Eighth activity report

Office of Administration of Justice

1 January to 31 December 2014

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I. Introduction

1. The eighth report of the Office of Administration of Justice (OAJ) covers the activities of the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) and United Nations Appeals Tribunal (Appeals Tribunal or UNAT) and their Registries, the Office of Staff Legal Assistance (OSLA) and the Office of the Executive Director for the period 1 January to 31 December 2014.

2. The report includes statistical information on caseloads and a summary of legal pronouncements by UNDT and UNAT on a range of subjects in 2014.

The United Nations Dispute Tribunal

A. Composition

3. During the reporting period, the composition of the Dispute Tribunal was as follows:

(a) Judge Vinod Boolell (Mauritius), full-time judge based in Nairobi;
(b) Judge Memooda Ebrahim-Carstens (Botswana), full-time judge based in New York;
(c) Judge Thomas Laker (Germany), full-time judge based in Geneva;
(d) Judge Goolam Hoosen Kader Meeran (United Kingdom), half-time judge;
(e) Judge Coral Shaw (New Zealand), half-time judge;
(f) Judge Jean-François Cousin[1] (France), ad litem judge based in Geneva;
(g) Judge Nkemdilim Amelia Izuako (Nigeria), ad litem judge based in Nairobi;
(h) Judge Alessandra Greceanu (Romania), ad litem judge based in New York.

4. At its sixty-seventh session, the General Assembly decided to extend the term of the three ad litem judges and staff that support them for one year ending on 31 December 2015.[2]

5. During the reporting period, the judges of the Tribunal held one plenary meeting in Geneva from 28 April to 5 May 2014. Judge Ebrahim-Carstens was elected President of the UNDT for one year, from 1 July 2014 to 30 June 2015.

B. Judicial work

1. Caseload

6. As at 1 January 2014, 226 cases were pending. In 2014 the UNDT received 411 new cases and disposed of 320 cases.[3] As at 31 December 2014, 317 cases were pending.

7. Table 1 below shows the number of cases received, disposed of and pending for the years 2009 to 2014. Table 2 shows the breakdown by duty station.

Table 1: UNDT cases received, disposed of and pending: 2009 to 2014

UNDT	Cases received	Cases disposed of	Pending (end of year)
2009	281	98	183
2010	307	236	254
2011	281	271	264
2012	258	260	262
2013	289	325	226
2014	**411**	**320**	**317**
Total	1827	1510	---

[1] Judge Cousin resigned effective 31 March 2014. Judge Rowan Downing was elected by the General Assembly on 18 December 2014 (A/69/555 and UN Journal No. 2014/243) and appointed to a term ending on 31 December 2015.
[2] See General Assembly resolution 69/203.
[3] The 411 new cases included applications for suspension of action (57), for interpretation of judgment (2), for execution of judgment (1), and for revision of judgment (1).

Table 2: Cases received, disposed of and pending by duty station

UNDT	Cases received			Cases disposed of			Pending (end of year)		
	GVA	NBI	NY	GVA	NBI	NY	GVA	NBI	NY
2009	108	74	99	57	19	22	51	55	77
2010	120	80	107	101	59	76	70	76	108
2011	95	89	97	119	59	93	46	106	112
2012	94	78	86	106	76	78	34	108	120
2013	75	96	118	77	103	145	32	101	93
2014	**209**	**115**	**87**	**67**	**128**	**125**	**174**	**88**	**55**
Total	701	532	594	527	444	539	---	---	---

2. Number of judgments, orders and court sessions

8. Table 3 shows the total number of judgments, orders and court sessions from 1 July 2009 to 2014. Table 4 shows the breakdown by duty station.

Table 3: UNDT judgments, orders and court sessions: 2009 to 2014

UNDT	Judgments	Orders	Court Sessions[4]
2009	97	255	172
2010	217	679	261
2011	219	672	249
2012	208	626	187
2013	181	775	218
2014	**148**	**827**	**258**
Total	1070	3834	1345

Table 4: UNDT judgments, orders and court sessions by duty station

UNDT	Judgments			Orders			Court sessions		
	GVA	NBI	NY	GVA	NBI	NY	GVA	NBI	NY
2009	44	20	33	39	26	190	21	33	118
2010	83	52	82	93	248	338	54	116	91
2011	86	52	81	224	144	304	54	117	78
2012	79	65	64	172	183	271	24	88	75
2013	41	67	73	201	219	355	32	114	72
2014	**37**	**67**	**44**	**197**	**275**	**355**	**31**	**119**	**108**
Total	370	323	377	926	1095	1813	216	587	542

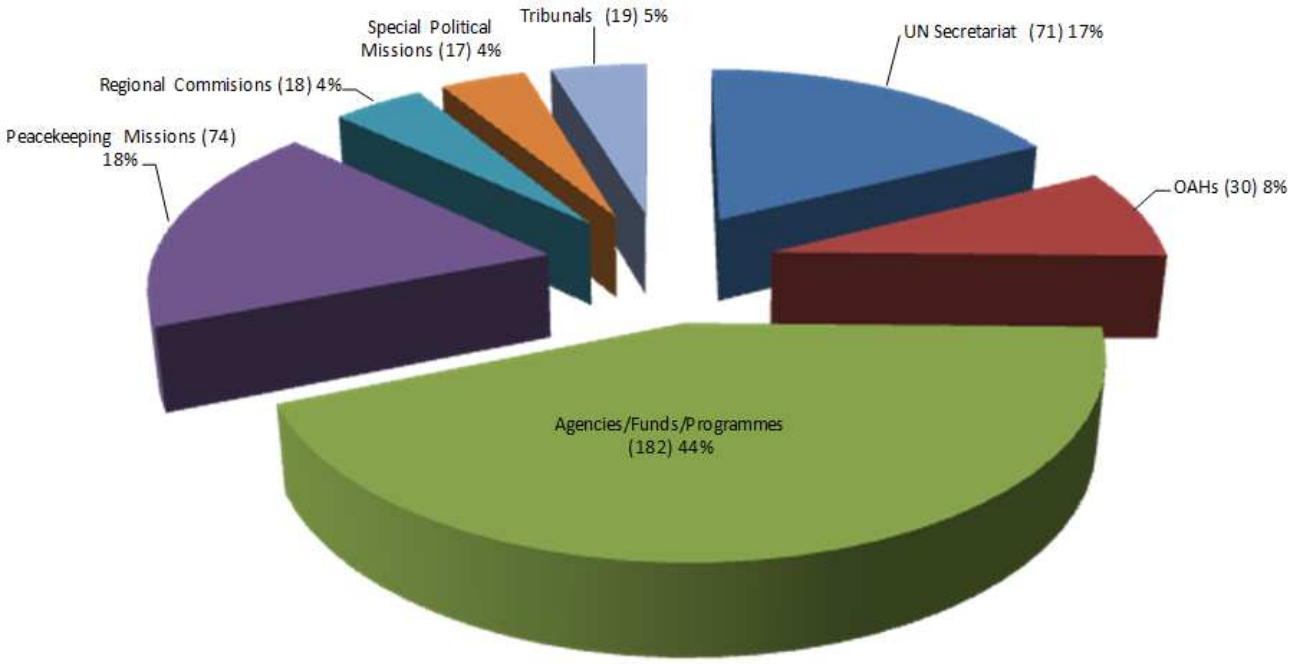
[4] A "court session" is a statistical unit used to ensure consistency among the three Registries in reporting on hearings. A hearing may consist of several daily court sessions (morning, afternoon, evening) and may be held over several days.

3. Sources of cases

9. The categories of applicants who filed cases in 2014 were as follows: Director (20); Professional (123); General Service (169); Field Service (21); Security (6); Trades and Crafts (9); National Staff (45); and Others (18).

10. The 411 cases received during the reporting period were filed by staff members in a number of UN entities, as illustrated in Chart 1 below.

