

**First activity report of the Office of Administration of Justice
1 July – 31 December 2009**

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I. Introduction

III. Activities of the United Nations Dispute Tribunal

A. Composition of the Dispute Tribunal

1. Judges of the Dispute Tribunal

9. In 2 March 2009, the General Assembly elected three full-time judges and two half-time judges. Subsequently, the General Assembly elected for a period of one year three ad litem judges to assist in handling the backlog of cases transferred from the Joint Appeals Boards (JABs) and Joint Disciplinary Committees (JDCs). The composition of the UNDT is as follows:

JAB/JDC cases were transferred to the Registry in Nairobi and 91 JAB/JDC cases were transferred to the Registry in New York.

15. Subsequently, judges agreed on the geographical distribution of cases among the three locations of the UNDT. Specifically, judges decided that if an applicant's office or duty station at the time of the contested decision was or is located in Europe or Western Asia (including the

Chart 2 New applications received in each registry (Geneva, Nairobi and New York) of the UNDT from 1 July to 31 December 2009

18. Chart (3) below shows that the majority of the new applications were received from applicants in the UN Secretariat, including UNHCR. The UNDT handled 69 cases from applicants in the UN Secretariat, 20 cases from applicants in the peacekeeping missions, 18 cases from applicants in UNDP, 10 cases from applicants in UNICEF and 4 cases from applicants in other entities such as UNFPA, UNOPS and WFP (local staff only).

Chart 3 New applications received by agency of applicants

4. Cases disposed of by the UNDT in 2009

19. The UNDT disposed of 93 cases in 2009. Chart (4) below shows that the Geneva Registry disposed of 52 cases while the Nairobi and New York Registries disposed of 19 and 22 cases respectively. The large number in Geneva is partially explained by group cases (instances where a number of applicants contested the same administrative decision) split into individual cases in Geneva, as well requests for suspension of action and applications on merits being counted as separate cases.

Chart 4 Cases disposed of by the UNDT in 2009

5. Number of judgments, orders and hearings

20. During the period 1 July to 31 December 2009, the UNDT issued 97 judgments on both the merits of cases and interlocutory matters. A total number of 255 orders were issued and 172 hearings were held by the UNDT. The average time taken to process a case in 2009 in each location was 3.5 months. Chart (5) below details the numbers of judgments, orders and hearings held by judges in Geneva, Nairobi and New York.

Chart 5 Number of judgments, orders and hearings in Geneva, Nairobi and New York

6. Cases referred to the Mediation Division

21.

23. Chart (6) below shows that, at 31 December 2009, 56 cases were pending in the Geneva Registry, 56 cases were pending in the Nairobi Registry and 78 cases were pending in the New York Registry.

Chart 6 Cases pending before the Dispute Tribunal as at 31 December 2009

8. Cases by subject-matter

24. The nature of cases before the UNDT can be roughly distinguished into seven categories:

Chart 7 Nature of cases before the UNDT

Chart 8 Cases by subject-matter

9. Legal representation of applicants before the UNDT

27. During the period covered by this report, 29% of staff members were not represented by legal counsel before the UNDT. OSLA provided legal assistance in 35% of cases before the Tribunal, 19% staff chose to be represented by legal counsel and 17% of staff were represented by volunteers who were either current or former staff members of the Organization (see chart 10). The greatest proportion of self-represented staff members was before the Geneva judges, with a rather important proportion of staff represented by volunteers. In Nairobi and New York, OSLA represented applicants in the majority of cases (see chart 9).

Chart 9 Legal representation of applicants in the three Registries

Chart 10 Legal representation of applicants before the UNDT

IV. Activities of the United Nations Appeals Tribunal

A. Composition of the UNAT

1. Judges of the Appeals Tribunal:

28. On 2 March 2009, the General Assembly elected the following ~~se~~ ~~ed~~ ~~ges~~ ~~;~~ judges:

Judge Inés Weinberg de ~~Pa~~ President (Argentina)

Judge Jean Courtial, First Vice-President (France)

Judge Sophia Adinyira, Second Vice-President (Ghana)

Judge Mark P. Painter (United States of America)

35. To date, four such entities have concluded special agreements with the UN Secretary-General accepting the competence of the UNAT: the International Civil Aviation Organization; the International Maritime Organization; the International Seabed Authority and UNRWA. It is anticipated that agreements will be concluded with the International Tribunal of the Law of the Sea and the International Court of Justice in the near future.

C. Judicial statistics

36. During the reporting period, the UNAT received five cases against the UNJSPB and 14 cases appealing judgments of the UNDT. The UNAT did not hold a session or issue judgments in any case in 2009.

V. Activities of the Office of

cases, OSLA provided summary legal advice to staff members not involving written submissions or negotiations with a third party.

41. Reasons for closure or resolution of cases included the following:

Chart 12 Cases pending in OSLA as at 31 December 2009

2.2.

