

**Fourth activity report of the Office of Administration of Justice  
1 July 2010 to 30 June 2011**



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## **I. Introduction**

1. The fourth report of the Office of Administration of Justice (OAJ) outlines the activities of the Office for period 1 July 2010 to 30 June 2011.
2. As the previous reports, this report covers the activities of the Office of the Executive Director, the UN Dispute and Appeals Tribunals and the Office of Staff Legal Assistance (OSLA).

## **II. Executive Summary**

3. During the second year of operation, the Office of the Executive Director, OAJ, closely monitored the discussions on the item administration of justice in the Fifth and Sixth Committees of the General Assembly, especially in regard to requests for additional resources. In its resolution 65/251, the General Assembly decided

**III.**

Judge Coral Shaw (New Zealand), half-time judge

Judge Jean-François Cousin (France), ad litem judge based in Geneva

Judge Nkemdilim Amelia Izuako (Nigeria), ad litem judge based in Nairobi

Judge Marilyn Kaman (United States), ad litem judge based in New York

15. At its 65th session, the General Assembly decided to extend the tenure of the three ad litem judges and their support staff for an additional six months until 31 December 2011. (See resolution 65/251.) The New York ad litem judge, Judge Marilyn Kaman was unable, for personal reasons, to accept a second term of office and she resigned effective 1 July 2011. In its report to the General Assembly A/65/853, the IJC decided, in view of the short period for the appointment, not to recommend any candidates for this vacancy.

## **2. Election of the President**

16. At the New York plenary meeting held from 27 June to 1 July 2011, Judge Memooda Ebrahim-Carstens was elected President for one year, from 1 July 2011 to 30 June 2012.

## **3. Plenary meetings**

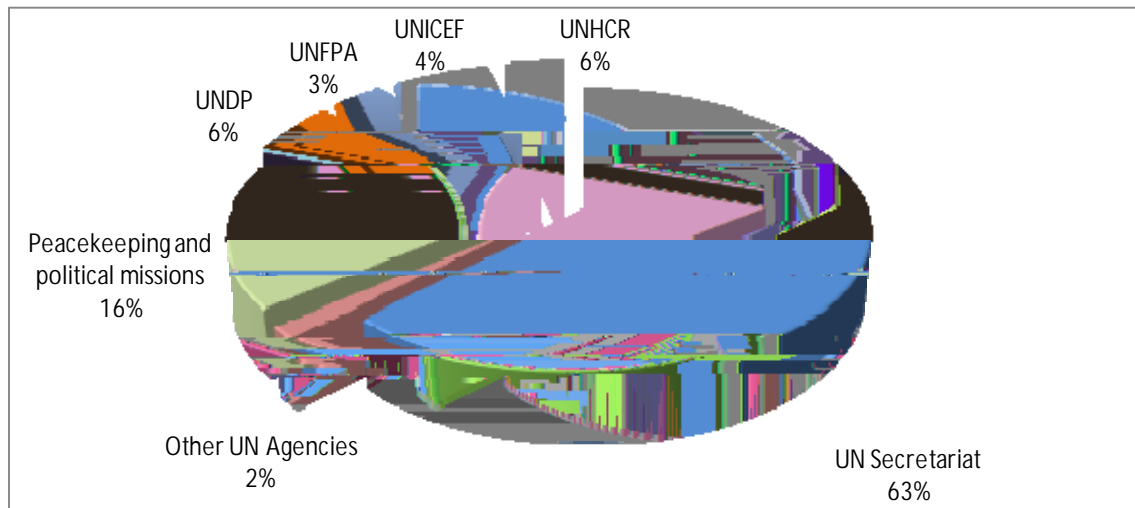
17. During the reporting period, the Judges of the Tribunal held two plenary meetings: from 13 to 17 December 2010 in Geneva and from 27 June to 1 July 2011 in New York. During the first of these meetings, the Judges discussed and agreed on a wide range of administrative and legal issues concerning their work; presented and discussed a series of practice directions and papers; considered and adopted an amendment to article 19 of the Rules of Procedure; and met with the OAJ Executive Director. At the second meeting, the Judges also presented and discussed a series of practice directions and papers; adopted a number of resolutions; held a closed round table with high-level United Nations officials, followed by a stakeholders' meeting; and met with the OAJ Executive Director.