Chart 1: Breakdown of cases received in 2014 by entity of the staff member



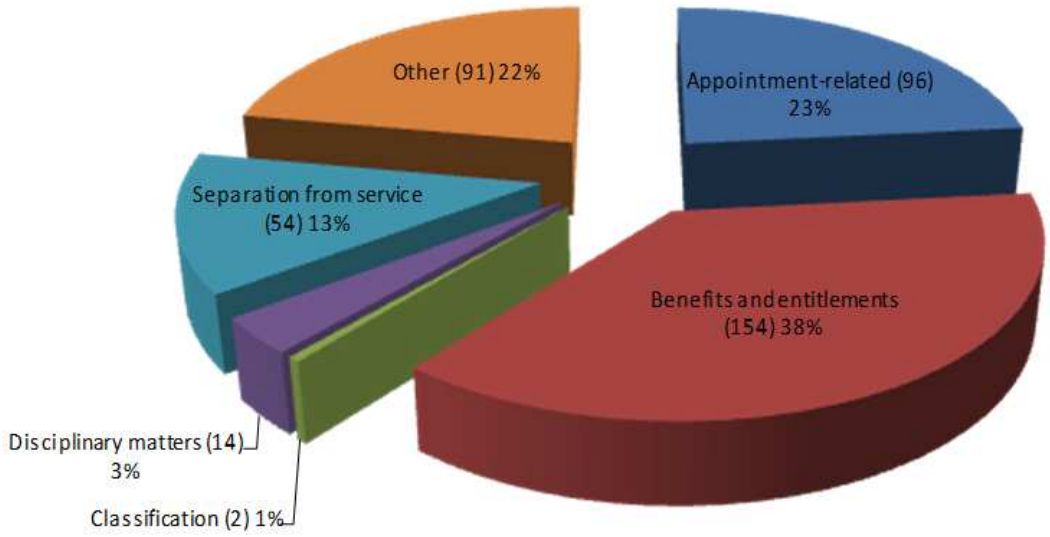
11. Information on the departments or offices where applicants were serving at the time of the contested decision is contained in Appendix I. (Please note that the decision-maker of a decision which was challenged before the UNDT may not have been part of the department or office where the applicant served.)

4. Subject matter

12. The subject matter of cases received during the reporting period fell into six main categories: (1) benefits and entitlements: 154 cases, (2) appointment-related matters (non-selection, non-promotion and other appointment-related matters): 96 cases, (3) separation from service (non-renewal and other

separation matters: 54 cases, (4) disciplinary matters: 14 cases, (5) classification: two cases, and (6) other: 91 cases. This is illustrated in Chart 2 below.

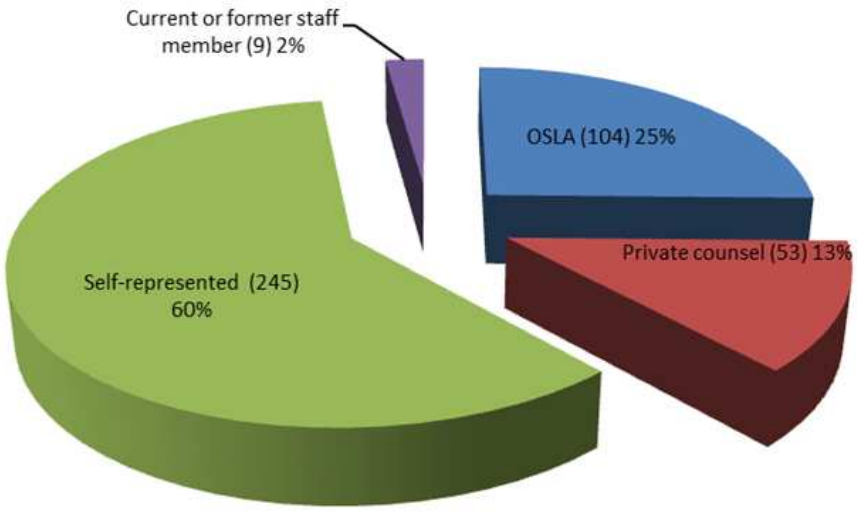
Chart 2: Cases received in 2014 by subject matter



5. Representation of staff members

13. OSLA provided representation in 104 of the 411 new cases received in 2014. In 53 cases, staff members were represented by private counsel, in 9 cases staff members were represented by volunteers who were either current or former staff members of the Organization and in 245 cases staff members represented themselves. This is illustrated in Chart 3 below.

Chart 3: Representation of staff members in 2014



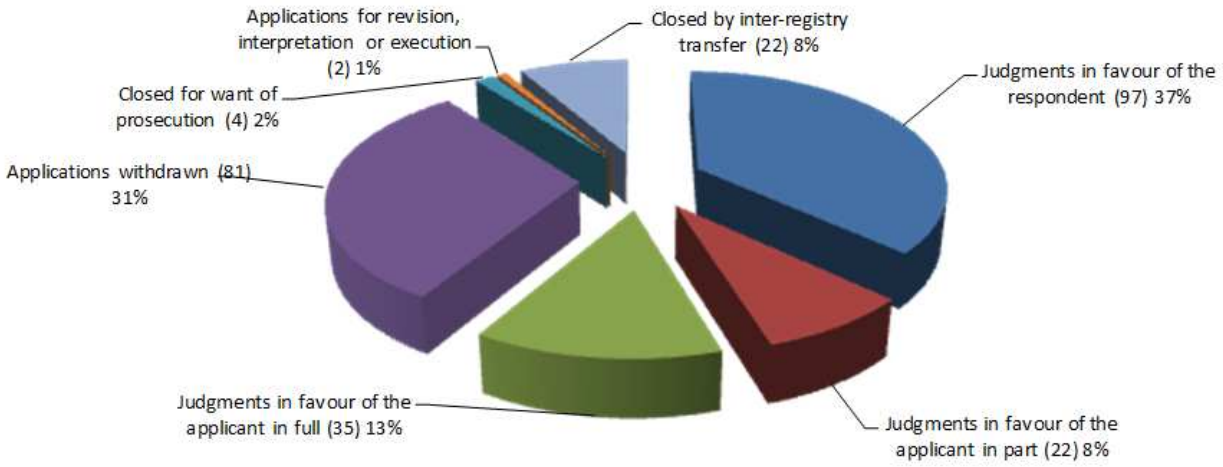
6. Informal resolution

14. During the reporting period, the UNDT identified, through case management, 37 cases as being suitable for informal resolution. Of these 37 cases, six were successfully mediated. Thirty-one cases were resolved informally by settlement between the parties with case management. A further 14 cases were resolved between the parties without case management, one of which was resolved in a formal mediation.

7. Outcomes

15. The outcomes of the 320 cases disposed of by the UNDT in 2014 are illustrated in Chart 4 below.

Chart 4: Outcome of cases disposed of in 2014



16. In 2014, 57 cases were decided in favour of the applicant either in full or in part. In 22 cases, only financial compensation was ordered. In 26 cases, both financial compensation and specific performance were ordered. Specific performance only was ordered in six cases, and in three cases no compensation was ordered. Suspension of action was requested in 57 cases and granted in 12 cases. Fourteen requests were rejected on receivability and 25 on the merits, 5 were withdrawn and one was transferred.

8. Referral for accountability

17. In 2014, the UNDT made four referrals for accountability under art. 10.8 of the UNDT Statute.

9. Jurisprudence

18. In 2014, the UNDT rendered legal pronouncements on a range of subjects, examples of which are set out in Appendix II in brief.

III. The United Nations Appeals Tribunal

A. Composition

19. During the reporting period, the composition of UNAT was as follows:

(a) Judge Mary Faherty (Ireland);
(b) Judge Sophia Adinyira (Ghana);
(c) Judge Inés Weinberg de Roca (Argentina);
(d) Judge Luis María Simón (Uruguay);
(e) Judge Richard Lussick (Samoa);
(f) Judge Rosalyn Chapman (United States);
(g) Judge Deborah Thomas-Felix (Trinidad and Tobago).[5]

20. In June 2014, UNAT elected its Bureau for the term of 1 July 2014 to 30 June 2015, with Judge Lussick serving as President, Judge Chapman as First Vice-President, and Judge Weinberg de Roca as Second Vice-President.

B. Judicial work

1. Sessions

21. UNAT held three sessions in 2014: a spring session (24 March to 2 April 2014), a summer session (16 to 27 June 2014) and a fall session (6 to 17 October 2014). At these sessions, UNAT heard and passed judgment on appeals filed against judgments rendered by the Dispute Tribunal (see art. 2.1 of the UNAT Statute), appeals against decisions of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board (UNJSPB or Pension Board), alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF or the Pension Fund), (see art. 2.9 of the UNAT Statute), and appeals against judgments and decisions from entities that concluded special agreements with the Secretary-General of the United Nations (see art. 2.10 of the UNAT Statute).

2. Caseload

22. During the reporting period, UNAT received 137 new cases and disposed of 146 cases.[6] As at 31 December 2014, UNAT had 101 cases pending. Table 5 below shows the number of cases received, disposed of and pending for 2014 and previous years.

[5] Judge Deborah Thomas-Felix was elected by the General Assembly on 10 December 2014 (see UN Journal No. 2014/237 p. 20) to fill the judicial vacancy created by the resignation of Judge Courtial effective 31 December 2013, for a term of office ending on 30 June 2019.

[6] UNAT disposed of 116 cases by judgment, including cases with more than one applicant, and closed 30 cases, including cases with more than one applicant, by judicial order or by decision of the UNAT Registrar.

