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All Heads of Departments and Offices

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A:

REFERENCE:

FROM: Andrei Terekhov, Executive Director  
DE: Office of Administration of Justice

*Terekhov*

~~SUBJECT: Third Activity Report of the Office of Administration of Justice  
(1 July to 31 December 2010)~~

~~It is submitted with the Third Activity Report of the Office of Administration of Justice  
covering the period from 1 July to 31 December 2010.~~

cc: The Deputy Secretary-General  
Mr. Nambiar  
Mr. Kim  
Executive Officers  
Chiefs of Administration

Third activity report of the Office of Administration of Justice  
1 July to 31 December 2010

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## I. Introduction

1. The third report of the Office of Administration of Justice (OAJ) outlines the activities of the Office for period 1 July to 31 December 2010.
2. As the previous two 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 reporting period, the Office of the Executive Director, OAJ, was mainly tasked with the coordination of the preparation of the report of the Secretary-General to the General Assembly, providing a review of the formal system of administration of justice. It also continued to make improvements to the OAJ website, which was launched on 28 June 2010, in particular to the website search capability in order to facilitate search of orders and judgments, and to the fully web-based case management system, which is nearing completion. In keeping with the mandate to negotiate and conclude agreements with entities in the UN Common system wishing to participate in the UN system of administration of justice, two additional agreements were concluded, one with the International Tribunal for the Law of the Sea (ITLOS) and another with the United Nations Joint Staff Pension Fund (UNJSPF). This brings the total of such agreements concluded by the Secretary-General of the United Nations under article 2.10 of the UNAT Statute to six. An agreement with the International Court of Justice (ICJ) is close to finalization. The OAJ also carried out an outreach mission to and held a town-hall meeting at Entebbe Support Base (MONUSCO), Uganda, on 1 and 2 July 2010. Additionally, the OAJ has supported the Internal Justice Council (IJC) in its work, including the preparation of its report to the General Assembly on the implementation of the new system of administration of justice, as well as the preparation of a code of conduct for the judges of the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), for consideration by the General Assembly.
4. To give a general overview of the first 18 months of operation of the new system of administration of justice (1 July 2009 to 31 December 2010), the UNDT received a total of 588 cases (including cases transferred from the old system) and disposed of 329 cases, rendered 313





21. The geographical distribution of cases among the three locations of the UNDT has been changed as follows:

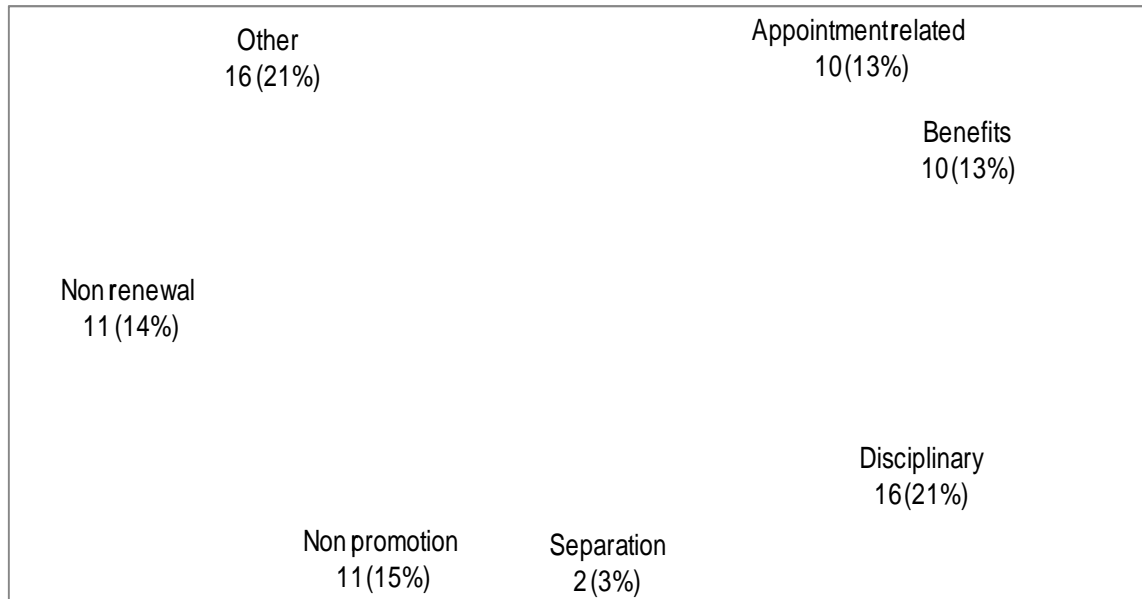
(a) Locations covered by the Geneva Registry:







Chart 5 Cases registered between 1 July and 31 December 2010 by subject-matter (combined data for the three Registries)



10. Legal representation of applicants before the UNDT

30. During the period covered by this report, OSLA provided legal assistance in 25 of new cases before the Tribunal, 12 staff members were represented by private counsel, nine staff members were represented by volunteers who were either current or former staff members of the Organization and 30 staff members represented themselves (see Charts 6 and 7).

Chart 6 Legal representation of applicants, registered cases by Registry (1 July to 31 December 2010)

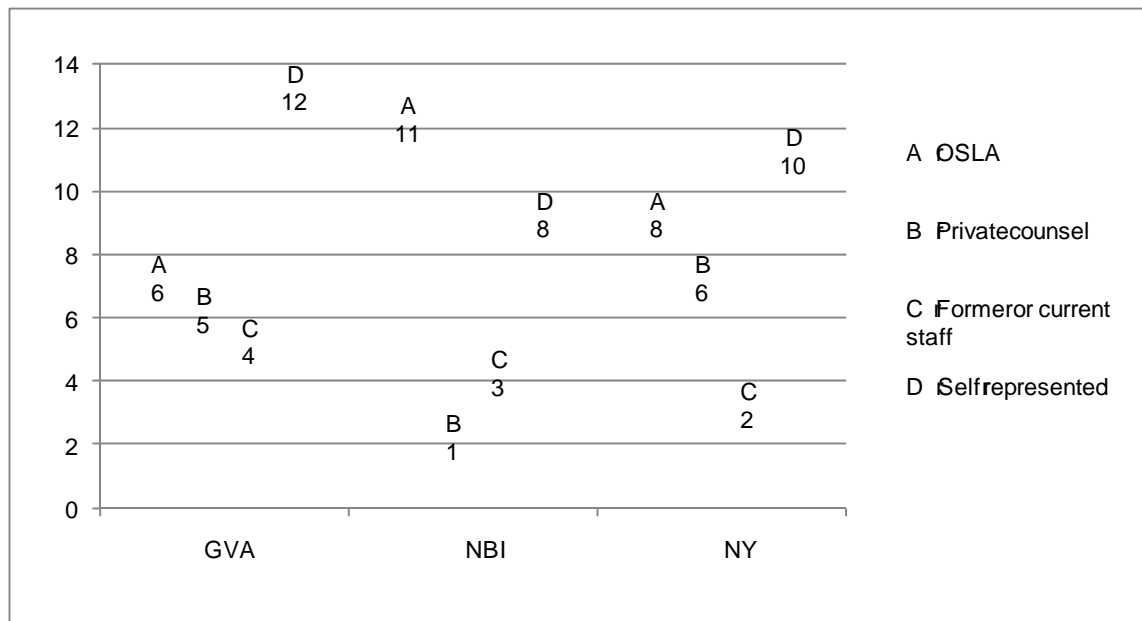
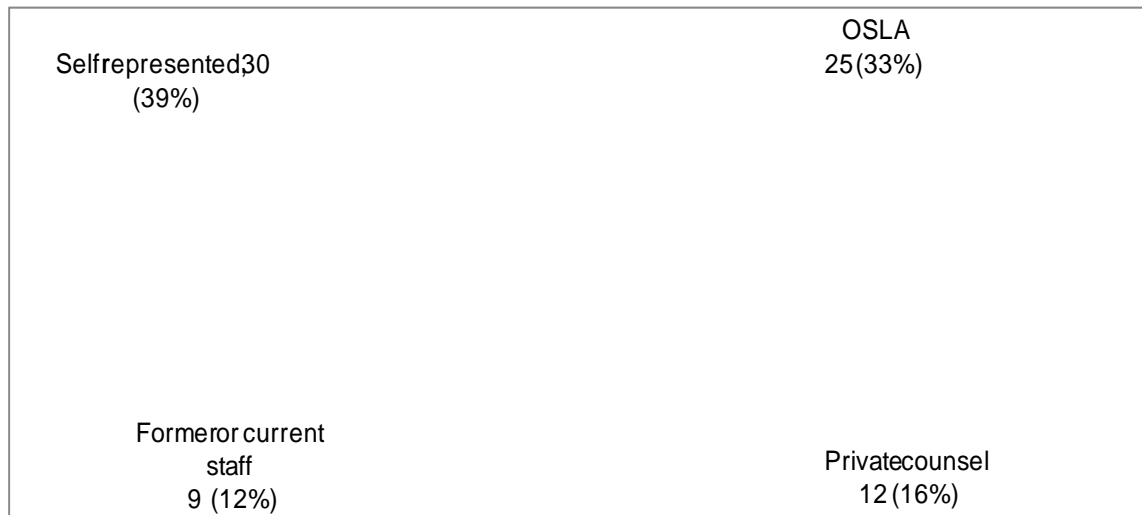