# **B. Judicial statistics**

## **1. General activity of the Tribunal**

18. At the beginning of the reporting period, as at 1 July 2010, the UNDT had 290 pending cases. During the period 1 July 2010 to 30 June 2011, the UNDT received a total of 201 new cases (including six cases remanded by the Appeals Tribunal) and disposed of 244 cases (including four remanded cases). As at 30 June 2011, 247 cases were pending, including 56 cases from the old system.

19. Of the 201 cases received during the reporting period, 126 cases originated from the UN Secretariat (excluding peacekeeping and political missions), including the regional commissions, offices away from headquarters, ICTR and ICTY, and various UN departments and offices; 32 cases originated from peacekeeping and political missions; and 43 cases from UN agencies, including UNHCR, UNDP, and UNICEF.

**Chart 1 Distribution of registered cases by clients (1 July 2010-30 June 2011)**

## 2. Cases transferred to the UNDT by the JABs and JDCs

20. During the reporting period, 33 of the cases inherited from the JABs and JDCs in Geneva, Nairobi, New York and Vienna had been disposed of (including three remanded cases): five in Geneva (including two remanded cases), 19 in Nairobi (including one remanded case) and nine in New York. Nine such cases, including two remanded cases, are still pending: two in Geneva (including one remanded case), four in Nairobi (including one remanded case) and three in New York.

## 3. Cases transferred to the UNDT by the former UN Administrative Tribunal

21. During the same period, 84 of the cases transferred from the former Administrative Tribunal were disposed of: 32 in Geneva, 19 in Nairobi and 33 in New York. A total of 47 of such cases remain pending: seven in Geneva, 21 in Nairobi and 19 in New York.

## 4. New applications received between 1 July 2010 and 30 June 2011

22. Between 1 July 2010 and 30 June 2011, the UNDT received a total of 201 new applications (including six remanded cases). Each month, on average, 17 applications were filed with the UNDT. Of the new applications, 64 were received in Geneva (including three remanded cases), 56 in Nairobi (including three remanded cases) and 81 in New York. As at 30 June 2011, 191 new cases (including two remanded cases) are pending: 41 (including one remanded case) in Geneva, 61 2

judgements, issued 206 orders and held 123 hearings; and, New York rendered 89 judgements, issued 343 orders and held 66 hearings.

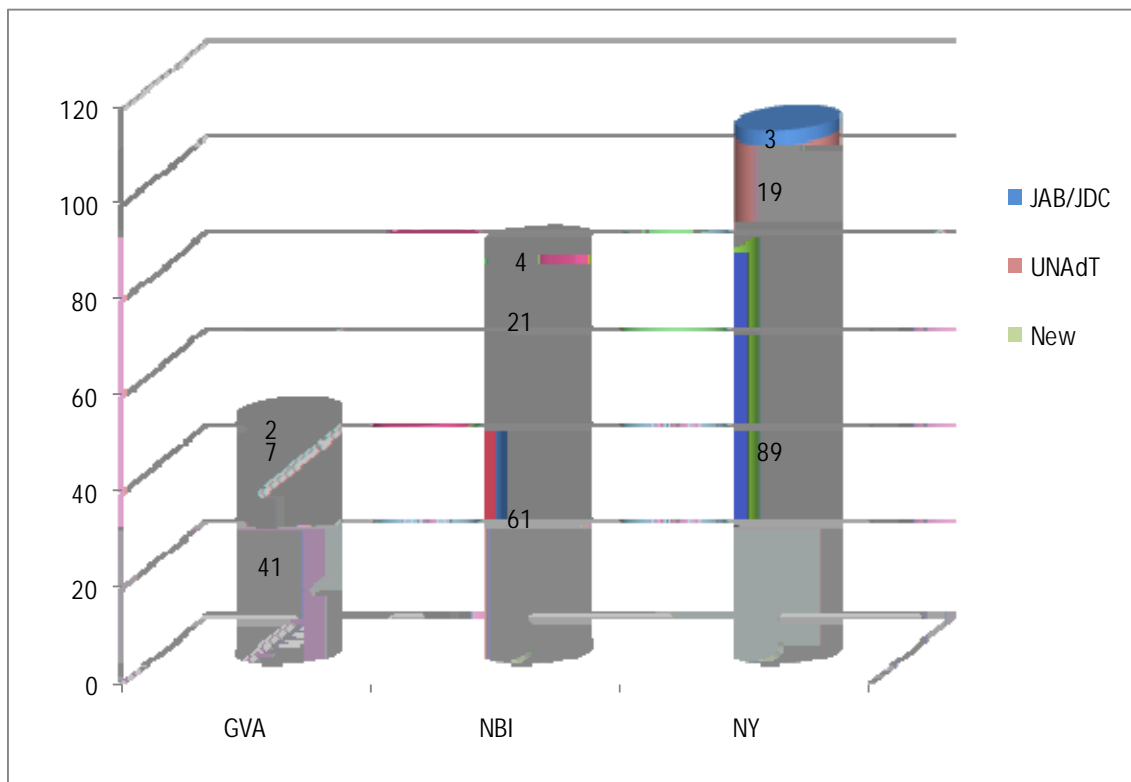
**7. Cases referred to the Mediation Division**