Table 5: UNAT cases received, disposed of and pending: 2009 to 2014

UNAT	Cases received	Cases disposed of	Pending cases
2009	19	N/A[7]	19
2010	167	95	91
2011	96	104	83
2012	142	103	122
2013	125	137	110
2014	**137**	**146**	**101**
Total	686	585	---

23. The ratio of cases filed by staff members compared to those filed on behalf of the Secretary-General changed from 2013 to 2014. In 2013, half of the cases were filed by staff members and half of the cases were filed on behalf of the Secretary-General; in 2014, 64 per cent of the cases were filed by staff members and 36 per cent of the cases were filed on behalf of the Secretary-General.

24. The Appeals Tribunal also received 84 interlocutory motions in 2014. These included, *inter alia*, motions to extend time limits, to adduce new evidence, to file additional pleadings, to strike, for interim relief, for confidentiality, for oral hearings, for suspension of decision, for withdrawal of some claims, for execution of judgment and for reconsideration.

25. Table 6 below shows the number of interlocutory motions received in 2014 and in previous years.

Table 6: Interlocutory motions received by UNAT: 2010 to 2014

UNAT	**Interlocutory motions received**
2010	26
2011	38
2012	45
2013	39
2014	**84**

3. Sources of cases

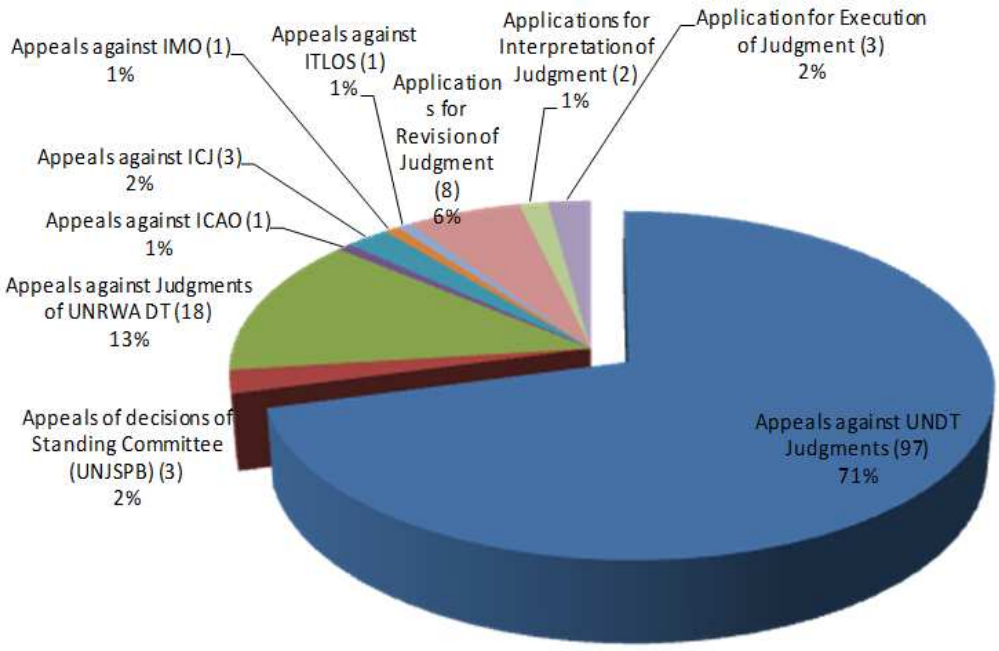
26. The 137 new cases filed in 2014 included 97 appeals against judgments of the UNDT (58 filed by staff members and 39 filed on behalf of the Secretary-General); three appeals of decisions of the Standing Committee acting on behalf of the UNJSPB; 18 appeals against judgments rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Middle East (UNRWA) (15 brought by staff members and three brought on behalf of the Commissioner-General); one appeal against a decision by the Secretary General of the International Civil Aviation Organization (ICAO), three appeals against decisions of the Registrar of the International Court of Justice, one appeal against the International Maritime Organization, and one appeal against a decision by the Registrar of the International Tribunal for the Law of the Sea. They also included eight applications for revision of UNAT judgments filed by staff members (including two UNRWA cases), two applications for interpretation of UNAT judgments (one UNRWA case) and three applications for

[7] UNAT did not hold a session in 2009; it held its first session in the spring of 2010.

execution of UNAT judgments. UNAT considered five cross-appeals which it disposed of in the respective judgments.

27. Chart 5 below provides a breakdown of the number of cases received between 1 January and 31 December 2014 by entity.

Chart 5: Cases received in 2014 by entity



28. Table 7 below reflects a breakdown of judgments, orders and hearings for UNAT for the period 2009 to 2014.

Table 7: UNAT judgments, orders and hearings: 2009 to 2014

UNAT	Judgments	Orders	Hearings
2009	N/A	N/A	N/A
2010	102	30	2
2011	88	44	5
2012	91	45	8
2013	115	47	5
2014	**100**	**42**	**1**
Total	496	208	21

4. Outcomes

29. Of the 86 cases related to UNDT judgments, 40 were filed by staff members and 46 were filed on behalf of the Secretary-General. Of the 40 appeals filed by staff members, 30 (75 per cent) were

rejected and eight were granted in full or in part (20 per cent) and two were closed on withdrawal (5 per cent). Of the 46 appeals filed on behalf of the Secretary-General, 14 were rejected (30 per cent) and 32 were granted in full or in part (70 per cent). In addition, UNAT considered five cross-appeals by staff members, which it disposed of in the respective judgments.

30. UNAT issued two judgments on appeals of decisions taken by the Standing Committee, acting on behalf of the Pension Board. Both appeals were dismissed. UNAT rendered 13 judgments, disposing of 10 appeals filed by UNRWA staff members and four appeals filed by the UNRWA Commissioner-General. Of the 10 appeals filed by UNRWA staff members, nine were dismissed and one was granted in part. The four appeals filed by the Commissioner-General were granted in full or in part. UNAT rendered two judgments disposing of appeals filed by ICAO staff members. One appeal was granted in part and one was dismissed on the merits.

31. UNAT rendered seven judgments disposing of 10 applications by staff members for interpretation, correction, revision or execution of judgments, including two Pension Fund cases. One application was granted and nine were denied.

32. Charts 6 and 7 below provide breakdowns of the outcome of appeals against UNDT judgments by staff members and on behalf of the Secretary-General.

Chart 6: Outcome of appeals against UNDT judgments filed by staff members

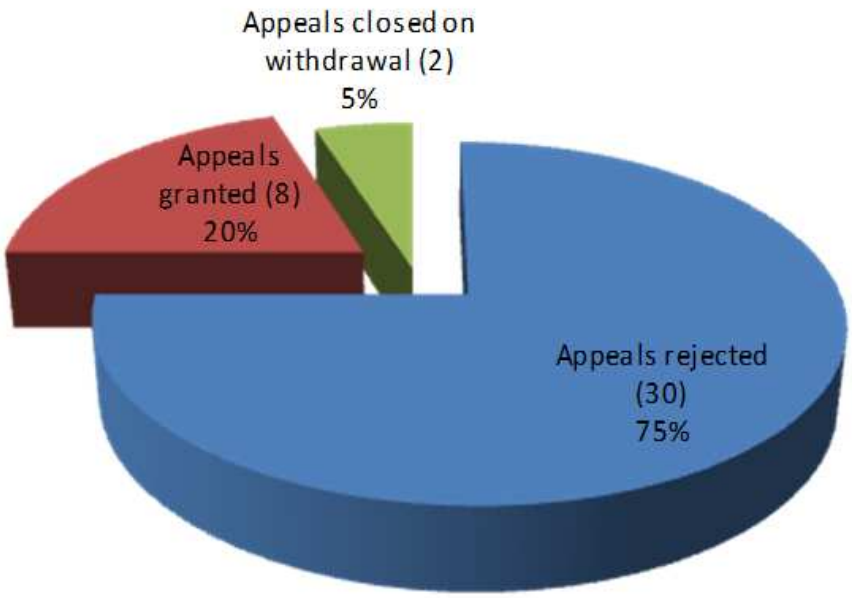
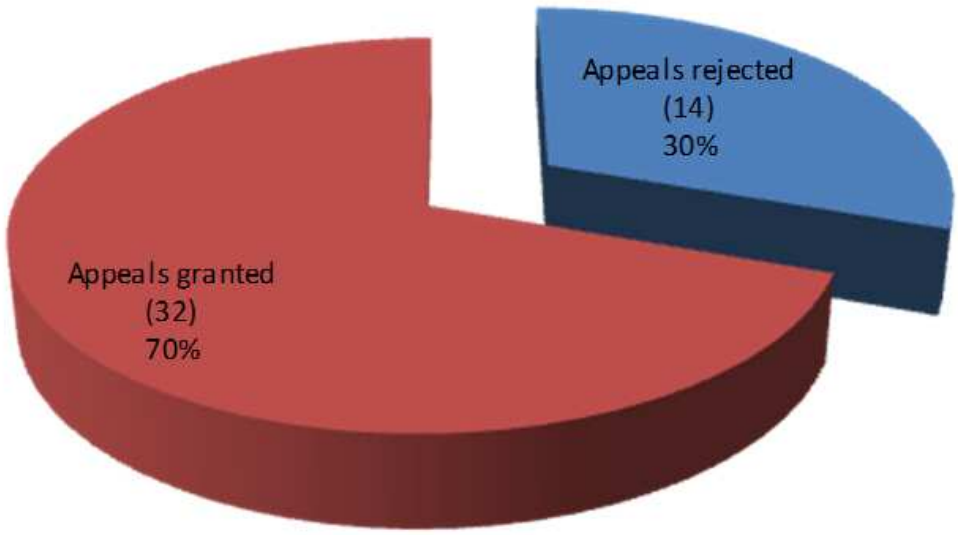