	New Cases	Resolved/Closed	Ongoing/Continuing
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involving non-renewal of contract, non-promotion and termination of contract. The reasons for resolution or closure of cases are described below. Ongoing/continuing cases remain pending a final decision or other resolution as of 31 December 2009.

Chart 14 Cases by subject matter

5. Cases by client (Department, Agency, Fund or Programme)

48. Chart (15) below provides an overview of OSLA cases by Secretariat departments or UN agency, fund or programme. The majority of cases arise from contested decisions taken by peacekeeping missions (DPKO/DFS) (181 cases); a large number of cases stem out of contested decisions made by the Department of Management (DM) (74 cases). The next largest caseloads by entity are UNDP (53), Regional Commissions (35), UNICEF (33) and DSS (31). A total of 151 cases are from four Secretariat entities, namely DM, DGACM, DSS and DESA. This may be explained by the fact that NY-based staff can more readily contact OSLA as opposed to colleagues in field missions.

Chart 15 Cases by client (Department, Agency, Fund or Programme)

6. Cases by gender of applicant

Chart 16 Cases by gender of applicant

Mututa; and UNDT/2009/048, Tsoneva the Tribunal held that the Administration must follow its own procedures when promoting staff and that an irregularity that vitiates the non-promotion decision requires that that decision be rescinded or that compensation be awarded. In UNDT/2009/014, Parker, the Tribunal held that an applicant is able to contest a review body's decision of non-recommendation for promotion on incorrect facts. In UNDT/2009/074, Luvai, the Tribunal held that an applicant cannot challenge the recruitment process of a post to which he did not apply because the vacancy announcement did not

In UNDT/2009/092, Calvani, the Tribunal held that because a decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effects during the suspension period and can only be deemed to have been implemented in its entirety at the end of the administrative leave, the respondent cannot claim the decision has already been implemented and the applicant for suspension of action is therefore receivable.

Cumulative nature of the conditions to grant a request for suspension of action

13. In UNDT/2009/033, Onana, the Tribunal found that where a decision has been shown to be prima facie unlawful, and although the Rules require that the Tribunal considers two further elements before granting the applicant with the interim relief that he seeks, the illegality is so fundamental a factor that it ought to be sufficient for the impugned decision to be suspended. By contrast, the Tribunal held in all other judgments and orders on requests for suspension of action that the conditions for the granting of a suspension of action are cumulative and that it is enough to demonstrate that one condition is not met to reject the request.

Prima facie unlawfulness

14. In UNDT/2009/003, Hepworth, the Tribunal elaborated on the meaning of the Latin expression "prima facie" and found that prima facie does not require more than serious and reasonable doubts about the lawfulness of the contested decision. In UNDT/2009/004, Fradin de Bellabre, the Tribunal found that to establish prima facie unlawfulness there has to be evidence that it is at least probable that the decision was unlawful. In UNDT/2009/008, Osman, the Tribunal found that the decision not to renew the applicant's contract was unlawful inasmuch as his performance evaluations were conducted following an irregular procedure. Similarly, in UNDT/2009/16, Tadonki, the Tribunal held that any decision not to renew the fixed-term appointment of the applicant and to resort instead to extensions of the contract when faced with applications for suspension of action is prima facie unlawful. In UNDT/2009/063, Kasmani, the Judge held that since none of the facts adduced by the applicant were challenged by the respondent, it was entitled to accept the applicant's case as stated, namely that he had been victimised for a personal conflict between his first and second reporting supervisors and that therefore the decision he wished suspension of was prima facie unlawful.

15. In UNDT/2009/064, Buckley, the Tribunal elaborated on the expression "appears prima facie to be unlawful" as when there is a reasonably arguable case that the contested decision is unlawful so that a merely reasonable (hence legitimate in ordinary parlance) expectation of a particular outcome is not the same as a legitimate expectation that gives rise to any legal rights, and will be insufficient to establish reasonably arguable unlawfulness. In UNDT/2009/092, Calvani, the Tribunal found that it resulted from the respondent's ill will to adduce evidence regarding proof of the identity of the author of the contested decision to place the applicant on administrative leave that the contested decision is unlawful.

the implementation of the decision not to renew the applicant's appointment would cause to the

grounds that article 8 of the Statute which ~~refer~~ to “exceptional case” for the granting of extension of time limit should not be interpreted too narrowly. The judge specified that “exceptional” is normally defined as something out of the ordinary, quite unusual, special or uncommon; therefore, the Tribunal was not required to interpret “exceptional case” referred to in

Compensation

27. In Crichlow, the Tribunal found that in respect of compensation for emotional suffering and distress, non-statutory principles for calculation of compensatory damages for emotional suffering and stress include non-punitive damages awarded to compensate proportionally for negative effects of a proven breach. This was further elaborated on in UNDT/2009/084, Wu, in which the Tribunal held that financial compensation (under article 10.5(b) of the UNDT Statute) must be proportionate to the injury suffered, bearing in mind the maximum amount set in the Statute. Even if an applicant did not suffer any financial damage, the immaterial injury caused to him/her by an illegal administrative decision may warrant compensation for the negative effects of the proven breach. To determine the amount of compensation, particular circumstances of a given case have to be taken into account, including the impact the established breaches have on the victim.