Chart 7 Legal representation of applicants (combined data for the three Registries)



11. Outcome of disposed cases

31. During the period covered by this report, 107 cases were disposed of. Of these cases, 52 judgements were in favour of the respondent (application rejected in full), 14 judgements were in favour of the applicant in full and 24 judgements were in favour of the applicant in part (i.e., some claims on liability). A total of 17 applications were withdrawn, including cases successfully mediated or settled (see charts 8 and 9).

Chart 8 Outcome of closed cases, by Registry (1 July to 31 December 2010)

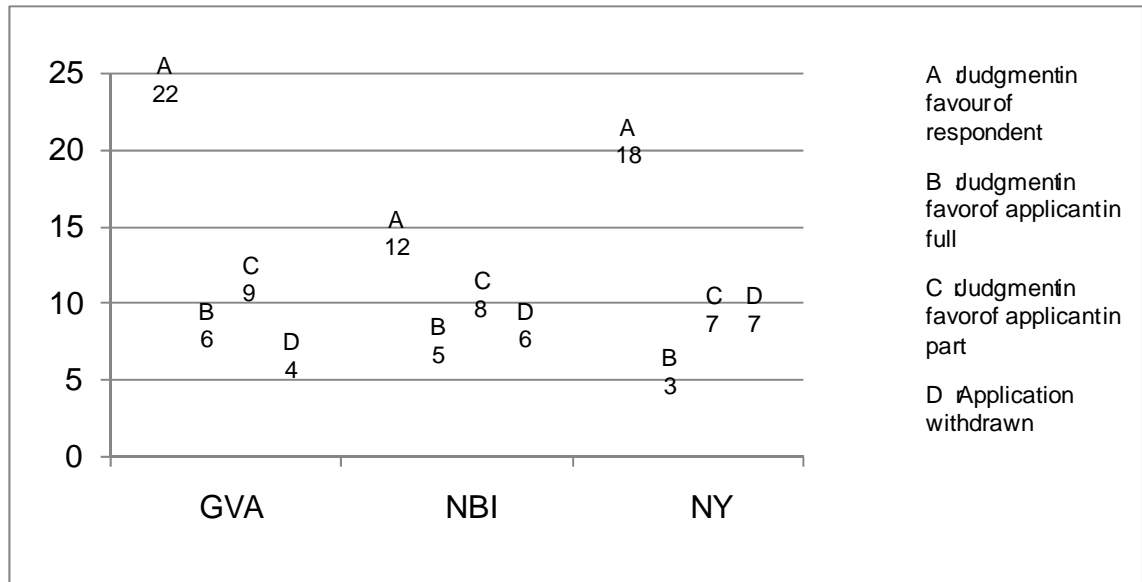
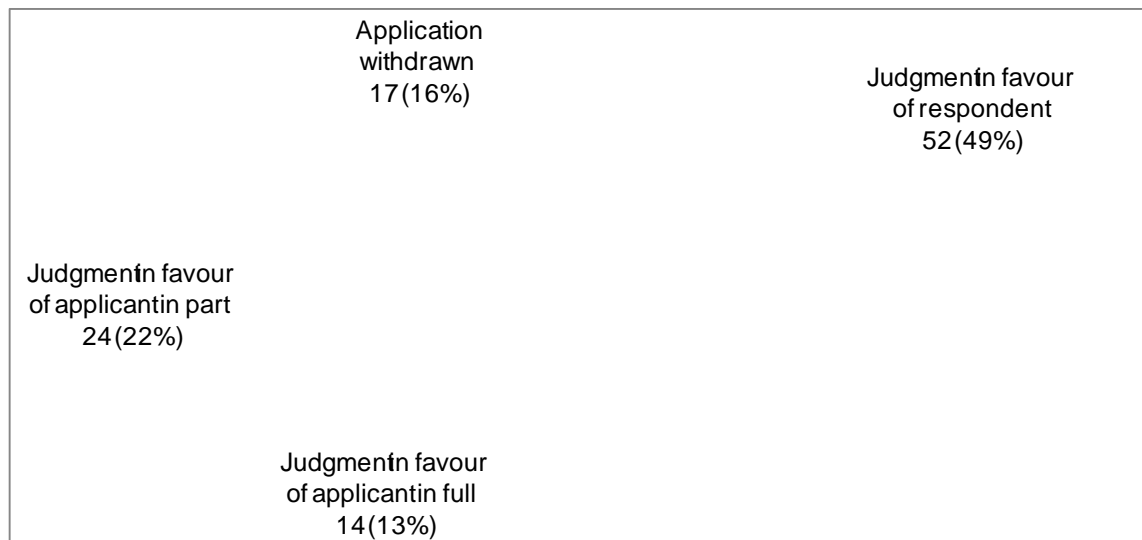