Chart 7: Outcome of appeals against UNDT judgments filed on behalf of the Secretary-General



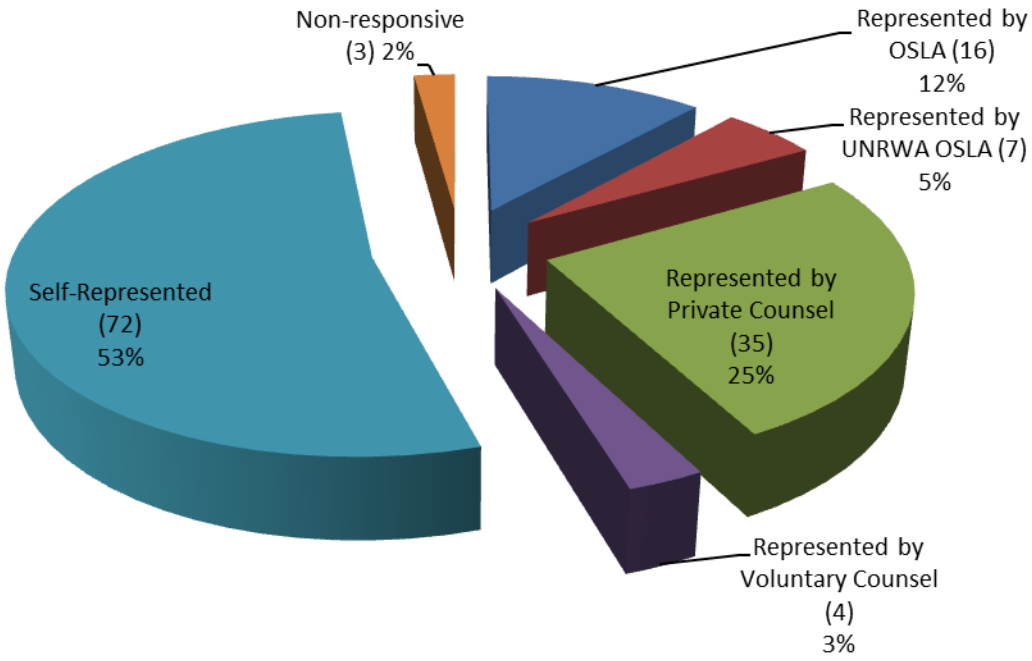
33. In 11 cases, UNAT vacated both the award of compensation and the specific performance ordered by the UNDT. In 16 cases, UNAT vacated or decreased the compensation awarded by the UNDT and in five cases UNAT vacated the UNDT's specific performance order. In one case, UNAT vacated the specific performance order and awarded compensation where none was awarded by the UNDT. In two cases, UNAT ordered specific performance where none was ordered by the UNDT and in one case, UNAT awarded compensation where none was awarded by the UNDT. UNAT remanded five cases to the UNDT.

34. In three cases, UNAT vacated an order of costs (one against the staff member and two against the Secretary-General). In two judgments, UNAT rejected appeals against decisions of the Standing Committee of the UNJSPB. In two cases, UNAT vacated the UNRWA DT's specific performance order and decreased or vacated the award of compensation. In one case, UNAT vacated the financial compensation awarded and in one case UNAT vacated the UNRWA DT's specific performance order. In one case, UNAT ordered both specific performance and awarded compensation where none was ordered by the UNRWA DT.

5. Representation of staff members

35. With respect to the 137 cases received during the reporting period, 16 staff members were represented by OSLA, seven staff members were represented by the UNRWA Legal Office–Staff Assistance (LOSA), 35 were represented by private counsel, and four by voluntary counsel. 72 staff members were self-represented and three staff members did not respond to appeals filed by the Secretary-General. This is illustrated in Chart 8 below.

Chart 8: Representation of staff members



6. Referral for accountability

36. In three judgments, UNAT found that the UNDT erred in making a referral for accountability to the Secretary-General under article 10.8 of its Statute.

7. Jurisprudence

37. In 2014 the UNAT rendered a number of legal pronouncements on a range of subjects, examples of which are set out in Appendix III in brief.

IV. The Office of Staff Legal Assistance

A. Framework

38. The Office of Staff Legal Assistance (OSLA) continued to provide legal advice and representation to UN staff world-wide, at all levels, in a wide range of employment matters, from non-appointment to termination, claims of discrimination/harassment/abuse of authority, pension benefits, disciplinary and misconduct cases, and other rights and entitlements under the staff rules. OSLA also provided advice and representation to former UN employees and their beneficiaries regarding rights that arose from their employment, including pension and post-separation entitlements claims.

B. Outreach and training activities

39. In 2014, OSLA visited MONUSCO, UNAMID, MINUSMA, UNOCI, MINUSTAH, UNGSC, UNIFIL, UNMIK, UNAMI and UN staff in Amman, Jordan facilitated by the Resident Coordinator's Office. Legal Officers gave presentations to staff members, UN staff associations and managers on the system of administration of justice at the UN, including the role of OSLA therein. OSLA participated in regular outreach and training activities for UN staff members in the five duty stations with an OSLA presence in addition to outreach and training activities organized by staff associations at those duty stations.

40. These activities provided invaluable opportunities to inform staff, staff associations and managers about the internal justice system, including OSLA's role. A recurring observation from these activities is that many staff members, especially in the deep field, have limited knowledge of the internal justice system, including the resources available to facilitate informal dispute resolution and how to access OSLA, the Management Evaluation Unit (MEU) and the Registries of the two Tribunals. OSLA continues to receive and accept invitations from peacekeeping missions and other operations and from staff associations to conduct outreach and training activities.

C. Case statistics

41. OSLA provides a wide range of legal assistance to staff, including summary legal advice; advice and representation during informal dispute resolution and formal mediation; assistance with the management evaluation review and during the disciplinary process; and legal representation of staff before the Dispute and Appeals Tribunals and other recourse bodies. Each request for legal assistance is tracked as a "case", although the time and action required on the part of the Legal Officer can vary.

1. Number of cases

42. In 2014 OSLA received 1,180 new cases and closed or resolved 1,171 cases. There were 213 cases carried over into 2014 from previous years. As at 31 December 2014, there were 222 cases pending. The numbers of cases received and their breakdown by type of case is illustrated in Table 8 below.

Table 8: Numbers and types of cases received: 2009 to 2014

OSLA	Summary legal advice	Management evaluation matters	Representation before the UNDT	Representation before the UNAT	Disciplinary cases	Other	Total
2009	172	62	128	10	156	73	601
2010	309	90	76	39	70	13	597
2011	361	119	115	21	55	10	681
2012	630	198	96	31	46	28	1029[8]
2013	491	116	70	33	37	18	765
2014	**797**	**210**	**102**[9]	**15**[10]	**44**	**12**	**1180**[11]
Total	2760	795	587	149	408	154	4853

43. "Summary legal advice" cases vary significantly. They often involve gathering information, conducting legal research, identifying strengths and weaknesses of a case, and advising staff members on options for seeking redress and likely outcomes and implications of a particular course of action or approach. These cases do not involve preparing submissions to a formal body such as the MEU or the Tribunals, or in cases of alleged misconduct, writing to the Administration, or otherwise representing a staff member. "Management Evaluation" cases are those cases where OSLA holds consultations and provides legal advice to staff member clients, drafts management evaluation requests on their behalf, holds discussions with the MEU or equivalent entity within the Funds and Programmes and negotiates settlements or agreed outcomes. "Disciplinary Cases" are those where OSLA provides assistance to staff members in responding to allegations of misconduct under the staff rules.

44. In cases before the Tribunals, OSLA holds consultations and provides legal advice to staff member clients, drafts submissions on their behalf, provides legal representation at oral hearings, holds discussions with opposing counsel and, to the extent possible, negotiates settlements. OSLA similarly provides advice and assistance in submissions and processes before other formal bodies, and represents staff in formal mediation.

