJ) is an independent office, headed by an Executive Director who is responsible for the overall coordination of the formal component of the internal justice system at the United Nations. OAJ was established at the outset of the system with the rationale that a separate OAJ, with operational and budgetary autonomy, would ensure the institutional independence of the system of internal justice. Apart from the Office of the Executive Director, which is mandated to provide recommendations on any improvements to the functioning of the system and undertake outreach on the system, OAJ includes staff members in the Registries supporting the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, and the Office of Staff Legal Assistance which provides legal assistance to staff members free from any other instruction.

Along with its headquarters in New York, OAJ also has a presence, through the Registries which support the seats of the Dispute Tribunal, in Geneva and Nairobi, respectively, and branch offices of the Office of Staff Legal Assistance in Geneva, Nairobi, Addis Ababa and Beirut.

The key functions of OAJ include: providing substantive, technical and administrative support to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal through their Registries. The three Registries supporting the Dispute Tribunal and the Registry supporting the Appeals Tribunal report to the Principal Registrar and are subject to the direction of the judges in judicial matters. OAJ also assists staff members and their representatives in pursuing claims and appeals through the Office of Staff Legal Assistance and, through the Office of the Executive Director, provides assistance, as appropriate, to the Internal Justice Council.

Outreach

OAJ is also responsible to provide information about the formal parts of the internal justice system. In pursuance of this goal, OAJ continued to implement its outreach strategy in 2018 to raise awareness and improve knowledge of United Nations staff about the internal justice system, including staff in field locations. The outreach strategy contemplates multi-media and multi-stakeholder approaches to dissemination of information, as well as face-to-face engagements at headquarters locations or through mission travel. In addition to utilizing the website of the internal justice system, the Office also seeks to include or embed information about the formal system into training and outreach activities of other offices and entities, such as the Ethics Offices in the United Nations Secretariat, funds and programmes and entities, the Office of the Ombudsman and Mediation Services, including the funds and programmes and UNHCR, human resources offices, staff representatives and offices providing support to peacekeeping operations. The Office also received support from the Executive Office of the Secretary General to communicate with heads of agencies and entities to encourage dissemination of information from the executive leadership to each staff member in their respective organization.

Since 2018, the OAJ, including the Office of the Executive Director, the Office of Staff Legal Assistance, the Registries supporting the Appeals Tribunal and the Dispute Tribunal, sometimes in collaboration with and at the invitation of staff representatives, have conducted

more than 35 outreach briefings and events for groups of staff members and managers, including onboarding sessions for newly recruited staff, at a wide range of field and main locations, including Addis Ababa, Amman, Brindisi, Entebbe, Goma, Kinshasa, Naqoura, Nairobi, New York, Nicosia, The Hague and Valencia. At some of these events (such as in Naqoura and Nicosia), the Office of Staff Legal Assistance held clinics with staff members. As part of the strategy, information is provided, on a regular basis, on the intranets of organizations, in particular iSeek, which has featured a specific Office of Administration of Justice page since 25 October 2017 and posted three articles in 2018 with topical information on a range of topics. The Department of General Assembly and Conference Management disseminated information on the new website of the internal justice system on its social media accounts.

The handbook *A Staff Member's Guide to Resolving Disputes* was revised in 2018 and, in 2019, made available in all six United Nations languages. The Guide uses simple language to explain how the internal system of administration of justice at the United Nations works. It offers an overview of both informal and formal avenues for conflict resolution, promotes informal resolution as a first step, offers step-by-step guidance for the formal processes and related timelines, and provides information how to obtain legal advice from the Office of Staff Legal Assistance, among other key information. It is accessible on the front page of the internal justice system website <https://www.un.org/en/internaljustice/> and hardcopies can be obtained from the Office of Administration of Justice.

To ensure that all staff, including in the field, are made aware of *the Guide*, on 22 March 2019, the Chef de Cabinet requested the Secretariat, funds and programmes and other entities to inform their staff of the Guide by sending a broadcast message to the inbox of each and every staff member. The Department of Operational Support has additionally requested all peacekeeping and special political missions, Offices away from Headquarters and regional commissions to include the Guide in induction programmes and make it available on internal web pages. In a parallel effort, the Executive Director of the Office of Administration of Justice contacted staff unions and associations across the Secretariat, funds programmes and entities and requested that they share the Guide with their constituencies. In addition, the Office of Administration of Justice, through an article on the global Organization-wide intranet page, invited all staff members to familiarise themselves with the Guide. The Ethics Offices for the Secretariat and the funds and programmes were also requested to include the Guide in their outreach activities for staff and to include links to the Guide on their websites. The Ombudsman for the Secretariat provided extensive support to OAJ, through the Regional Ombudsman offices, to distribute hard copies of the Guide in the several languages, on a broad geographic basis. The Ombudsman for the funds and programmes also supported dissemination of the Guide in those entities. Hard copies are made available to stakeholders for distribution, on request.

OAJ is currently overhauling the system used for managing the support to the Dispute Tribunal and the Appeals Tribunal for disposing of cases. This project will include a change and upgrade of technical platform aligned with United Nations information technologies strategy for applications and information security, resulting in a more robust and up-to-date application. The solution will contain improved reporting and monitoring capabilities allowing the Registries to better track and manage their cases; more streamlined and easier to use system

that first time users can easily navigate and that functions with a wide range of internet browsers; more efficient transfer of appealed cases from the Dispute Tribunal to the Appeals Tribunal; more comprehensive case data collection for better reporting and monitoring; added functionality to address group cases; more efficient basic case management functionality allowing to move, delete, import, control access to files more efficiently. The launch of the overhauled version is expected in the first half of 2020.

The United Nations Dispute Tribunal

The United Nations Dispute Tribunal (UNDT) comprises independent judges appointed by the General Assembly on the nomination of the Internal Justice Council.

Composition

At the start of 2018, the UNDT consisted of three full-time judges in New York, Geneva and Nairobi, and two half-time judges who are deployed by decision of the UNDT President to any of the three locations of the Tribunal. The UNDT also included three ad litem (or temporary) judges, one at each location, on a full-time basis. Ad litem judges were first appointed by the General Assembly in 2009 for only a one-year term to assist with disposing of the backlog of cases from the former internal justice system of the Organization. Thereafter, the General Assembly extended their appointment, on an annual basis. At the start of 2018, the UNDT consisted of eight judges:

- Teresa Da Silva Bravo (Portugal), full-time judge in Geneva
- Memooda Ebrahim-Carstens (Botswana), full-time judge in New York
- Agnieszka Klonowiecka-Milart (Poland), full-time judge in Nairobi
- Alexander Hunter Jr. (United States), half-time judge
- Goolam Hoosen Kader Meeran (United Kingdom), half-time judge

- Rowan Downing (Australia), ad litem judge in Geneva
- Alessandra Greceanu (Romania), ad litem judge in New York
- Nkemdilim Izuako (Nigeria), ad litem judge in Nairobi (President in 2018).