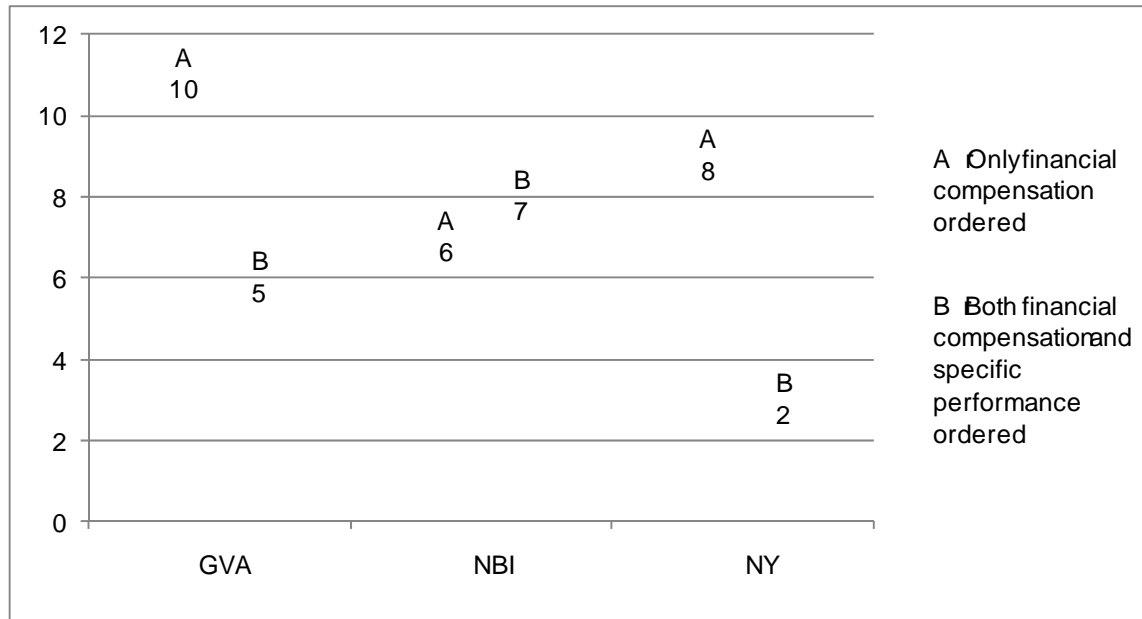
Chart 9 Outcome of closed cases (combined data for the three Registries)