25. During the period covered by this report, the UNDT identified 14 cases suitable for mediation and referred them to the Mediation Division in the Office of the Ombudsman. Of these, seven cases were successfully mediated.

**8. Cases pending before the UNDT as at 30 June 2011**

26. As at 30 June 2011, the Dispute Tribunal had 247 cases pending, 191 of them being new cases (including two remanded cases), nine cases transferred by the former JABs and JDCs (including two remanded cases) and 47 cases transferred by the former Administrative Tribunal. Chart 2 below shows that, as at 30 June 2011, 50 cases were pending in the Geneva Registry (including two remanded cases), 86 cases were pending in the Nairobi Registry (including two remanded cases) and 111 cases were pending in the New York Registry.

**Chart 2 Cases pending before the Dispute Tribunal as at 30 June 2011**

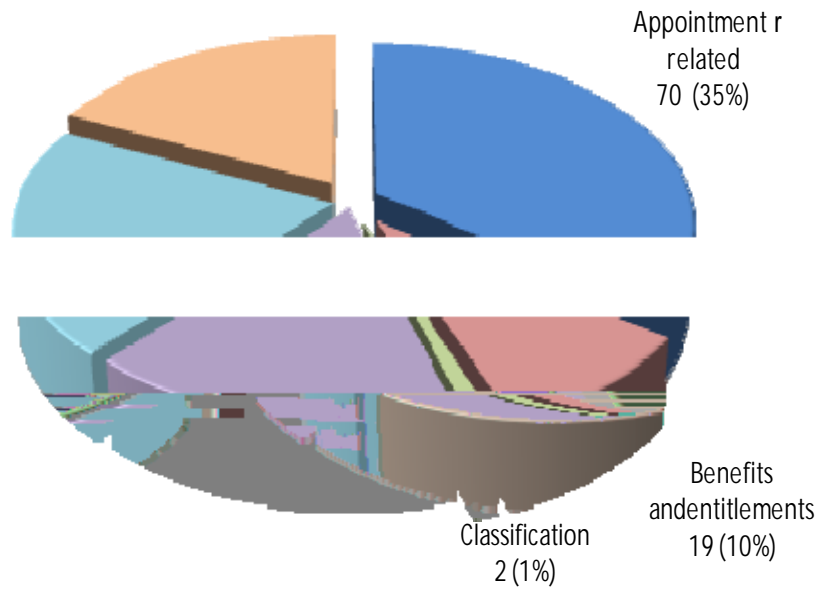


**9. Cases by subject-matter**

27. The nature of cases before the UNDT received during the reporting period may be distinguished into six main categories: (1) appointment-related matters (non-selection, non-promotion and other appointment-related matters), (2) benefits and entitlements, (3) classification, (4) disciplinary matters, (5) separation from service (non-renewal and other separation matters), and (6) other. The Chart below shows the number of cases registered between 1 July 2010 and 30 June 2011 by subject-matter for the three Registries.



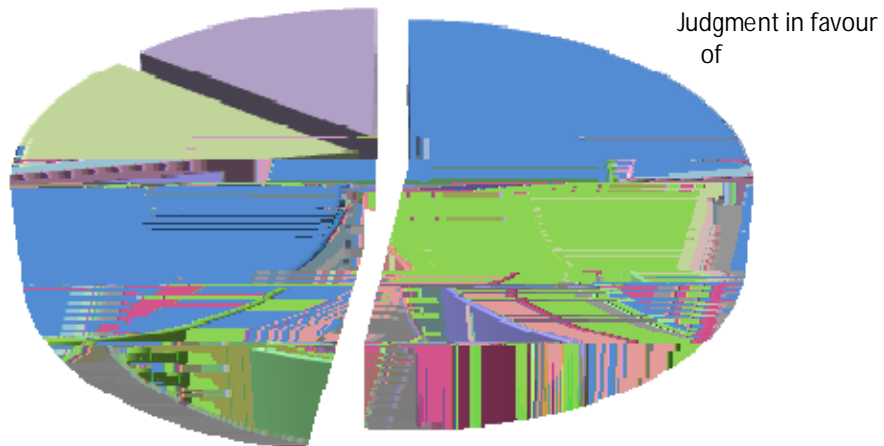
**Chart 3** Cases registered between 1 July 2010 and 30 June 2011 by subject-matter (combined data for the three Registries)