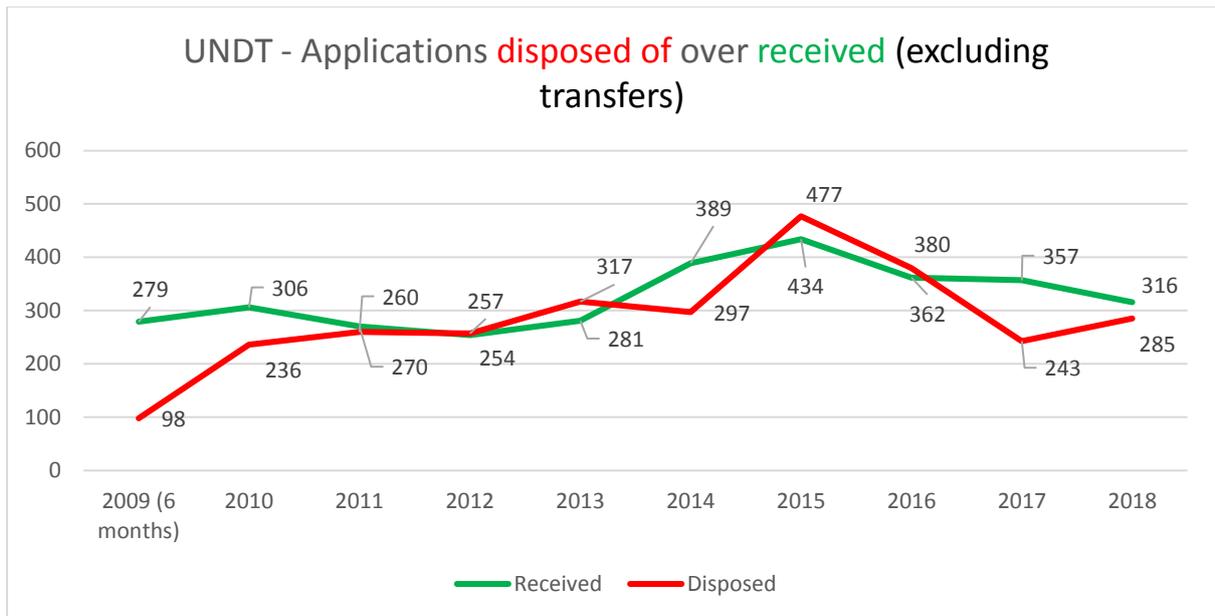
In 2018, the General Assembly elected two new judges for the UNDT whose terms commenced on 1st July 2019. The new judges, Joelle Adda, full-time judge in New York (France) and Francesco Buffa, half-time judge (Italy) replaced judge Ebrahim-Carstens and judge Meeran, respectively, whose terms ended on 30 June 2019.

On 22 December 2018, the General Assembly created four new half-time judicial positions in the UNDT to replace the ad litem positions. It further decided not to extend the ad litem judge position in New York and extended the positions of two ad litem judges in Geneva and Nairobi and the current incumbents pending the appointment of four additional new half-time judges.

The General Assembly accordingly amended the Statute of the UNDT to reflect the new composition of the Tribunal (three full-time judges, one each in New York, Geneva and Nairobi and six half-time judges).

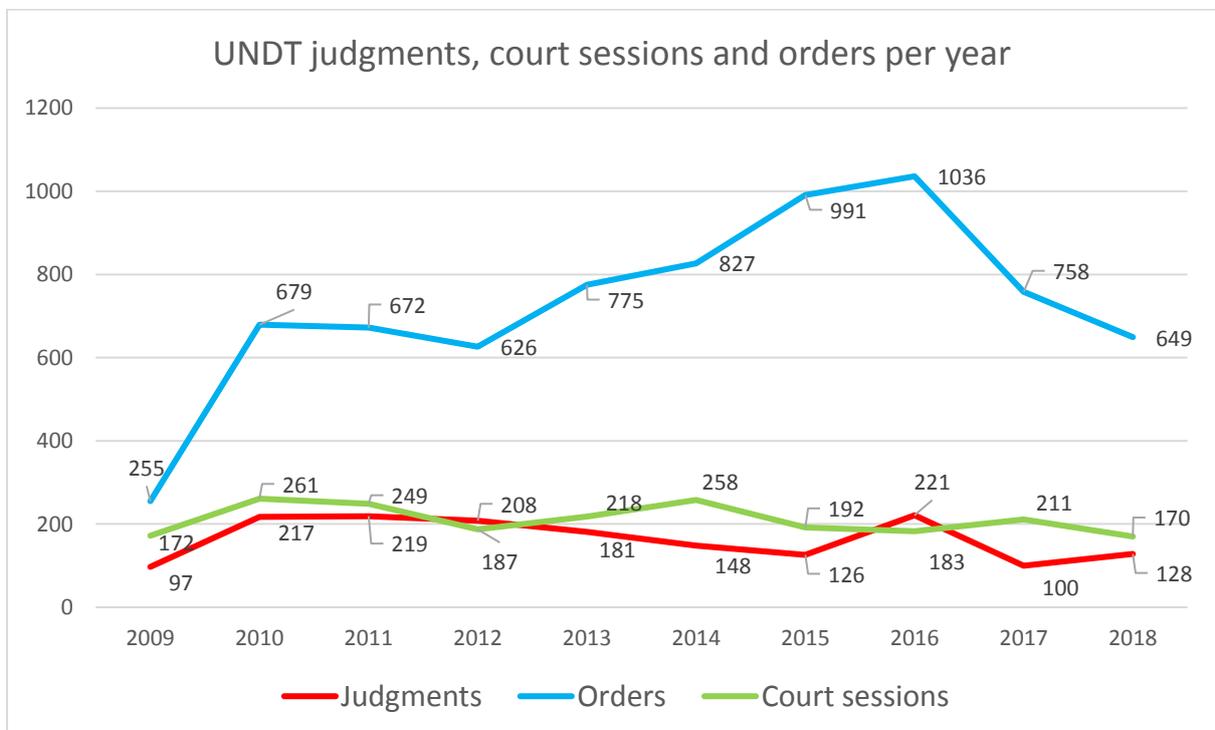
Cases

Since 2009, the Registries in New York, Nairobi and Geneva supported the judges in the delivery of a large number of judgments, orders and court sessions.

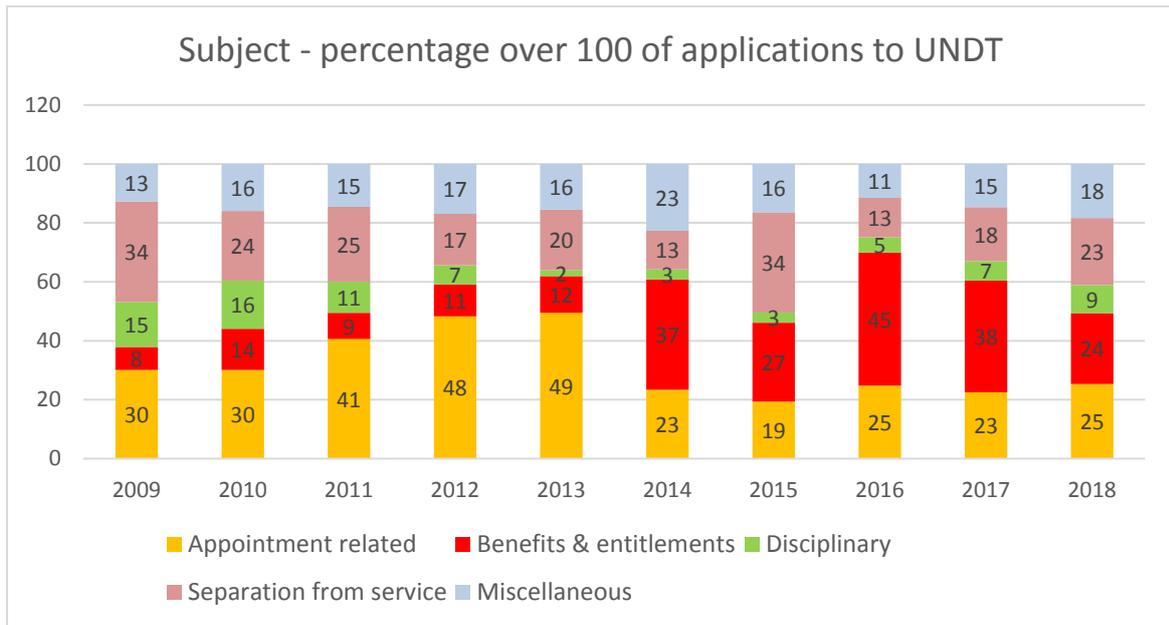


The receipt and disposal of applications provides an indication of the workload and output of the UNDT, both of which fluctuate over time. Another indicator are the number of judgments, orders and court sessions.