2. Breakdown of the cases

45. The charts and tables below provide various breakdowns of the 1,180 cases OSLA received in 2014.

[8] The relatively higher number of cases in 2012 was due to a number of "class appeals" in which large groups of staff from the same UN entity facing the same issue approached OSLA for assistance, but each individual was counted as a case.

[9] OSLA's figure is different from that of the UNDT Registry due to differences in the calendar year when cases were opened by OSLA and received by the UNDT.

[10] OSLA's figure is different from that of the UNAT Registry due to differences in the calendar year when cases were opened by OSLA and received by the UNDT and OSLA's withdrawal from representation in one case.

[11] The relatively higher number of cases in 2014 was due to a number of "case clusters"; for example, staff members from the same UN entity similarly impacted by the same issue or groups of staff members seeking summary legal advice on the same issue or individual cases resulting in numerous applications.

Chart 9: New cases by recourse body

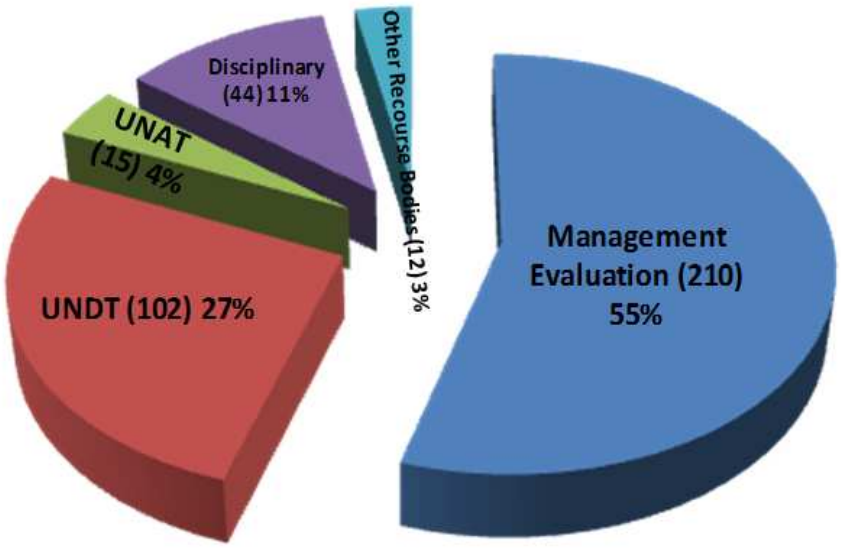


Chart 10: New cases by subject matter

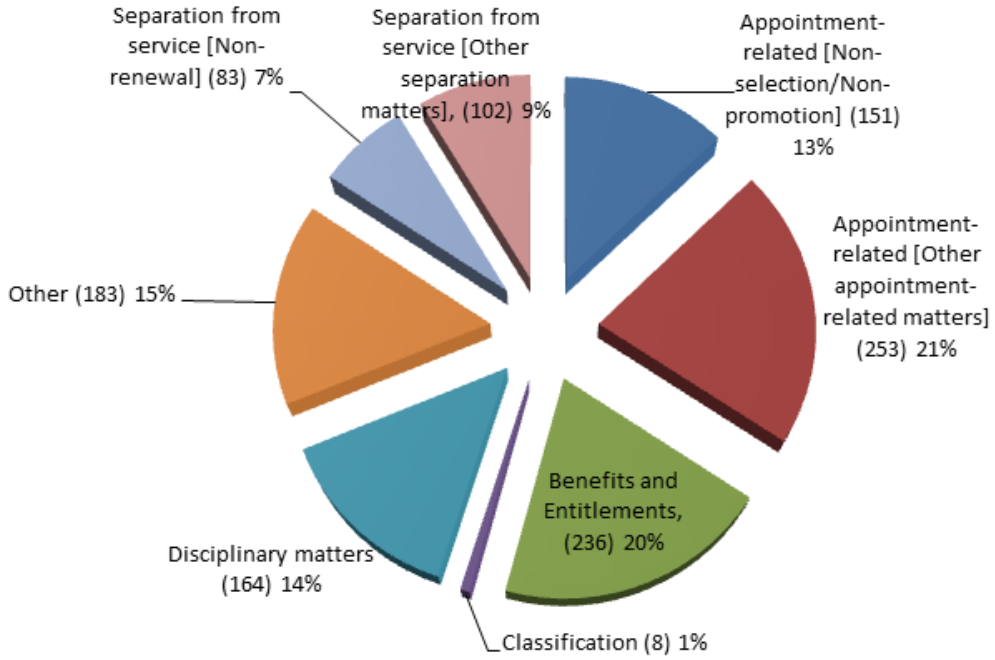


Table 9: UN entity in which the staff member was employed at the time of request for legal assistance

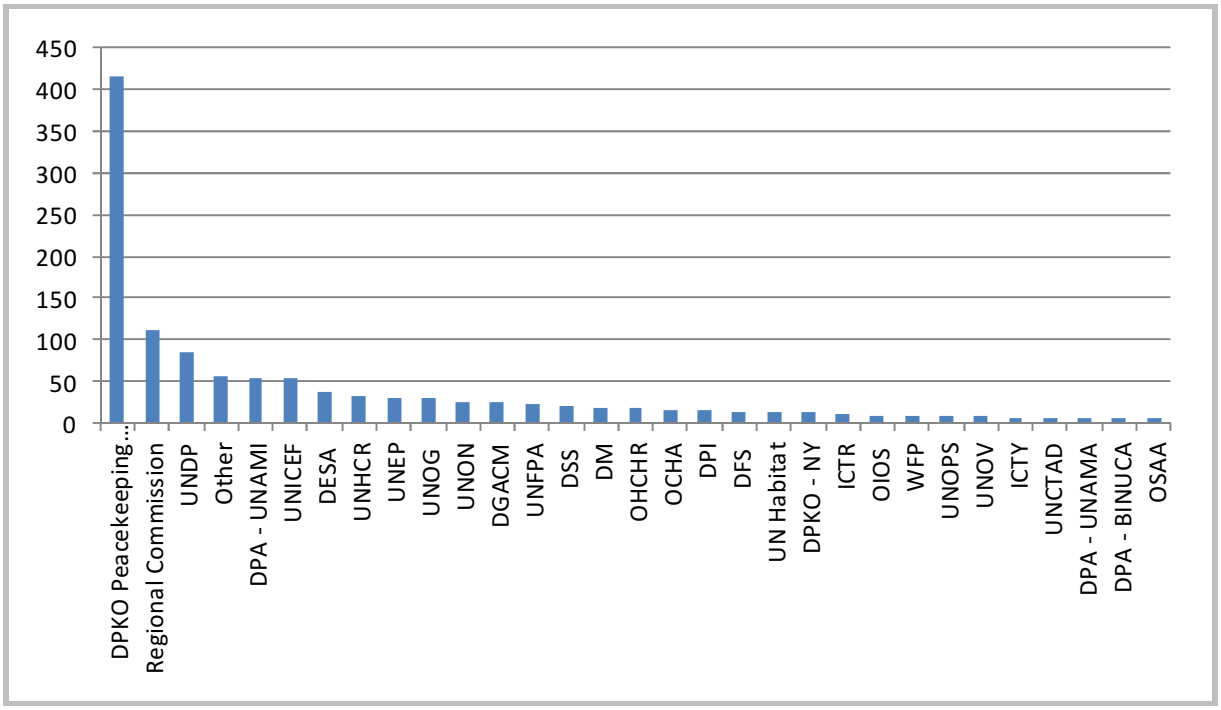
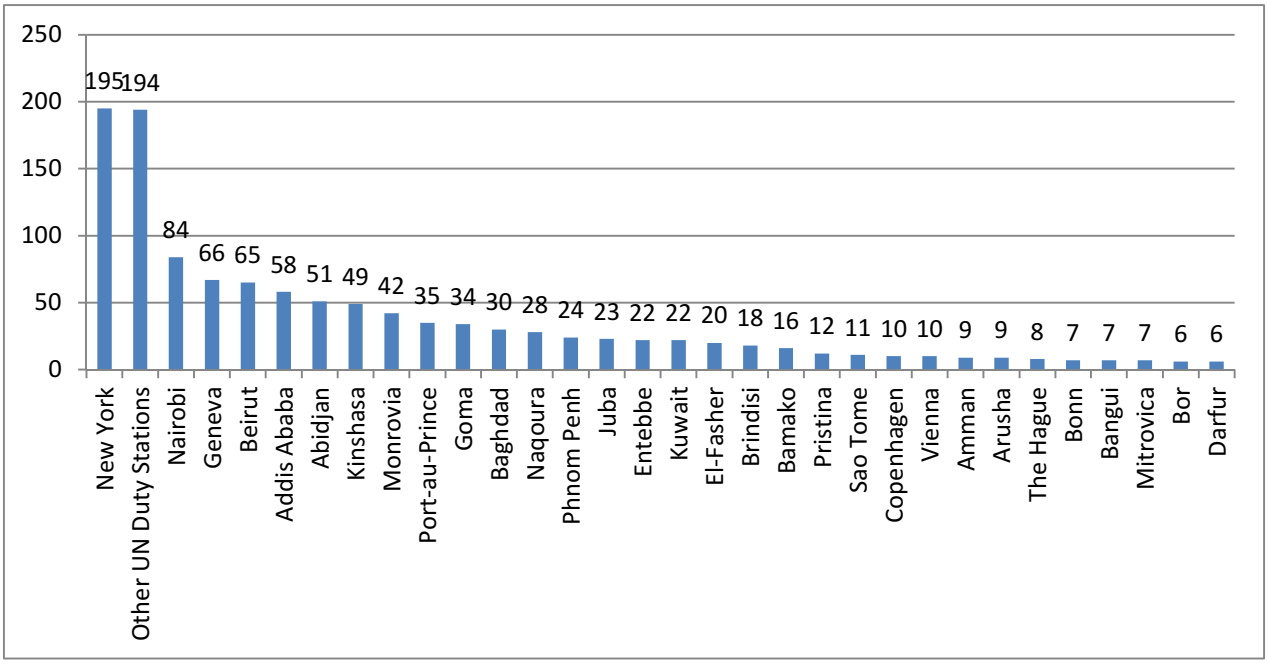