Withdrawal of a withdrawal of an application

28. In UNDT/2009/023, Sheykhiyani, the Tribunal held that an applicant could not withdraw a withdrawal of an application. It ruled by way of summary judgment (since there were no dispute as to the material facts and judgment was restricted to a matter of law) that according to general principles of procedural law any statement of intention toward the court has to be clear and without any preconditions, and cannot be withdrawn because, normally, procedural law does not tolerate turning back the clock, as reasons of security and reliability tie the parties to their statements unless they were in error about their meaning.

Production of documents

29. In UNDT/2009/050, Koda, the Tribunal granted the applicant's motion for access to the notes taken by a fact-finding panel who prepared a confidential fact-finding panel report that allegedly cleared the applicant of misconduct allegations but made adverse findings and made recommendations including that conditions should be attached to the extension of the applicant's contract. The Tribunal ruled that the notes taken by the panel contain material that is or may well be relevant to the applicant's case.

Striking of submission, amended pleadings

30. In its Judgment UNDT/2009/082, Krioutchkov, the Tribunal did not grant the respondent's motion that the applicant's submission be struck out on the basis that the submission raised new factual and legal issues, relied on new documents and requested remedies different from those sought in the application on the merits. The Tribunal held that since neither the Statute nor the Rules of Procedure of the Tribunal prescribe the form of the parties' submissions filed in accordance with an order of the Tribunal, the matter falls under article 36 of the Rules of Procedure and the applicant cannot be precluded from amending his earlier submission so long as the respondent's legal rights and interests are not impaired.

Stay of proceedings, abuse of process

31. In UNDT/2009/020, Hussein, the Tribunal held that an applicant cannot seek a stay of the proceedings on the grounds that she wishes time to determine whether to continue, amend or terminate her appeal against a non-promotion decision, as appropriate, depending on whether the action is an abuse of process of the Tribunal.

Summary dismissal judgment

32. In UNDT/2009/027, Sina, the Tribunal dismissed the respondent's motion for summary dismissal judgment in a non-renewal case on the grounds that where evidence is capable of establishing a likelihood of a connection between

evidence will ordinarily arise that a failure to do so will make it relatively easy for the other party to treat the fact as proven.

Failure to comply with an order to show cause / striking of application

33. In UNDT/2009/006, Manokhin, and UNDT/2009/009, Kouka, the applicants in both cases failed to respond to the order to show cause why their appeals against a decision to summarily dismiss them should not be struck out since they had no reasonable prospect of success. The Tribunal found that it had authority to strike out the applications. The Tribunal held that the orders to show cause had been properly served on the applicants, that the evidence was sufficient to substantiate the charges, that these were cases of serious misconduct, there was no evidence of procedural irregularities or improper motive or abuse of power by the Administration. Both applications were struck out. Similarly, in UNDT/2009/069, Ahmad Ghosn, the Tribunal struck the application on the grounds that the applicant failed to actively and diligently pursue his claim.

Definition of an administrative decision

34. In UNDT/2009/074, Luvai, the Tribunal elaborated on the definition of an administrative decision. Specifically, the Judge found that the fact that the applicant did not apply for a post and, as result, there was no administrative decision affecting the applicant's rights, including his due process rights, did not preclude him from contesting the selection decision on the grounds that a decision must not necessarily be of individual application for an applicant to have a cause of action. In UNDT/2009/090, Teferra, the Judge held that given the nature of the decisions taken by the Administration, "there cannot be a precise limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken".

Recusal / conflict of interest

35. In UNDT/2009/005, Campos, the President of the Dispute Tribunal found that the applicant's claim that the Dispute Tribunal's Judges could not review the decision of the Secretary-General not to nominate him as a staff representative on the IJC had no merit. The President held that the Judges were elected by the General Assembly and they are not subservient to the members of the IJC. In UNDT/2009/033, Onana, the Tribunal held that to address the applicant's counsel's concerns about a potential conflict of interest, given that the Registrar of the Tribunal was partly involved in the contested decision making processes, it excused the Registrar from his functions in respect of this case so that would have no substantive involvement in the matter.

Mediation

36. In UNDT/2009/053, Adrian, the Tribunal considered that the case at hand was one that was eminently suitable for mediation as the mediation process would give the parties an opportunity to reach a satisfactory solution in what appeared to be a case of error and misunderstanding.

Legal costs

37. In Crichlow, the Judge held that legal costs will be awarded if the Tribunal finds that in the course of the proceedings there has been an abuse of the process by a party. There may be other instances when the Tribunal will feel compelled to order award of costs.