The judgments listed below do not include judgments on withdrawal as they do not render a decision on a dispute. Orders include decisions on applications for suspension of action, a large group of case management orders, withdrawals of applications and other orders. A court session is a term used for UNDT hearings and Case Management Discussions. Three court sessions can be held in one day.

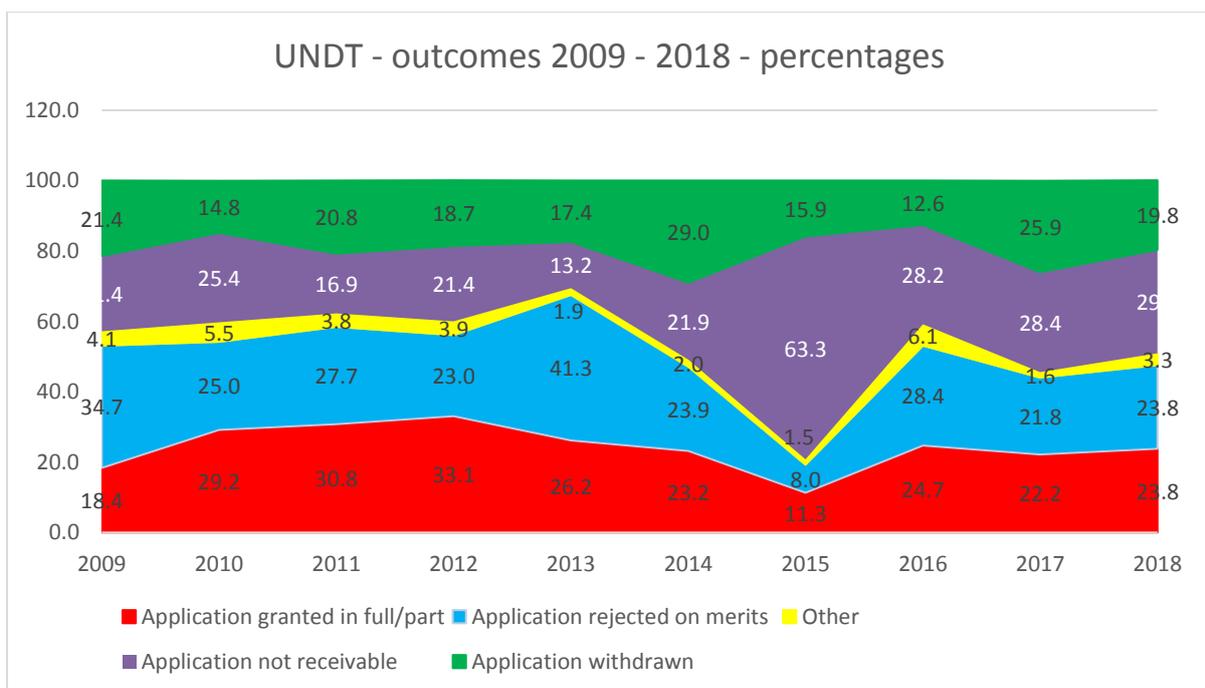


Since 1 July 2009, the issues brought before the UNDT when challenging an administrative decision were as follows:



Appointment-related applications relate to non-selection and non-promotion. Separation from service applications relate to non-renewal of contract and termination of contract. Miscellaneous applications include a variety of issues such as classification and due process issues.

The outcome of applications, as such, are an important indicator for the work that is done by the UNDT and for the areas in which the Registries support the Tribunal. It also gives an indication of the success rate of applications. It should be noted that an application may be withdrawn because the Applicant and Respondent have found a mutually agreeable solution to the dispute. "Other" outcomes are those which may not have been requested in the Application but decided by UNDT. The following graph depicts how the percentages over 100% vary over the years.



Receivability refers to whether the Applicant fulfils the conditions to file an application, that is, that the application is timely, that the Applicant is a staff member, a former staff member or a person making claims on behalf of an incapacitated or deceased staff member, and that the application is challenging an individual administrative decision affecting the staff member's terms of appointment or the contract of employment or imposing a disciplinary measure, or seeking to enforce a mediation agreement. If an application is decided in full or part for the Applicant by the UNDT, this means that the Applicant has partially or wholly prevailed on the merits. The merits are the substantive factual and legal issues in the application.

The United Nations Appeals Tribunal

The United Nations Appeals Tribunal (UNAT), like the UNDT, comprises independent judges appointed by the General Assembly on the nomination of the Internal Justice Council.

Composition

UNAT is comprised of seven judges. In 2018, UNAT consisted of six judges due to a vacancy which arose in 2017:

John Murphy (South Africa), President in 2018
Dimitrios Raikos, Greece)
Sabine Knierim (Germany)
Martha Halfeld Furtado de Mendonça Schmidt (Brazil)
Richard Lussick (Samoa)
Deborah Thomas-Felix (Trinidad and Tobago).

Cases

The Registry provides substantive, technical and administrative support to UNAT in the adjudication of cases at its location in New York and when holding sessions at other locations.

UNAT does not provide a full review of UNDT judgments or other first-level decisions. Its statutory role is to hear and pass judgment on appeals filed against a judgment rendered by the UNDT in which it is asserted that the UNDT: (a) exceeded its jurisdiction or competence; (b) failed to exercise jurisdiction vested in it; (c) erred on a question of law; (d) committed an error in procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision.

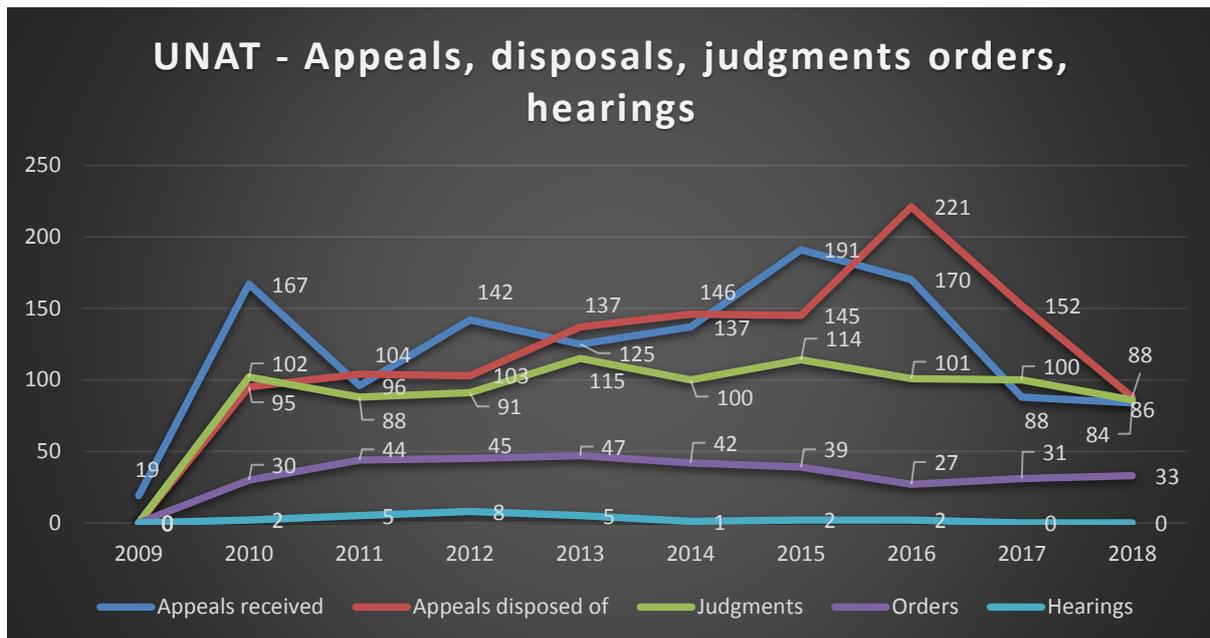
UNAT is also the appellate body for a number of organizations and institutions which have accepted its jurisdiction through a special agreement with the United Nations. As at 31 December 2018, these organizations were:

- International Civil Aviation Organization
- International Court of Justice
- International Maritime Organization
- International Seabed Authority

- United Nations Joint Staff Pension Fund (jurisdiction over decisions of the Standing Committee of the Fund and Fund staff members)
- United Nations Relief and Works Agency
- World Meteorological Organization.

Both the Applicant and the Respondent in a first-level dispute can appeal the judgment or decision in that dispute.

From 2009 to 2018, the UNAT Registry supported the Tribunal in its adjudication of 1,219 appeals. An appeal can be disposed of by judgment or order. Several appeals may be disposed of in one single judgment.



The Office of Staff Legal Assistance

The Office of Staff Legal Assistance (OSLA) provides a wide range of legal services to staff. Although established as part of the formal system of internal justice (management evaluation, UNDT, UNAT), in the context of the General Assembly's emphasis on informal resolution of disputes, staff are encouraged to visit OSLA at the earliest stage of a dispute. This will contribute to early resolution of a dispute, before any formal process has been initiated. At that early stage, OSLA would assist with informal settlement or provide the necessary advice to staff to conclude the matter.

OSLA's workload has increased year-on-year since its establishment in 2009 as illustrated below. In 2018, OSLA received 3,216 new requests for assistance, and had 1896 matters carried over from the previous year. In 2018, OSLA closed or resolved 2,483 requests.

Which kind of requests for assistance did OSLA receive over the years? The Office counts each staff member client as a separate "request for assistance".

<i>Year</i>	<i>Summary advice</i>	<i>Management evaluation matters</i>	<i>Representation before UNDT</i>	<i>Representation before UNAT</i>	<i>Disciplinary matters</i>	<i>Other</i>	<i>Annual total</i>	<i>End-of-year pending requests</i>
2009	171	62	168	13	155	31	600	377
2010	309	90	77	39	70	12	597	261
2011	361	119	115	21	55	10	681	293
2012	630	198	96	31	46	28	1029	234
2013	491	116	70	33	37	18	765	213
2014	798	210	102	15	44	11	1180	222
2015	830	196	415	16	33	12	1502	278
2016	1006	319	71	322	35	3	1756	232
2017	1190	1132	1761	8	50	6	4147	1896
2018	1187	975	918	17	94	25	3216	1965
Total	6973	3417	3793	515	550	156	15473	-

The increase in workload in 2017 and 2018 can be explained in part by a number of 'group' cases where a large number of staff members approached the Office in respect of the same administrative decisions. The majority (68%) of requests for assistance in 2018 related to benefits and entitlements, reflecting some significant changes to the staff salary and benefits package which came into effect during the 2017 as well as significant post-adjustment changes in Geneva. Whilst the Office receives a very large number of requests for assistance, it should be noted that only a small proportion of these proceed to the Tribunals. In 2018, representing a multitude of staff members, OSLA filed 173 requests for management evaluation, 119 applications to the UNDT, and had 8 proceedings before UNAT. Overall, 50% of cases (excluding the 'group' cases) were resolved informally or otherwise disposed of without recourse to any formal mechanism at all.

Staff members are also able to seek legal assistance from private counsel, at their own cost, or other individuals.

OSLA's services are free of charge to staff of the United Nations and other United Nations-system entities that are part of the internal justice system. There are around 75,000 staff members worldwide with access to OSLA's services and the Office, as established in 2009, simply could not manage the ever-increasing number of requests for assistance. To help boost OSLA's resources, in 2013 the General Assembly approved a voluntary supplemental funding mechanism for OSLA. It operates by way of payroll deduction of 0.05% net base salary of staff who do not opt-out. In 2018, the revenue from these contributions helped fund additional five legal officer positions in New York, Geneva, and Nairobi, as well as an administrative position in Nairobi. With this increased capacity, OSLA has been

much better able to attend effectively to the many requests for assistance it receives each week. Significantly, in its resolution 73/276 the General Assembly, recognizing the ongoing positive contribution of OSLA to the system of administration of justice, decided to extend the voluntary supplemental funding mechanism for OSLA for a period of three years, to 31 December 2021. This will enable a longer-term recruitment strategy, which in turn will help ensure greater continuity of counsel for OSLA's clients and greater capacity to provide consistent and comprehensive legal assistance.

Annex I: Summaries of select judgments delivered by the UNDT and UNAT in 2018

A complete set of UNDT and UNAT judgments issued during the period covered by this report is available on the website of the internal justice system (<http://www.un.org/en/internaljustice/>).

UNDT

Judgment UNDT/2018/021 (not appealed)

International Civil Service Commission - post adjustment multiplier review Geneva

Applicable law:

- Article 2.1(a) UNDT Statute
- Article 8 UNDT Statute
- Staff rule 11.2(b)

UNDT judgment: The 21 Applicants, staff members of UNOPS based in Geneva, requested: (1) the rescission of the decision to implement a change to the post adjustment component of the salary which resulted in a 7.7% pay cut and was notified to all staff through a broadcast message from the Department of Management of 11 May 2017 and (2) compensation for any loss accrued prior to the requested rescission. The Respondent challenged the receivability of the application on several grounds, including that the change to the post adjustment resulted from the implementation of a decision by the International Civil Service Commission (ICSC) on post adjustment multipliers and, therefore, is not an administrative decision subject to review pursuant to the UNDT Statute.

The UNDT concluded that the applications were not receivable. Based on the definition of what constitutes a reviewable individual administrative decision as set out in the *Andronov* case, and considering caselaw in the *Andati-Amwayi*, *Tintukasiri et al.*, *Obino*, *Ovcharenko et al.* and *Pedicelli* cases, the UNDT held that, even assuming that the 11 May 2017 communication confers a general intent to implement the ICSC decision with respect to each and every staff member based in Geneva, such individual decisions had not yet been taken.

UNDT/2018/044 (receivability) and UNDT/2018/107 (liability and relief) (neither were appealed)

Placement from regular budgeted post on post funded by general temporary assistance – administrative decision – receivability – specific performance

Applicable law:

- Article 2.1(a) UNDT Statute
- Article 10.5(b) UNDT Statute
- Staff regulation 1.2(c)

UNDT judgments: The Applicant contested that when transferred from Geneva to New York as part of a restructuring exercise, she was placed against a general temporary assistance post while she previously held a fixed-term appointment on a regular budget post. UNDT held that the application concerned an appealable administrative decision and therefore was receivable.