Table 10: Cases by duty station of the staff member client[12]



[12] All duty stations with fewer than six cases are in the "other UN duty stations" category.

Chart 11: Cases by gender

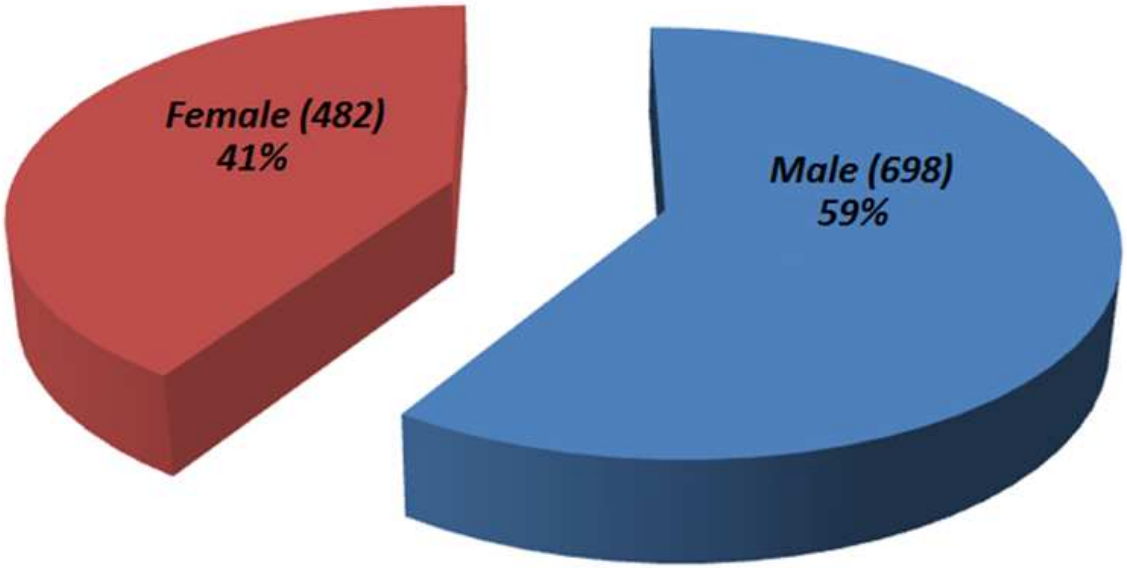
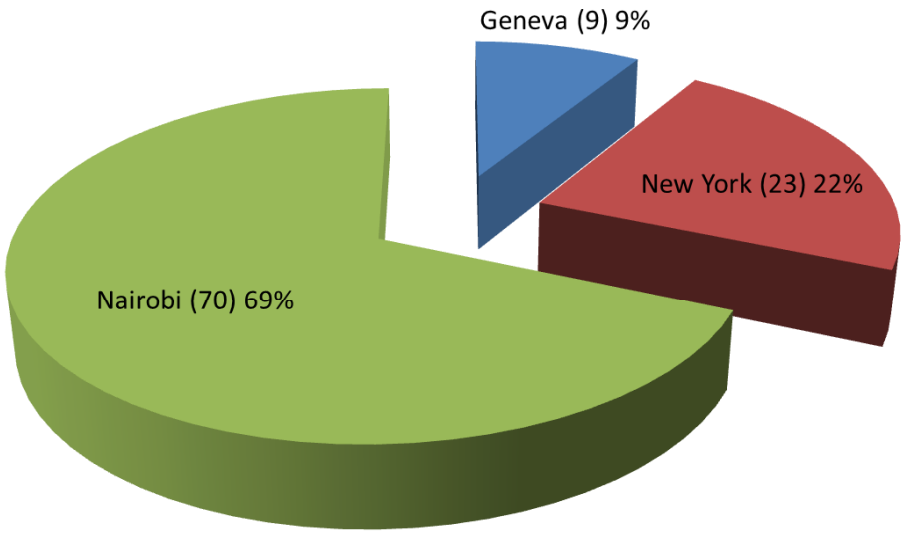


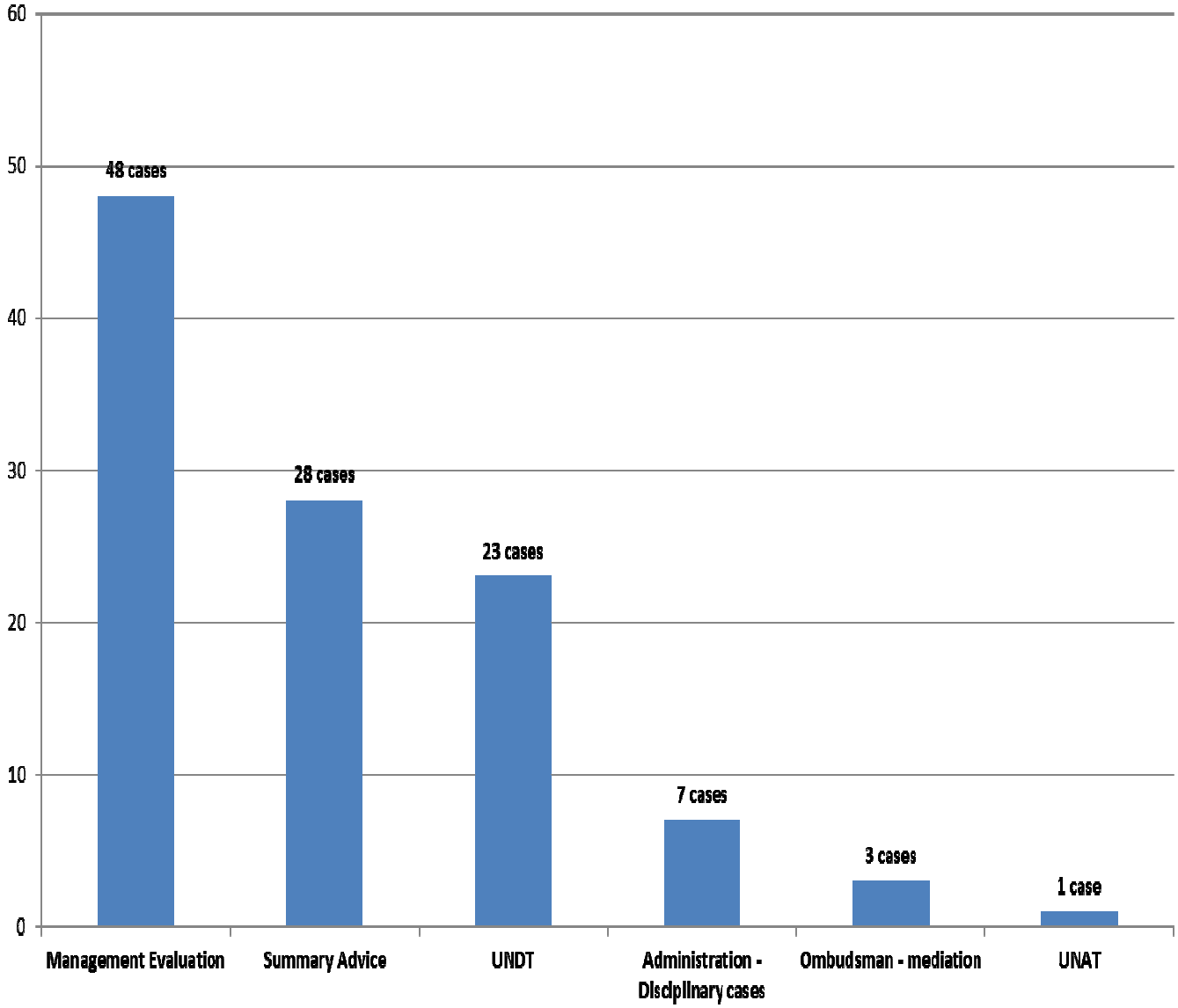
Chart 12: Cases before the UNDT by location



3. Settlement of cases

46. OSLA settled 110 cases in 2014. This figure includes cases which were opened in previous years but were closed in 2014 as a result of settlement, as well as new cases opened and closed in 2014 as a result of settlement. Table 11 below shows the breakdown of those cases by the forum (i.e., relevant recourse body) in which they settled.