### 11. Outcome of disposed cases

29. During the period covered by this report, 244 cases were disposed of. Of these cases, 127 judgements were in favour of the respondent (i.e., application rejected in full), 49 judgements were in favour of the applicant in full and 33 judgements were in favour of the applicant in part (i.e., some claims on liability granted). A total of 35 applications were withdrawn, including cases successfully mediated or settled (see Chart 5).

**Chart 5 Outcome of closed cases (combined data for the three Registries)**



Judge Mary Faherty (Ireland)

32. On 11 October 2010, Judge Rose Boyko tendered her resignation from the Appeals Tribunal, for personal reasons, effective 15 January 2011. On 28 January 2011, the General Assembly elected Judge Mary Faherty (Ireland) to replace Judge Boyko.

**2. Election of the President and Vice-Presidents**

33. From 1 July 2010 to 30 June 2011, Judge Courtial served as President, and Judge Adinyira and Judge

**3. Relief ordered and compensation awa**

### **C. Challenges and observations**

52. Funding limitations continue to present many challenges for OSLA's ongoing operations. In his second report to the General Assembly on the functioning of the system (A/66/275), the Secretary-General re-emphasized the need to strengthen OSLA with a number of additional posts, both at the professional and general service level. The report also contains a proposal for staff-funded mechanisms to fund OSLA, in response to a request from the General Assembly at the 65th session (see resolution 65/251, paragraph 40).

53.

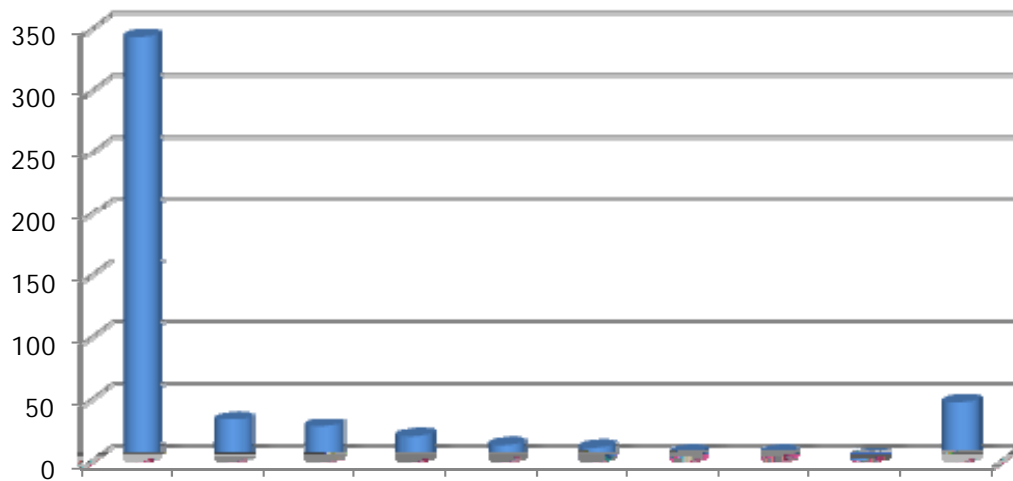
**3. Representation before the Dispute Tribunal**

59.