With regard to the merits, observing that the funding source for a general temporary assistance post is different and of provisional, unstable and insecure nature, UNDT found that placing the Applicant on a general temporary assistance post instead of a regular budget post, necessarily had a negative impact on her level of job security and, by implication, also on the terms and conditions of her

employment contract. UNDT further found that, under the circumstances of the case and with reference to the documentation on record, the Applicant had a legitimate expectation to be placed on a regular budget post rather than a general temporary assistance as her parent post. UNDT ordered, as specific performance, the Administration to place the Applicant on a regular budget post with all deliberate speed and, in the interim, if applicable, place her on an extra budgetary post, which the Applicant submitted would provide a more secure funding stream and stable assignment period.

UNDT/2018/055 (affirmed by judgment 2018-UNAT-892)

Private legal obligations of staff members, alimony payments, deduction from salary, minimum vital income, judicial immunity, exercise of discretion

Applicable law:

- Article 2.1(a) UNDT Statute
- Staff rule 3.18(c)(iii)
- ST/SGB/1999/4

UNDT judgment: The Applicant, a staff member of the United Nations Interim Administration Mission in Kosovo (“UNMIK”) challenged two decisions: (i) the deduction of 25 per cent of his salary in implementation of an alimony order issued by a domestic court of the Republic of Kazakhstan (Kazakhstan); and (ii) the Administration refusal to recognize one of his children (daughter El.) as his dependent for the purpose of the United Nations child dependency benefits. The Applicant is the father of five children, born between 1991 and 2017. At the time that the Applicant filed his application with the Tribunal (July 2016), he had four children. El. was born in September 2001 from a common law relationship with a citizen from Kazakhstan. The couple split later on.

In August 2005, a domestic court of Kazakhstan issued ordered the Applicant to pay 25 per cent of his salary to his former partner in support of their daughter El. The court order was pronounced in absentia because the Applicant was not residing in Kazakhstan at the time and he stressed that no notice was sent to him. In March 2012, UNMIK became aware of the August 2005 court order. UNMIK contacted the Applicant in August 2012 about the child support claim. The Applicant replied to UNMIK requesting them to hold the salary retentions in abeyance pending adjudication of certain proceedings that he had initiated as of 2010 before domestic courts.

On 1 August 2014, UNMIK started making monthly deductions of 25 per cent from the Applicant’s net salary as with alimony. The deductions were paid to El.’s mother who worked as a national staff member of OCHA in Kazakhstan. The Applicant requested UNMIK to suspend the deduction from his salary arising from the court order. He informed UNMIK that in June 2015 he had received a judgment from a domestic court in Kosovo for child support in respect of another child (son E.). On 25 November 2015, UNMIK rejected his request noting that any change in the deductions being made was subject to his appealing said order and providing a new order from that Court. The Applicant contested the 25 November 2015 decision. As a result of the Applicant’s request for management evaluation, the first contested decision (25% deduction) was upheld but the Applicant was allowed to include his daughter El. as a dependent.

The UNDT ruled that the second aspect of his application before the UNDT (ii) was moot, because El. had been recognized as a dependent by UNMIK. UNDT decided further that the decision to deduct 25 per cent of the Applicant’s salary was unlawful because the Administration was incorrect in assuming that it had no discretion regarding the amount to be garnished from the staff member’s salary. In light of the Organization’s judicial immunity and the wording of staff rule 3.18(c)(iii), which is mirrored in section 2.1 of the Secretary-General’s Bulletin ST/SGB/1999/4 (Family and child support obligations of

staff members), the Administration had discretionary authority in determining the amount to be deducted on the basis of the Kazakh court order.

The UNDT ruled that the discretionary power of the Secretary-General in implementing the deductions could not be such as to deprive a staff member e.g. of his/her own subsistence amount or minimum vital. The UNDT considered that the Administration had failed to lawfully exercise its discretion by not taking into account all relevant considerations including whether the relevant court proceedings had been concluded in absentia and whether other national court orders had granted alimonies to the concerned staff member's other family members. The UNDT also noted as relevant considerations the Organization's duty of care vis-à-vis its staff members, as well as an assessment of the needs of the family members from whom the national court order provided alimonies for, the cost-of-living at the place of residence of the minor child(ren) and the minimum vital of the staff member.

The UNDT found, for instance, that the Administration had failed to consider the impact of the Kosovo court order, which referred to the alimonies to be paid to the Applicant's then three minor children by equal share. The UNDT further found, without substituting itself to the Secretary-General, that a monthly deduction of 25 per cent appeared unreasonable, in light, inter alia, of the amount of child dependency allowance paid to the mother by the UN in Kazakhstan (USD 27) and of the fact that the Applicant had, at the time of the contested decision, two-and since February 2017 three-other minor children.

The UNDT rescinded the contested decision and to reimburse the Applicant the amounts deducted from his salary from November 2015 onwards, minus the child support paid to the Applicant for his daughter El. as of that date.

**Judgment UNDT/2018/083 (affirmed in part by 2019-UNAT-909, compensation increased)
Abolishment of post - comparative review - lateral transfer - redeployment of post - termination of appointment**

Applicable law:

- Art. 2(1)(a) UNDT Statute
- Art. 10 (5) UNDT Statute
- Art. 10 (8) UNDT Statute
- Staff Rule 9

UNDT judgment: The Applicant challenged the decision of the United Nations Assistance Mission for Iraq (UNAMI) to terminate her appointment as of 26 January 2015. At the time of the contested decision, the Applicant was serving at the G-5 level with the functional title of Administrative Assistant. In July 2012, the Applicant was laterally transferred from the office of the Chief of Administrative Services (CAS) in Kuwait to the Supply Section without her consent. She subsequently challenged this decision at the Tribunal and judgment was issued in her favour in Judgment No. UNDT/2016/058. In September 2013, unbeknownst to the Applicant, she was placed against a post in the Contracts Service Unit rather than the Warehouse Unit where she worked. In November 2014, the Applicant received a memorandum informing her of the termination of her contract effective 1 January 2015 as a result of her post being relocated to Erbil, Iraq. The Applicant discovered in December 2014 that unlike the four other Supply/Warehouse Assistants in the Supply Section, she had not been contacted by the Internal Review Panel (IRP), which was conducting comparative reviews of cases of post abolishment or redeployment within the mission, to submit documentation for the comparative review process.

In December 2014, the Applicant requested management evaluation of the decision to terminate her contract and requested that she be included in the comparative review process for a Supply/Warehouse Assistant since these were the functions, she performed in the Supply Section. Although the Respondent conceded that the Applicant had been excluded from the comparative review of Supply/Warehouse Assistants in error, she was not allowed to participate in the comparative review exercise post facto and the decision to terminate her contract was upheld. The Tribunal noted that despite having the functional title of Administrative Assistant while working in the Warehouse Unit, the Applicant's day to day work was essentially the same as that of her other colleagues working at the GL-5 level in the Warehouse Unit.

The Tribunal held that separation of the Applicant from service was the sole decision of the UNAMI Chief of Administrative Services.

The Tribunal noted that the Respondent's first reaction to the application was to claim that the Applicant was not qualified to be included in the comparative review which was to determine which staff members would be retained in the Kuwait duty station of UNAMI following the restructuring. He subsequently admitted in amended pleadings that the Applicant had been excluded in error; but that even if she had been included in the comparative review, she would not have scored highly enough to warrant her retention. The Tribunal found that the Respondent did not ask for and was never in possession of the Applicant's updated PHP. He was therefore not in a position to review it, or to come to the erroneous conclusion that even if the Applicant had been included in the comparative review in the Warehouse and Supply section, she would have scored the least marks.