12. Relief ordered and compensation awarded

32. During the period covered by this report, 38 judgements were rendered in favour of the applicant either in full or in part. In 24 instances, only financial compensation was ordered. In 14 instances, both financial compensation and specific performance were ordered.

Chart 10 Relief ordered by Registry (1 July to 31 December 2010)



V. Activities of the United Nations Appeals Tribunal

A. Composition of the Appeals Tribunal

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## B. Judicial statistics

### 1. General activity of the Tribunal

36. This report includes statistics from the summer 2010 session of the Appeals Tribunal (held from 21 June to 1 July) which were not yet available when the prior report was prepared and from its fall session, which was held from 18 to 29 October 2010. At these two sessions, the Tribunal heard and passed judgement on appeals filed against judgements rendered by the UNDT (see article 2.1 of the UNAT Statute); against decisions of the Standing Committee acting on behalf of the UNJSPB, alleging non-observance of the Regulations of the UNJSPF (see article 2.9 of the UNAT Statute); and, on appeals from entities that have concluded a special agreement with the Secretary-General of the United Nations under article 2.10 of its Statute

37. During the first 18 months of operation, UNAT received a total of 186 new appeals, rendered 103 judgements and disposed of 95 cases. It issued 30 orders.

38. During the reporting period, from 1 July to 31 December 2010, UNAT received a total of 76 new appeals, including seven against the Fund, three against UNRWA, one against ICAO, and 51 cases appealing judgements of the UNDT staff members and 14 by the Administration. The Tribunal issued 28 orders.

### 2. Outcome of disposed cases

39. During the period covered by this report, 70 judgments were issued and 62 cases were disposed of.

40. One judgement was rendered in appeal against the UNJSPB, in which the Appeals Tribunal

## VI. Activities of the Office of Staff Legal Assistance

### A. Introduction

47. During the first 18 months of operation, OSLA dealt with 1192 cases, 714 of which it has closed or resolved. As at 31 December 2010, OSLA had a total of 478 active cases.

48. During the current reporting period (1 July 2010 to 31 December 2010), OSLA received 254 new cases and closed 204 cases.

49. These numbers reflect OSLA representing staff members before a body in the formal system, assisting in informal dispute resolution,



counterparts in the legal offices of the Secretariat and UN agencies, funds and programmes. Positive and good progress has been made in this regard, both through resolving individual cases and through joint training opportunities and formal and informal exchanges with colleagues.

56. Against this background OSLA continues to achieve a great deal with limited resources. In summary, this achievement is demonstrated by: the number of cases resolved, either directly by OSLA or with OSLA's contributions and assistance, by the continued development of office structures, policies and internal guidelines, through the establishment of an internal database and on-line resources for use by legal counsel, and the establishment and coordination of a reliable network of volunteer and pro bono counsel and legal interns working with the Office. Other hallmarks of OSLA's progress include its positive contacts with UN staff unions and associations, members of the IJC, academic and legal institutions, and other UN entities. OSLA has completed several successful outreach/field missions to staff managers serving in field missions in the period 1 July to 31 December 2010, including Uganda (Entebbe Support base (MONUSCO)); Goma, DRC (MONUSCO); N'djamena, Chad (MINURCAT); Baghdad, Iraq, and Amman, Jordan (UNAMI); Naqoura, Lebanon (UNIFIL); Accra, Ghana (UNHCR and other UN entities); and, Cairo, Egypt (UNHCR and other UN entities).