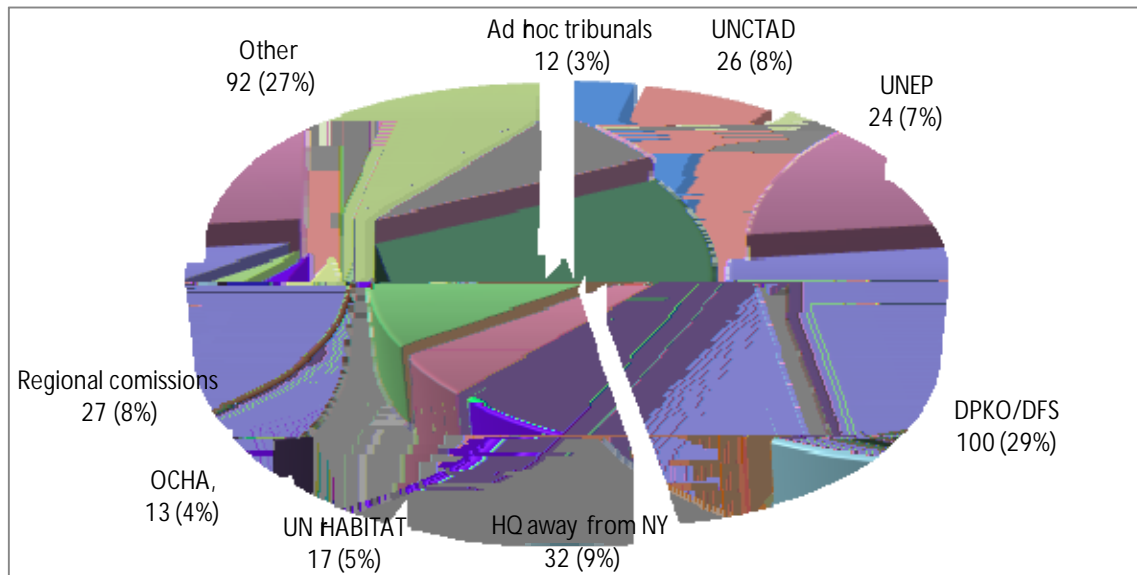
**5. Cases by client (Department, Agency, Fund or Programme)**

61. Charts 8 and 9, below, provide a breakdown of new OSLA cases received from Secretariat departments or UN agency, peacekeeping and political missions, and funds or programmes between 1 July 2010 to 30 June 2011.

**Chart 8 Cases by client (department, agency, fund or programme)**



**Chart 9** Cases submitted by office in UN secretariat during reporting period



**6. Cases by gender**

62. Of the 506 new cases, 302 were brought by male staff members and 204 by female staff members.





















taken. However, when an organizational measure affecting a staff member is taken based on the personal circumstances of that staff member, s/he must have the possibility to present observations before the decision is taken.

***Work conditions***

75. In *Edwards* UNDT/2011/022 and *Applicant* UNDT/2011/106, the Tribunal acknowledged the existence of a general principle of law according to which the Administration is bound to provide a safe work environment.

76. In *Leboeuf et al.*, the Tribunal examined in detail the definitions of “scheduled workday” and “hours of work” in order to determine the scope and application of compensation for overtime.

***Performance evaluation***

77. In *Simmons* UNDT/2011/084 and *Simmons* UNDT/2011/085, the Tribunal held that, although the Administration shoulders the ultimate responsibility for implementing and completing the performance evaluation report, including the workplan, staff members also have certain obligations, including preparing a draft workplan.

78. In *Jennings*, the Tribunal held that rebuttal proceedings

UNDT/2010/102 that it cannot and should not, except in rare situations, excuse an applicant for the failure of her/his counsel to successfully defend her/his case.

84. In *Morin* UNDT/2011/069, the Tribunal held that the principle of the equality of arms requires that a fair

## APPENDIX II

### Proceedings of the UNAT

#### Introduction

1. A summary of the major legal pronouncements made by the UNAT in judgments rendered (1 July 2010 to 30 June 2011) is provided below. The summaries are not authoritative and the judgments cited below are not comprehensive. For a complete set of the judgments issued during the period covered by this report by the Appeals Tribunal, the website of the Appeals Tribunal (<http://un.org/en/oaj/appeals>) should be consulted.

#### Access to the internal justice system

2. In *Gabaldon* (2011-UNAT-120), the Appeals Tribunal recalled that an employment contract of a staff member subject to internal laws of the Organization is not the same as a contract between private parties, and that the issuance of a letter of appointment by the Administration can not be regarded as a mere formality. The issue before the Appeals Tribunal was whether the appellant, who had received an offer of employment, but not a letter of appointment, from the Organization, should be regarded as a staff member and thus should have access to the internal justice system to contest the legality of the Administration's withdrawal of the offer of employment. The Appeals Tribunal held that an offer of employment, though it does not constitute a valid employment contract, may produce legal effects, if all the conditions set forth in the offer of employment were unconditionally accepted and fulfilled by the offeree in good faith. In such a situation the offeree should be regarded as a staff member for the limited purpose of seeking recourse within the internal justice system. The Appeals Tribunal overturned the UNDT's judgment and remanded the case to the UNDT for examination of facts of the case in light of its holding.