The Tribunal did not accept the Respondent's argument that the Applicant was excluded from the comparative review because she was an Administrative Assistant and not a Warehouse Assistant even though the details of the Applicant's role and functions were readily available. The Tribunal found that the conduct of UNAMI's Chief of Administrative Services, both as a manager within the Organization and a witness before the Tribunal, fell short of her duties and responsibilities as a manager in the international civil service. The Tribunal found the behavior of the Chief to be an indication of bias against the Applicant. The Tribunal awarded the Applicant six months' net base salary as compensation for the unlawful termination of her appointment.

UNDT/2018/132 (not appealed)

Separation from service – sexual harassment and abuse of authority

Applicable law:

- Article 2.1(a) UNDT Statute
- ITC/EDB/2015/07

UNDT judgment: The Applicant challenged the decision of the Assistant-Secretary-General, Office of Human Resources Management (ASG, OHRM), to separate him from service with compensation in lieu of notice and termination indemnity for sexual harassment and abuse of authority. Based on the investigation of a fact-finding panel, which had been reviewed and completed by the Office of Internal Oversight (OIOS), the ASG, OHRM, concluded that the Applicant engaged in inappropriate conduct towards the Complainant by sending her text messages calling her "BB" and "my hamster" and giving her a card stating "Our love is like an electric blanket and you control the switch" together with a scarf. The ASG, OHRM, also concluded that the Applicant sought to meet the Complainant outside the office and lured her to meetings under the disguise of "office retreats", which provided "a context" for his above-mentioned actions. Given that the Applicant was the Complainant's Hiring Manager and First Reporting Officer, and that the Complainant was in a precarious contractual situation, there was an

imbalance of power and the Applicant's conduct was considered to amount to abuse of authority, in addition to sexual harassment.

The Applicant challenged the decision on the basis that the Complainant was ill-motivated and sought to seek revenge for the non-renewal of her contract, that the investigation was vitiated by procedural irregularities and flawed in several respects, and that the facts had not been established through clear and convincing evidence. The Tribunal noted that the procedure to investigate this case departed from the one envisaged in ITC/EDB/2015/07 in that the investigation was first conducted by a fact-finding panel and then reviewed and completed by OIOS, upon request from the panel. However, it held that given the difficulties faced by the panel to investigate this complex case, which at some point included an allegation of rape, and the specific mandate vested in OIOS, the recourse to this investigative body to review and complete the investigation did not constitute a procedural flaw nor violated the Applicant's due process rights. The Applicant was allowed to challenge the evidence in the same way as if the whole investigation had been conducted by the fact-finding panel.

The Tribunal further found that both the fact-finding panel and OIOS reached the conclusion that the Applicant sexually harassed the Complainant and abused his authority without properly ascertaining the underlying facts and evaluating the credibility of the witnesses, who presented diametrically divergent versions of events. Given that the application essentially involved issues of facts and that the dispute could not be resolved through a mere examination of the investigation file, the Tribunal proceeded to hear the evidence de novo and to re-determine the merits of the case in accordance with recent jurisprudence of the Appeals Tribunal.

In examining whether the facts had been established, the Tribunal expressed serious doubts about the credibility of both the Complainant and the Applicant, leading it to conclude that little weight could be given to their testimonies unless corroborated by additional evidence. The various allegations made by one another suggested the existence of a relationship that may have gone beyond a purely professional one, including various encounters outside the workplace. A number of factual elements remain unexplained, such as the fact that the Applicant and the Complainant found themselves together by the Lake Geneva at least once; the context of the text messages and the import of one of the Complainant's own messages; the alleged exchange of gifts between the two, which they reported in a contradictory manner and the Complainant's apparent motivation to secure her employment.

However, both the Applicant and the Complainant consistently denied having had an intimate relationship or exchanges that would go beyond the nature of a purely professional relationship. Neither of them produced the full content of the exchanges, and the Applicant provided implausible explanations for the card and the text messages. In these circumstances, the Tribunal could not speculate about the relationship. Based on the material evidence, the Tribunal confirmed the facts retained in the contested decision, except for alleged office retreats. In any event, the alleged office retreats were not considered as reprehensible acts in and of themselves by the ASG, OHRM, but merely as "context".

In examining if the facts amounted to misconduct, the Tribunal stressed that the definition of sexual harassment in Sec. 1.3 of ITC/EDB/2015/07 contains three material elements: firstly, there must be a conduct of a sexual nature; secondly, the conduct must be expected or be perceived to cause offence or humiliation and thus be unwelcome; and thirdly, it must have an effect on the working environment. It does not require that the alleged offender subjectively knew that his or her conduct is inappropriate or offensive. The test focusses on the conduct itself and requires an examination of whether it would be expected or be perceived to cause offence or humiliation to a reasonable person, taking into account the overall circumstances in which the conduct occurred. Further, the reference to

“unwelcome” conduct does not require that the alleged offender be put on notice that his or her conduct is unwelcome.

However, if staff members engage in an ambiguous relationship or in consensual exchanges of a sexual nature and, at some point, one of them no longer consents to being part of such exchanges, it may be required that the other staff member be put on notice of the change in the dynamics of the relationship.

The Tribunal found that the two text messages and the card sent by the Applicant to the Complainant, which contain terms of endearment and convey messages of sexual or at least romantic connotation, amount to a behaviour of a sexual nature within the definition of sec. 1.3 of ITC/EDB/2015/07. It further found that the Applicant’s conduct may reasonably be perceived to cause offense or humiliation to the Complainant, such that this conduct was unwelcome. Absent any information as to the context in which this conduct occurred, and without any submission or admission by the Applicant—and/or the Complainant—that they had engaged in an ambiguous relationship, the Tribunal had to examine the situation in light of the standards applying to a normal professional relationship between a supervisor and his supervisee. Finally, the Tribunal found that the Applicant’s conduct occurred in the work place in the context of a superior-subordinate relationship. The Tribunal therefore concluded that the Applicant’s conduct amounted to sexual harassment.

The Tribunal further found that the conduct also constituted abuse of authority as it occurred in a context where the Complainant was in a vulnerable situation of employment and was under a reasonable impression that the Applicant could secure her employment. The Tribunal finally found that the sanction imposed by the ASG, OHRM, was not disproportionate to the offences in light of the practice and policy of the Organization in dealing with sexual harassment and the aggravating factors, which included the continuing denial of the Applicant, his implausible explanations and his lack of remorse. The Tribunal dismissed the application.

UNDT/2018/137 (not appealed)

Receivability - administrative decision – discretion - repeated communication of a decision - appropriate job description and functional title

Applicable law:

- Articles 2(1), 8.3 and 10.2 UNDT Statute
- Articles 14 and 30 UNDT Rules of Procedure
- Staff regulation 1.2(c)

UNDT judgment: The Applicant contested the Administration’s refusal to amend the job description and functional title of a colleague of the Applicant encumbering a partly similar function. UNDT reviewed, whether such refusal can be an administrative decision subject to judicial review. The Respondent argued it produces no direct legal consequences affecting the Applicant’s terms and conditions of appointment. UNDT considered that if the Applicant’s allegations are substantiated, she may have been deprived of her functions in violation of the Organization’s rules, such as rules governing classification and/or realignment, especially as she submitted she was notified twice that there was no change to her functions while her functions in fact were changed, shifting some to her colleague. While staff regulation 1.2(c) gives the Administration broad discretion when it comes to organization of work, the exercise of discretion can be challenged on the basis that the decision was arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith. As the staff member alleged that the contested decision is not in compliance with her contract of employment, UNDT is competent to hear and decide the case. Regarding the deadline for an application to UNDT, the date of an administrative decision is determined based on objective elements

that both parties can accurately determine. The reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines while an unambiguous re-examination by the Administration of an earlier decision would give rise to a new and separate administrative decision. The application was deemed receivable.