#### D. Statistics

##### 1. Number of cases received in OSLA in the period 1 July to 31 December 2010

57. As at 1 July 2010, OSLA had 428 pending cases. From 1 July to 31 December 2010, 254 additional cases were brought by staff members (including former staff members or affected dependants of staff members) to OSLA. During the reporting period, 204 cases were closed or resolved, bringing the number of cases pending before OSLA to 478 as at 31 December 2010.

##### 2. Advice and legal representation to staff appearing before recourse bodies

58. Table 1 below provides further details of the 254 new OSLA cases for the period 1 July to 31 December 2010, including a breakdown of formal cases before each recourse bodies, those not before formal bodies or where summary advice was provided, and the number of closed or resolved cases for each recourse body or category.

59. In Table 1, "Disciplinary cases" indicate those cases where OSLA provided assistance to staff members in responding to allegations of misconduct. In cases before the UNDT and UNAT, as well as the former UN Administrative Tribunal

|                              |     |     |
|------------------------------|-----|-----|
| UNICEF OIA                   | -   | -   |
| UNJSPF                       | -   | -   |
| Cases before formal body     | 103 | 110 |
| Cases not before formal body | 34  |     |

Chart 12 OSLA closed/resolved cases before UN Dispute Tribunal by venue  
(Geneva, Nairobi and New York)

NY  
13(32%)

GVA  
14(34%)

NBI  
14(34%)

Chart 14 Closed/resolved cases by subject matter for the period 1 July to 31 December 2010



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

62. Charts 15 and 16, below, provide an overview of OSLA cases received from Secretariat departments or UN agency, peacekeeping political missions, and funds or programmes between 1 July and 31 December 2010.



**6. Cases by gender**

57. Of the 254 new cases, 149 were brought by male staff members and 105 by female staff members. Of the cases closed/resolved during the reporting period, 114 were from male staff members and 90 from female staff members.

# APPENDIX I

## Proceedings of the UNDT

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| 4. Appeals in respect of benefits/entitlements/salaries/allowances/cl  |   |
| 5. Other appointment-related appeals (including reassignment of sta  |   |
| appointment beyond retirement age, withdrawal of offer of appoi  |   |
| 6. Separation from service .....   |   |
| 7. Suspension of action pending management evaluation .....  |   |
| 8. Other matters.....  |   |

### Introduction

1. A summary of major legal pronouncements made by the UNDT in judgments rendered from 1 July to 31 December 2010 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 UNDT, the website of the UNDT (<http://un.org/en/oaj/dispute/>) should be consulted. It should also be borne in mind that, at the time of the writing of the report, a number of UNDT judgments were being appealed before the UNAT by either the applicant or the respondent. Therefore, the findings made by the UNDT in a number of the judgments mentioned below should not be considered final and the website of the UNAT should be consulted for the final determination made in the cases being appealed.

#### 1. Non-promotion/non-selection

2. In *Liarski* UNDT/2010/134, the Tribunal held that job requirements differing from those expressed in a generic job profile which are seen as necessary or desirable for a particular post are permitted, provided that the drafters of the vacancy announcement are not influenced by extraneous or ulterior motives. The Tribunal also stated that, although it will not substitute its decision for that of the Administration in the discretionary matters of appointment and promotion, it will examine whether the selection process was carried out in an improper, irregular or otherwise flawed manner, and assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable.

#### 2. Non-renewal/non-extension of contract

3. In *Eldam* UNDT/2010/133, *Dzintars* UNDT/2010/150 and *Applicant* UNDT/2010/211, the Tribunal reiterated that, while decisions on the renewal of fixed-term appointments are within the Secretary-General's discretionary power, they must not be improperly motivated and must not violate due process and that when the Administration gives a justification for the exercise of its discretionary power, especially as regards non-renewal of a contract, the reason must be supported by the facts. In these cases, the reason for the non-renewal of the Applicants' contracts was poor performance. The Tribunal held that while its control over supervisors' assessment of staff members' performance is limited to cases of manifest error, it is for the Tribunal to check, on the one hand, that supervisors have complied with the procedural rules for performance appraisal and, on the other, that the rating given warranted the Administration's not renewing a contract on the ground of performance.





for an Applicant to allege procedural flaws in the disciplinary process, s/he must also demonstrate that such flaws have affected his/her due process rights.