Table 11: Cases settled and closed in 2014 by forum



V. The Office of the Executive Director

47. The Office of Administration of Justice (OAJ) is an independent office responsible for the overall coordination of the formal system of administration of justice, and for contributing to its functioning in a fair, transparent and efficient manner.[13]

48. As in past years, in 2014 OAJ coordinated the preparation of the Secretary-General's report on administration of justice at the United Nations (A/69/227), participated in discussions on the report held by the Advisory Committee for Administrative and Budgetary Questions (ACABQ) and provided additional information to the ACABQ and the Fifth and Sixth Committees of the General Assembly as requested.

49. Through the Office of the Executive Director, OAJ provided administrative and technical support, as appropriate, to the Internal Justice Council in connection with its mandate, including with respect to its meetings and teleconferences and the preparation of its annual report on the implementation of the system of administration of justice to the General Assembly (A/69/205). During the reporting period, the Council instituted a full public process to identify suitable candidates for judicial vacancies at the UNDT and the UNAT arising as a result of resignations. OAJ provided support to the Council in that process and in the preparation of its report on the appointment of judges to the UNAT and UNDT to the General Assembly (A/69/373).

50. OAJ continued to enhance online search capabilities for users of the jurisprudential search engine, to enhance the Court Case Management System (CCMS) platform for data recording and reporting purposes and to update the OAJ website to disseminate information on the formal system of administration of justice at the United Nations. There were 115,741 visitors to the OAJ website in 2014, of which nearly 32 per cent were new.

51. During the reporting period, OAJ also disseminated information regarding the formal system of administration of justice at meetings and symposia of international organizations.

[13] See ST/SGB/2010/3, "Organization and terms of reference of the Office of Administration of Justice".

APPENDIX I: UNDT CASES RECEIVED IN 2014 – BY EMPLOYMENT ENTITY

UN Secretariat (Headquarters)	DESA	7
	DGACM	28
	DM	7
	DPI	8
	DPKO	2
	DSS	6
	OAJ	4
	OCHA	1
	OIOS	4
	Other UN Secretariat (Headquarters)	4
	Total	**71**
UN Secretariat Offices Away from Headquarters	UNOG	17
	UNON	11
	UNOV	2
	Total	**30**
Peacekeeping missions	MINUSTAH	5
	MONUSCO (former MONUC)	23
	UNAMID	4
	UNFICYP	2
	UNIFIL	2
	UNLB	1
	UNMIK	1
	UNMIL	15
	UNMISS	6
	UNOCI	7
	UNSOA	3
	Other	5
	Total	**74**
Regional Commissions	ECA	5
	ESCAP	8

	ESCWA	5
	Total	**18**
Special political missions	UNAMA	8
	UNAMI	2
	UNIPSIL	2
	UNPOS	1
	UNSMIL	4
	Total	**17**
Tribunals	ICTR	4
	ICTY	12
	MICT	2
	UNAKRT	1
	Total	**19**
Agencies/Funds/Programmes/Other UN entities	UNCTAD	1
	UNDP	38
	UNEP	6
	UNFPA	36
	UN-Habitat	4
	UNHCR	40
	UNICEF	39
	UNODC	3
	UN-Women	5
	WFP (local staff)	3
	Other	7
	Total	**182**
Grand total		**411**

Appendix II: Pronouncements of the UNDT

1. Summaries of selected legal pronouncements made by the UNDT in judgments rendered from 1 January to 31 December 2014 are provided below. They are for illustrative purposes only and are not authoritative, representative or exhaustive. The complete set of UNDT judgments issued in 2014 is available on the OAJ website (http://un.org/en/oaj/dispute). Further, certain UNDT judgments summarized may have been appealed to UNAT by either party. Accordingly, the UNAT website should be consulted for the final determination made in cases that have been appealed.

Late claim for separation entitlements – personal standing of former staff member – exercise of discretion - abuse of proceedings – award of costs

2. In *Yakovlev v. Secretary-General, UNDT/2014/040*, the applicant, a former staff member who had served as a procurement officer in the Secretariat, challenged the decision of the administration to dismiss his request, made six years after the expiry of the applicable time limit, to proceed with payment of several entitlements he claimed were due to him upon separation. The applicant asserted that exceptional circumstances beyond his control had made it impossible for him to claim those entitlements in a timely manner. The administration denied the request for an exception but indicated that it might consider paying for tickets for the applicant and his spouse if the applicant could prove that he had no financial means to return to his home country. The applicant did not respond or provide any proof. The issues before the UNDT were whether the applicant had standing to bring his application; whether the administration's discretion to deny the request for an exception was properly and lawfully exercised; and whether the applicant had manifestly abused the proceedings and, if so, whether costs should be ordered under art. 10.6 of the UNDT Statute.

3. The UNDT found that the applicant had standing to bring his application, but failed to establish that the administration's decision to refuse to grant him an exception to the two-year time limit under Staff rule 12.3(b) and proceed with payment was unlawful. The Tribunal further found that the applicant manifestly abused the proceedings before it.

4. With regard to the issue of standing, the Tribunal referred to art. 3.1 of the Statute which provides that an application under the Statute may be filed by "any former staff member of the United Nations". The Tribunal also referred to Staff rule 12.3(b) and the absence of language therein that would limit the application of the rule to current or former staff members in respect of entitlements that had not expired, and found that the rule encompassed exceptions that allowed the waiver of time limits provided for in the Staff Rules.

5. With respect to the exercise of discretion, the Tribunal observed that the applicant asserted his own turpitude against the Organization as a ground for not having been able to comply with the Rules. The Tribunal noted that the applicant had had ample opportunity to request a deferment of payment of his separation entitlements but had opted not to do so. The Tribunal also noted that the applicant had effectively refused to prove that he was impecunious and thus obtain payment of the cost of return travel home. The UNDT found that the applicant failed to establish that the administration's decision to refuse to grant him an exception under Staff rule 12.3(b) was unlawful.

6. With respect to abuse of process, the Tribunal considered that the applicant chose deliberately to omit disclosing information with respect to the very same factors that led the administration to exercise its discretion to refuse his request, and chose to ignore the administration's willingness to consider, for humanitarian reasons, payment of his travel back home prior to filing his application with the UNDT. By choosing to bring the matter before the UNDT while the administration stood ready to reconsider its

decision at least in part, the applicant used up valuable resources and time that would otherwise have been devoted to other more urgent matters pending before the Tribunal. The Tribunal also rejected the applicant's reliance on his incarceration (following his arrest and conviction for financial crimes he committed against the Organization) as *force majeure* and found it to be disingenuous, frivolous and unreasonable. There were no unpredictable or uncontrollable events that would have prevented the applicant from filing his claim for separation entitlements. In the result, the Tribunal found that the applicant had manifestly abused the proceedings before it and ordered the applicant to pay costs in the sum of USD 5,000 for abuse of process.

Non-renewal of FTA – communication from the Management Evaluation Unit on time limits – lawful exercise of discretion

7. In *Jansen v. Secretary-General, UNDT/2014/115*, the applicant, a P-5 staff member at UNECE, challenged the non-renewal of his fixed-term-appointment (FTA) beyond its expiry. He was working as project manager on an extra-budgetary project funded exclusively by one member state; his FTA was limited to the particular post and department. In July 2012, the applicant was informed that his appointment would not be extended beyond 30 November 2012 because the donor no longer supported funding of the project. He filed a first request for management evaluation. In early November 2012, the applicant was informed that the donor had indicated it would discontinue the project by 1 June 2013 and the applicant signed a FTA effective 1 December 2012 that provided it would expire without notice on 31 May 2013. On 15 November 2012, the applicant contacted MEU, referred to his pending case and requested the MEU to incorporate the decision not to extend his contract beyond 31 May 2013 in his first request for management evaluation, but to hold the entire request in abeyance until 28 February 2013, as informal resolution efforts were ongoing. The MEU extended the abeyance but did not acknowledge the inclusion of the new decision in the first request. On 19 February 2013, the applicant requested the MEU to continue to hold his case in abeyance until 31 May 2013, since he had secured funding for the extension of his contract beyond 31 May 2013 but finalization of the funding was taking some time. The MEU responded to the effect that the November 2012 decision superseded the July 2012 decision, rendering his first case moot, and closed the file without having reviewed the November 2012 decision not to extend his contract beyond 31 May 2013. On 29 May 2013, the applicant was informed that, having exhausted all possible options, his contract would not be renewed beyond 31 May 2013. The applicant submitted a new request for management evaluation on 31 May 2013 in respect of what he considered a new decision not to renew his contract beyond 31 May 2013 or, alternatively, not to request his exceptional placement on a TVA against a vacant post. He was separated that same day.