UNAT

Judgment 2018-UNAT-811 - Fraud in form of false accounting and uttering of forged and falsified documents to the Organization constitutes serious misconduct justifying summary dismissal without benefits

Applicable law:

- Article 7(1)(c) UNAT Statute
- Article 18(1) UNAT Rules of Procedure
- ST/AI/2011/4

UNAT judgment: The staff member appealed the decision to summarily dismiss her. The UNDT found that there was clear and convincing evidence to substantiate the allegation that the staff member had committed misconduct by submitting requests for special education grants for her children overstating the fees charged by the school and by omitting to declare sibling discounts and scholarships received from the school for three school years. However, the UNDT held that the decision to summarily dismiss her from service for fraud was disproportionate and therefore unlawful. The UNDT upheld the staff member's application in part, ordered partial rescission of the dismissal decision (to be replaced with separation from service with termination indemnity) or alternative compensation in place of the complete rescission of the dismissal decision. The Secretary-General appealed the UNDT Judgment.

UNAT held that the Secretary-General had discharged his burden to establish the facts of misconduct by clear and convincing evidence in relation to all the allegations of wrongdoing regarding the special education grants. The evidence proved not only fraud in the form of false accounting, but also the uttering of forged and falsified documents to the Organization. The staff member's behavior constituted serious misconduct by which she enriched herself at the expense of the Organization. UNAT held that dishonesty and impropriety of this kind justified summary dismissal without any benefits. Accordingly, UNAT upheld the Secretary-General's appeal and vacated the UNDT's judgment.

Judgment 2018-UNAT-819 – Right of staff member to “appeal” an administrative decision imposing a disciplinary measure is not restricted to a review of the investigative process, but will almost always require a renewed appeal

Applicable law:

- Article 2(1) UNDT Statute
- Article 10(4) and (5) UNDT Statute

UNAT judgment: The staff member contested the decision to separate him from service. The decision was based on the finding that he had engaged in sexual harassment, specifically, by making unwelcome sexual advances towards a colleague. The UNDT held that the evidence was insufficient in that it did not establish the misconduct beyond a preponderance of evidence. It accordingly rescinded the disciplinary measure and remanded the matter to the Administration to resume the

disciplinary procedure and obtain additional evidence. As an alternative, the UNDT ordered in-lieu compensation.

UNAT found that the UNDT erred in limiting its review to the investigative process. The right of a staff member to “appeal” an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal de novo, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body had neither the institutional means or expertise to conduct a full and fair trial of the issues.

UNAT, however, noted that there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Considering the proven facts in this case, UNAT found that the UNDT was too circumspect in the weight it ascribed to the evidence and erred in its conclusion that the fact of sexual harassment had been established only on a balance of probabilities. UNAT held that the undisputed facts, the evidence of a credible report, coherent hearsay evidence pointing to a pattern of behavior, the consistency of the witness statements, the unsatisfactory statement of the staff member and the inherent probabilities of the situation, taken cumulatively, constituted a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred. Accordingly, it concluded that the sanction imposed by the Administration in this case was proportionate and vacated the UNDT judgment.

Judgment 2018-UNAT-840 - Secretary-General’s implementation of General Assembly resolution constitutes an administrative decision. - A vested right to a salary for services rendered is an acquired right

Applicable law:

- Article 8 of the United Nations Charter
- General Assembly resolutions 13(I) of 1946 and resolutions 70/244 and 71/263
- Art. 2(1) UNDT Statute
- Staff regulation 12.1

UNAT judgment: Prior to 1 January 2017, staff members in professional and higher categories were paid their net salary at either a single or a dependency rate, depending on their family status. In 2015, the General Assembly adopted the introduction of the Unified Salary Scale, providing one net salary for all staff members without regard to family status. In 2016, the General Assembly acceded to the Secretary-General’s request to amend the Staff Regulations for the implementation of the approved changes. As the gross and net base salaries of the staff members who were previously paid at the dependency rate would be reduced, they would receive a progressively depreciating transitional allowance of six per cent of net remuneration for a six-year period. Five staff members claimed that these unilateral variations of their remuneration were illegal and in breach of their contracts of employment and their acquired rights.

The UNDT held that the decisions implementing the Unified Salary Scale constituted administrative decisions in terms of Article 2 of the UNDT Statute since they negatively impacted the staff members’ terms and conditions of appointment. The UNDT accordingly held that the applications challenging these decisions were receivable. It held further that there was a normative conflict between General Assembly resolutions 70/244 and 71/263, adopting the Unified Salary Scale, and preceding General Assembly resolutions still in force protecting staff members’ acquired rights. The UNDT concluded that the Secretary-General’s implementation of the Unified Salary Scale for the staff members, which

resulted in their being paid reduced gross and net base salaries, violated their acquired rights and was thus unlawful. Accordingly, the UNDT rescinded the contested decisions. With regard to the staff members' claim that the transitional allowance had a discriminatory effect on them, the UNDT found that it lacked jurisdiction to examine whether the decision of the General Assembly to provide for the transitional allowance was illegal and discriminatory because the claims concerned a legislative or regulatory decision and not an administrative decision.

The Secretary-General appealed the UNDT judgment. The majority of the judges held that the Secretary-General's implementation of the resolutions involved an administrative decision with an adverse impact. These judges accepted that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions and that the power he exercised was a purely mechanical power, more in the nature of a duty. However, they found that such exercises of power were administrative in nature and involved a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They were thus administrative decisions and were reviewable on narrow grounds of legality. Having found that the contested decisions constituted administrative decisions, UNAT examined whether there was indeed a normative conflict or an irreconcilable inconsistency between resolution 13(I) of 1946, protecting acquired rights of staff members, and resolutions 70/244 and 71/263, which introduced the Unified Salary Scale. In UNAT's view, an acquired right means a vested right and employees only acquire a vested right to their salary for services rendered. This ensures that staff members are not retrospectively deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. UNAT concluded that the contested decisions did not violate the staff members' acquired rights as the General Assembly resolutions altered the staff members' future salaries. There was thus no normative conflict between resolution 13(I) of 1946 and resolutions 70/244 and 71/263. Absent any normative conflict, the Secretary-General did not act illegally in implementing resolutions 70/244 and 71/263.

As for the staff members' cross-appeal claiming that the UNDT erred in finding that it lacked jurisdiction to examine whether the decision of the General Assembly to provide for the transitional allowance was illegal, discriminatory and in violation of Article 8 of the United Nations Charter, UNAT held that the UNDT was correct to decline jurisdiction on the basis that only appeals in relation to administrative decisions are receivable by it. UNAT upheld the Secretary-General's appeal, dismissed the staff members' cross-appeal, and vacated the UNDT judgment.