13. In *Buendia et al.* UNDT/2010/176, the Tribunal held that it could not uphold the findings and conclusion of a disciplinary process where due process rights were breached, and rescinded the decisions to impose disciplinary sanctions against the Applicants. In *Applicant* UNDT/2010/148, the Tribunal held that, in cases where allegations of impropriety are made against staff members, ST/AI/371 contains a requirement for programme managers to undertake an initial inquiry, which has to be adequate and timely, to determine whether there was “reason to believe” that the identified staff members had “engaged in an unsatisfactory conduct for which a disciplinary measure may be imposed”. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction.

#### **4. Appeals in respect of benefits/entitlements/salaries/allowances/classifications**

##### ***Home leave***

14. In *Wang* UNDT/2010/132, the Tribunal held that the change of the country of home leave referred to in administrative instruction ST/AI/367 is subject to the Secretary-General being satisfied of the three specified conditions, which include its consistency with the purposes and intent of staff regulation 5.3. Staff members have the right to enjoy entitlements acquired by the application of an exception, but only for as long as the circumstances meet the conditions of the exception; if those circumstances materially change, the staff member may lose those acquired rights.

##### ***Special leave with full pay (SLWOP)***

15. In *Kamunyi* UNDT/2010/214, the Tribunal pointed out that staff rule 105.2 confers a general power on the Secretary-General to grant special leave in exceptional cases. While the rule does not specify what the scope of that power is, this can be ascertained from the specific context of the words which precede it and the wider context of this and other Staff Rules and Regulations. The tribunal noted that the rule about special leave is found in Chapter V of the Staff Rules which deals with annual and special leave, not disciplinary measures and procedures, and it concluded that “exceptional cases” is not a catch-all which extends to Chapter X disciplinary measures.

16. In *Lauritzen* UNDT/2010/172, the Tribunal held that while former staff rule 105.2(a) allowed the Secretary-General to place, at his own initiative, a staff member on SLWFP if he considers such leave to be in the interest of the Organization, such measure should only be taken in exceptional cases and for a limited period of time. Staff members, as long as they remain in the service of the Organization, have the right not only to be remunerated, but also to be given work.

##### ***Classification***

17. In *Meesukul* UNDT/2010/141, the Tribunal dismissed the Applicant’s appeal of the decision not to reclassify her post, holding that where an applicant raises general complaints of unfairness and denial of due process, it is incumbent upon the applicant to provide sufficient detail and evidence to sustain the complaint. In *Jaen* UNDT/2010/165, the Tribunal held that it would not be proper to circumvent the established budgetary procedures by shifting the posts approved by the General Assembly for specific functions to create other posts with different functions without the General Assembly’s approval. In *Bhatia* UNDT/2010/157, the Tribunal held that where a special post allowance had been paid for a period, withdrawn, and then paid again for a later period where no change in functions had been documented, it should have been paid for the entire period. Alternatively, it could be correctly argued that the Applicant had a legitimate expectation of the continuing payment, in the context of the pattern of retroactive grants and the failure to consult with the Applicant on the change in functions.

5. **Other appointment-related appeals (including reassignment of staff, appointment beyond retirement age, withdrawal of offer of appointment, etc)**

## **8. Other matters**

### ***Request for review/Management evaluation***

23. In a number of judgments, the Tribunal reiterated that requests for administrative review or management evaluation are mandatory first steps in the appeal process (*Znamenski* UNDT/2010/208, *Ryan* UNDT/2010/174, *Osman* UNDT/2010/158, *Ibekwe*

### ***Legal assistance***

30. In *Borg-Oliver* UNDT/2010/155, the Tribunal reiterated its jurisprudence in *Abu-Hawaila* that it cannot and should not, except in rare situations, excuse an Applicant for the failure of his/her Counsel to successfully defend his/her case.