#### Production of documents

3. In *Bertucci* (2011-UNAT-121), the Appeals Tribunal stated the principle that the UNDT has the right to order the production of any document relevant for the purposes of the fair and expeditious disposal of its proceedings. If the Administration opposes the UNDT's order to produce a certain document in its possession, it may, with sufficiently specific and justified reasons, request the UNDT to verify the confidentiality of the document in question. Before such verification is completed, the said do

administration of justice is rendering timely Judgments. Cases before the UNDT could seldom proceed if either party were able to appeal interlocutory decisions.

7. One judge dissented on the grounds that privilege, if claimed, is a threshold issue and must be determined finally before the trial may proceed. To do otherwise could lead to error by the trial judge that would result in a new trial. If the evidence in question is truly privileged, it cannot be ordered to be produced as this would destroy the privilege. Also, if truly privileged, the trial judge would err in drawing an adverse inference against its non-production.

8. In *Wasserstrom* (2010-UNAT-060), the Appeals Tribunal, applying its ruling in *Bertucci* (2010-UNAT-062), rejected as not receivable an interlocutory appeal against the UNDT decision that the determination by the Ethics Office that no retaliation occurred constituted an administrative decision falling within the jurisdiction of the UNDT. The alleged lack of jurisdiction of the UNDT was not clearly established in this case: the question of whether there was an administrative decision required adjudication on the merits of the case and could not be the subject of an interlocutory appeal.

9. The Appeals Tribunal further held in *Wasserstrom* that the appeal against the UNDT's order for production of documents was not receivable because it was interrelated with the alleged lack of jurisdiction. Interlocutory appeals on matters of evidence, procedure, and trial conduct were not receivable.

#### **Anonymous evidence in disciplinary proceedings**

10. In *Liyararachchige* (2010-UNAT-087), the Appeals Tribunal determined that the UNDT erred in law by upholding the decision to summarily dismiss the staff member, which was taken in violation of the requirements of adversarial proceedings and due process. The Tribunal held that, while the use of statements gathered in the course of an investigation from witnesses who remain anonymous throughout the proceedings, including before the Appeals Tribunal, cannot be excluded as a matter of principle from disciplinary matters, a disciplinary measure may not be founded solely on anonymous statements.

#### **Power to award interest and applicable interest rate**

11. In *Warren* (2010-UNAT-059), the Appeals Tribunal found that both the UNDT and the Appeals Tribunal have the power to award interest in the normal course of ordering compensation. Noting the inconsistent approach of the UNDT in several of its judgments, the Appeals Tribunal decided to award interest at the US Prime Rate applicable at the due date of the entitlement, calculated from the due date of the entitlement to the date of payment of the compensation awarded by the UNDT. The Appeals Tribunal further decided that its judgments must be executed within 60 days of the date the judgment is issued to the parties. If the judgment is not executed within 60 days, five per cent must be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of compensation.

12. One judge dissented on the ground that the UNDT had no statutory authority to impose interest and therefore exceeded its jurisdiction in awarding interest.

13. In later judgments (*Castelli* (2010-UNAT-082); *Mmata* (2010-UNAT-092); *Ianneli* (2010-UNAT-093), the Appeals Tribunal modified or set aside the UNDT judgments on the issue of interest rate so as to bring them in line with *Warren*.

#### **Payment of, and maximum amount of, compensation**

14. In *Crichlow* (2010-UNAT-035), the Appeals Tribunal noted that the Secretary-General had already paid the damages awarded by the UNDT. By paying the compensation ordered, the Secretary-General accepted the UNDT judgment and his cross-appeal was therefore moot.

15. In *Mmata*, the Appeals Tribunal affirmed the UNDT award of compensation for loss of earnings for seven months from the date of *Mmata*'s separation from service to the date of the UNDT judgment (as an alternative to the order for reinstatement of the staff member) plus an additional amount of two years' net base salary. The Secretary-General maintained that, while the total of these amounts exceeded the compensation limit of two years' net base salary, the UNDT did not particularize any reasons to justify an increased award under article 10.5 (b) of the UNDT Statute. In the opinion of the Appeals Tribunal, article 10.5 (b) of the UNDT Statute

does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation. In addition to finding that the staff member was unfairly dismissed for serious misconduct, the UNDT found evidence of blatant harassment and an accumulation of aggravating factors that supported an increased award.

**Damages awarded without evidence of economic loss**

16. In *Abboud* (2010-UNAT-100), the Appeals Tribunal noted that the UNDT found that the irregularities did