Judgment 2018-UNAT-843 - Decision to waive a staff member's immunity is not an administrative decision

Applicable law:

- Article 105 United Nations Charter
- Agreement on the Privileges and Immunities of the United Nations between the United Nations and the Swiss Federation (1946)
- Article 2.1(a) UNDT Statute
- Staff regulation 1.1(f)

UNAT judgment: The staff member contested the Secretary-General's decision to waive his diplomatic immunity with regard to his dispute over the lease of an apartment at his duty station in Geneva. At the request of the Permanent Mission of Switzerland to the United Nations, the Secretary-General lifted the staff member's immunity with respect to the execution of a judgment issued by a Geneva court ordering the staff member to pay compensation to the landlord. The UNDT found the application to be receivable on the ground that the decision to waive immunity constituted an administrative decision which had a direct impact on the staff member. It concluded, however, that the

Administration had properly exercised its discretion to waive the staff member's immunity and it had acted reasonably and properly, taking account of all relevant considerations, in lifting the immunity. UNAT held that when responding to requests for the waiver of an official's immunity, the Organization must comply with its legal obligations to the requesting Member State under the relevant international instruments, which limit immunity to official acts and oblige the Secretary-General to cooperate at all times with the appropriate authorities to facilitate the proper administration of justice and to prevent the occurrence of any abuse in connection with the privileges and immunities.

The Secretary-General is best placed to appreciate the nature of the Organization's obligations to a Member State, what form of cooperation will be in the interests of the Organization, and whether non-waiver is necessary for the fulfilment of the purposes of the Organization. These considerations imbue a decision of the Secretary-General to waive immunity with an executive or political character, negating the categorization of the decision as one administrative in nature. Accordingly, UNAT held that the staff member's application to the UNDT was not receivable *ratione materiae* and vacated the UNDT judgment.

Judgment 2018-UNAT-847 – Obligation to give priority consideration to redundant continuing or indefinite appointment holder for suitable vacant posts or posts likely to become vacant at same grade level or a lower grade, if staff member has expressed interest

Applicable law:

- Article 10(5) UNDT Statute
- Staff rules 9.6 and 13.2

UNAT judgment: The staff member, who held an indefinite appointment at the GS-7 level, contested the decision to separate her from service. The UNDT found that the decision to terminate her appointment for abolition of post and to separate her from the Organization had not been taken in line with the mandatory legal framework and was unlawful. The UNDT ordered rescission of the contested decision and awarded the staff member compensation for moral damages.

UNAT held that the UNDT was correct in concluding that the Administration's decision to terminate the staff member was unlawful, since it did not fully comply with its obligations under Staff Rule 9.6(e) and (f) to make all reasonable and bona fides efforts to consider her for available suitable posts, as an alternative to the abolished one. UNAT noted that the phrase "suitable posts" is not defined in the Staff Rules, and that nothing in the language of Staff Rule 9.6(e) and (f) indicates that the obligation of the Administration to consider the redundant staff member for suitable posts, vacant or likely to be vacant in the future, is limited to the staff member's grade level. UNAT held that the Administration is under an obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest. Thus, UNAT concluded that the staff member should have been considered not only for suitable posts at the same level as her abolished G-7 post in New York, but also for all the lower available suitable posts in New York, for which she had expressed her interest by way of application thereto.

Nonetheless, UNAT found that the UNDT made several errors of law: a) the UNDT erred in finding that it sufficed, in order for the staff member to be retained in service, to have a relative competence for the new suitable post. UNAT held that if the redundant staff member was not fully competent to perform the core functions and responsibilities of an alternative suitable post, the Administration had no duty to consider him or her for the post; b) the UNDT erred in finding that the staff member should have been considered for available suitable posts covering the entire parent organization, including but not limited to her duty station, because she had passed the exam for the Professional level. UNAT

held that it was immaterial whether or not the staff member had passed the exam for the Professional level at some point since the abolished post she was encumbering at the critical time fell into the General Services category and not into the Professional category; c) the UNDT erred in finding that an affected staff member had a right to be retained in suitable positions occupied at the date of abolition by staff members having a lesser level of protection under Staff Rule 9.6(e). UNAT held that the Administration was bound to consider the redundant staff members only for suitable posts that were vacant or likely to become vacant in the future; and d) the UNDT erred in finding that staff members were entitled to be retained without having to apply for vacant job openings. UNAT held that a staff member holding a continuing or indefinite appointment facing termination due to abolition of his or her post were obliged to fully cooperate by applying for suitable posts that were vacant.

UNAT ordered rescission of the contested decision and compensation in lieu of rescission. UNAT vacated the UNDT's award of compensation for moral damages as the staff member did not present evidence of harm.

Judgment 2018-UNAT-873 - Section 5.14 of ST/SGB/2008/5 does not introduce a mandatory condition for the composition of an investigation panel, but merely professes a preference - judicial order directing ASG/OHRM to "institute" disciplinary proceedings impinges upon discretion of ASG/OHRM

Applicable law:

- Articles 2(1) and 10(5) UNDT Statute
- ST/SGB/2008/5

UNAT judgment: The staff member filed a complaint against her former supervisor and former colleague, pursuant to ST/SGB/2008/5. The complaint alleged improper deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, defamation and preferential treatment of another staff member. The complaint was investigated by two separate fact-finding panels resulting ultimately in the decision of the ASG/OHRM that no prohibited conduct took place and a decision to close the matter without further action.

The staff member contested the decision to take no further action on her complaint. The UNDT found that the contested decision was unlawful. Its conclusion was based on various findings of procedural unfairness and unreasonableness. The UNDT rescinded the contested decision to take no further action and remanded the case to the ASG/OHRM to institute disciplinary procedures against the staff member's former supervisor. It also ordered that the staff member be paid moral damages for the psychological harm she suffered as supported by medical evidence, as well as compensation for the harm of a loss of opportunity to have her complaint fully and properly investigated, as a result of the impossibility to conduct a third investigation after the first two had been vitiated as irregular.

UNAT held that the UNDT's findings that the former supervisor might have retaliated against the staff member for her work-related conduct and for seeking recourse in the internal justice system and that he used his position of authority to improperly influence her work conditions were supported by the available evidence. UNAT found that the former supervisor had evicted the staff member from her functions preventing her from carrying out her duties and intended to humiliate and embarrass her by unjustifiably copying uninterested persons in personal and confidential communications concerning her performance. The former supervisor adopted an aggressive and abrasive tone, made demeaning remarks in his communications to the staff member and thereby created a hostile and offensive work environment. Such actions constituted possible misconduct or harassment as defined in ST/SGB/2008/5. For these reasons, the contested decision to take no further action into the staff member's complaint against her former supervisor was irrational and not one that a reasonable

decision-maker could reach. UNAT concluded that the rescission of the contested decision by the UNDT was therefore correct and within its remedial powers under Article 10(5) of the UNDT Statute. As for the contention that the investigation panel was improperly constituted, UNAT noted that Section 5.14 of ST/SGB/2008/5 does not introduce a mandatory condition that the panel be constituted by individuals from the department, office or mission and only exceptionally from the OHRM roster, but merely professes a preference. UNAT held that non-compliance with that preference will not lead to the nullity of any appointment from the roster provided that the selection is not unreasonable. UNAT further held that the UNDT's order directing the ASG/OHRM to "institute" disciplinary proceedings impinges upon the discretion of the ASG/OHRM. UNAT modified the order of the UNDT to direct the ASG/OHRM to act in terms of Section 5.18(c) of ST/SGB/2008/5. Finally, UNAT reduced the UNDT's award of moral damages on the grounds that the staff member had contributed to several months of delay in the investigation and she did not lose an opportunity to have her complaint properly investigated.