### ***Privileges and immunities***

31. In *Bekele* UNDT/2010/175, the Tribunal held that:

- it was “not in the Organization’s interests that its standards are compromised in any way and for its staff or agents, to be treated below such standards by the authorities of a host country which clearly subscribes to and is bound by United Nations standards. For a host country to blatantly disregard its obligations by submitting UN staff, be they national or international, to degrading treatment, is a situation that this Organization must not be confronted with.”
- “Despite the abusive treatment occasioned to the Applicant, the Secretary-General made no representations to the Ethiopian Government through the appropriate channels. In actual fact, to illustrate the disregard of the applicable Staff Regulations and Staff Rules, the Respondent presented oral evidence that the applicant was advised by the UNECA Security Officer to file his complaints with the Addis Ababa Police Commission. (...) How did the

out in the Staff Regulations and Rules. They are free to engage in any outside occupation or employment, one of the pre-requisites being that counsel should be practising lawyers or University professors. The Applicant could not therefore successfully claim that she is a “staff member” or “staff” of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations.

***Compensation***

35. In *Kamunyi* UNDT/2010/214, the Tribunal held that the remedy of rescission is not appropriate where the unlawfulness relates to procedural failures such as those which occurred in the handling of the request for waiver of immunity. However, the Applicant was entitled to

the proceedings on the basis of lack of prosecution. In *Li* UNDT/2010/163, the Tribunal dismissed the case for want of prosecution, having found that the Applicant had failed to file her application within the time limits granted by the Tribunal and had demonstrated a lack of vigilance and diligence, and that she must be deemed to have abandoned the proceedings.

#### ***Conditions of work***

41. 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.

#### ***Secretary-General’s discretion to withhold OIOS investigation reports***

42. In *Klein* UNDT/2010/207, the Tribunal found for the Applicant on the basis that the discretion to withhold or modify an OIOS investigation report pursuant to General Assembly resolution 59/272 exists for reasons which include avoiding or minimising harm in circumstances such as where an OIOS report has been improperly concluded, and must be exercised reasonably.

#### ***Performance evaluation***

43. In *Jennings*, the Tribunal held that, as soon as performance shortcomings are identified, appropriate steps to rectify the situation should be taken, in consultation with the staff member. Accordingly, performance improvement measures may be instituted based on the ongoing performance evaluation and prior to the finalization of the e-PAS report. The Tribunal also held that rebuttal proceedings constitute part of the performance evaluation process and must be completed with maximum dispatch. The rating resulting from the rebuttal process cannot be appealed.

#### ***Specific performance***

44. In

**APPENDIX II**  
**Proceedings of the UNAT**

Introduc

5. Damages awarded without evidence of economic loss ..... 2

**Introduction**

1. A summary of the major legal pronouncements made by the UNAT in judgments rendered during its second and third sessions held from 21 June to 1 July and from 18 to 29 October 2010 is

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.

6. In *Wasserstrom* (2010-UNAT-060), the Tribunal, applying its Judgment in *Bertucci*, held that the interlocutory appeal from the decision of the UNDT, that the determination by the Director of the Ethics Office that no retaliation occurred constituted an administrative decision falling within the jurisdiction of the UNDT, was not receivable. 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.

7. The Appeals Tribunal also held in *Wasserstrom* that the appeal against the UNDT's order for production of documents was also 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.

#### **4. Payment of and maximum amount of compensation**

8. 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 judgment award, the Secretary-General accepted the UNDT Judgment and his cross-appeal was therefore moot.

9. In *Mmata* (2010-UNAT-092), the Appeals Tribunal affirmed the UNDT award of compensation for loss of earnings for the seven months from the date of his separation to the date of the UNDT Judgment (as an alternative to the order for reinstatement of the staff member) plus an additional amount in the sum of two years' net base salary. Because the total of these amounts exceeded the compensation limit of two years' net base salary, the UNDT gave 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.

#### **5. Damages awarded without evidence of economic loss**

10. In *Abboud* (2010-UNAT-100), the Appeals Tribunal noted that the UNDT found that the irregularities did not create any economic loss or actual damage for the appellant. It also noted that the appellant had not requested any damages. Nonetheless, the UNDT awarded him damages. The Appeals Tribunal vacated the award of damages.