8. The issues before the Tribunal were whether the application was receivable and whether the non-renewal decision was unlawful. With respect to receivability, the Tribunal found that an application could be considered receivable when, following erroneous advice from the MEU and good faith reliance on it, the applicant failed to comply with the statutory time-limits.

9. With regard to the nature of the decision, the Tribunal stated that a decision which only repeated the original administrative decision without additional contents or grounds did not reset the clock for appeal. A legitimate expectation for renewal of appointment could only be created through an express promise, which had to be in writing. A decision not to renew a FTA, if based on legitimate grounds supported by evidence, constituted a lawful exercise of discretion. The administration did not have an obligation to place a staff member whose FTA was limited to a specific post and department in another department or to otherwise secure his continued employment. It therefore rejected the application on the merits since the non-renewal decision was based on legitimate grounds and constituted a lawful exercise of discretion on the part of the administration.

Refusal of a lien – prohibited conduct and retaliation as a result of testifying as a witness before UNDT in another case

10. In *Nartey v. Secretary-General*, UNDT/2014/051, the applicant contested, *inter alia*, the decision by the United Nations Office at Nairobi (UNON) not to grant a lien on his post to enable him to undertake a mission assignment to the African Union/United Nations Hybrid Operation in Darfur ("UNAMID"). The applicant asserted that the decision was taken as part of a series of prohibited conduct and retaliatory actions against him for having testified as a witness before the Tribunal in the case of *Kasmani, UNDT/NBI/2009/67*.

11. The Tribunal first considered whether the application was receivable. The Tribunal observed that it was clear that the administration's objection to the receivability of the case had at its core the failure of the applicant to request management evaluation of each of his allegations of prohibited conduct and/or retaliation. It referred to ST/SGB/2008/5 and observed that prohibited conduct of harassment and abuse of authority against a staff member would most often be seen to have occurred over a period of time and involve a series of incidents. To argue that a victimized staff member must make a request to the MEU on every occasion on which alleged prohibited conduct took place was untenable. Having regard to the peculiar characteristics and elements of prohibited conduct, the UNDT held that the application was receivable.

12. The Tribunal then considered whether the applicant was a victim of harassment and/or retaliation following his testimony in the *Kasmani* case. After considering the evidence and examining whether there were any actions, inactions, utterances and/or series of incidents which supported the applicant's claim that he was a victim of prohibited conduct and retaliation at UNON, the UNDT found that the administration had acted based on motives bent on exacting retaliation and forcing the applicant out of UNON.

13. The Tribunal recalled that in the *Kasmani* case it made an order of protection from retaliation in favour of the witnesses in that case, which included the applicant, and found that testifying before a Tribunal amounted to an "activity protected by the present policy" within the scope of section 1.4 of ST/SGB/2005/21.

14. That order also had directed that the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violations of the order. Subsequently, the applicant submitted a complaint of discrimination, harassment, abuse of authority and retaliation by UNON to the Ethics Office. The Tribunal considered that the Ethics Office did not adequately act upon the report of retaliation filed by the applicant in accordance with the provisions of ST/SGB/2005/21 and failed to protect him, and failed to obey the order made in the *Kasmani* case.

15. The Tribunal awarded the applicant six months' net base salary as compensation for procedural irregularities resulting from the failure of the administration to follow its own guidelines and its rules and procedures, together with moral damages in the sum of USD 10,000 for the stress caused to the applicant over a period of years. The Tribunal also referred an official from UNON and an official from the Ethics Office for accountability under article 10.8 of the UNDT Statute.

Disciplinary measures – summary dismissal – conduct of investigation - evidence – role of Tribunal

16. In *Tshika v. Secretary-General, UNDT/2014/122*, the applicant, a former staff member of MONUC, contested the decision to summarily dismiss her from service for attempting to defraud the

Organization by making a false claim for medical expenses. The Tribunal commenced its consideration of the case with a review of the Tribunal's role in disciplinary matters. The role of the Tribunal was to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. In other words, the Tribunal was entitled to examine the entire case before it and to determine whether a proper investigation into the allegations of misconduct had been conducted.

17. With respect to the conduct of the investigation, the Tribunal referred to the jurisprudence and stressed that an investigation must be thorough and disclose an adequate evidential basis before a view is formed that a staff member may have committed misconduct. The Tribunal found that the subject investigation was poorly conducted.

18. The Tribunal then turned to the recommendation that disciplinary proceedings be initiated against the applicant and considered what evidence should satisfy a head of office or responsible officer that a report of misconduct was well-founded. The Tribunal noted that under ST/AI/371, it was the responsibility of the head of office or responsible officer to undertake a preliminary investigation where there was reason to believe that a staff member had engaged in unsatisfactory conduct and that the head of office or responsible officer appeared to be vested with wide discretion at the initial stage of a disciplinary matter. That discretion was to be exercised judiciously in the light of what the investigation has revealed. The head of office or responsible officer was compelled to carefully scrutinize the facts gathered during the investigation; see if there were any flaws or omissions in the facts gathered that needed to be remedied; assess whether all available and relevant witnesses had been interviewed; and call for supplementary investigation or clarification if need be. In this case, the UNDT found that the responsible officers did not carefully scrutinize the investigation report so as to identify the flaws in the facts gathered and that, as a consequence, the threshold of "well-founded" was not reached because the conclusion was based on an investigation report that was flawed.

19. The Tribunal recalled that the administration had the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. An accused staff member could not be made to shoulder the flaws of a badly conducted investigation. The UNDT stated that the whole investigation centered on the fact that no surgery was ever performed on the applicant's husband, and the charge against the applicant was that she was claiming reimbursement for a surgery that never took place. At the oral hearing, the administration attempted to rely on hearsay evidence in support of the charge. The Tribunal indicated that caution should be exercised before acting on such evidence, especially in a disciplinary matter. The Tribunal held that the evidence was not clear and convincing so as to warrant an adverse finding against the applicant. At the hearing the administration also attempted to establish that the amounts of the invoices and receipts produced by the applicant and her husband had been manipulated, which had never been put to the applicant specifically in the charge sheet. After considering the evidence, the Tribunal was not persuaded that the administration had discharged the standard of proof required to establish that they were fraudulent and indicated that it would not embark on an analysis of what clearly appeared to be a new charge that was not the subject of an investigation.

20. In the result, the Tribunal concluded that the established facts did not legally amount to misconduct and that the disciplinary measure imposed on the applicant was unlawful *ab initio* and therefore a violation of her rights. The applicant was awarded one year's net based salary for monetary loss arising out of the unfair dismissal and for loss of opportunity to secure another job owing to the dismissal. The UNDT also awarded the sum of USD 5,000 as moral damages based on the applicant's testimony of harm.

Claim for compensation under Appendix D of the Staff rules – service incurred – exception to limit – burden of proof

21. In *Karseboom v. Secretary-General, UNDT/2014/130*, the applicant, a security guard at MONUC, had a bicycle accident while on leave in Spain in April 2006 and suffered an injury to his lower back diagnosed as *lytic spondylolisthesis*. He received medical treatment in Spain and following medical clearance returned to full duty in September 2006. The applicant had a second accident while on duty in October 2006, suffered severe injury to his left leg and did not return to his duties again. Following medical evacuation to Spain, an x-ray and an MRI of his back were performed. The applicant was diagnosed with persisting low back pain secondary to *lytic spondylolisthesis* and told that his vertebrae required surgical repair. The applicant underwent surgery twice in 2008.

22. The applicant filed a claim for compensation under Appendix D. The Advisory Board on Compensation Claims (ABCC) found that only the injury to his left leg and knee was service-incurred. The applicant filed a request for reconsideration under article 17 of Appendix D, to have his spinal back injury recognized as service-incurred and to be awarded compensation for permanent loss of function under article 11.3(c) of Appendix D. The ABCC, upon the advice of the medical director, who based his advice on the medical report of an independent practitioner prepared in connection with the applicant's request for a disability benefit that was being considered by the UN Staff Pension Committee under the UNJSPF Regulations, recommended to the Secretary-General that the spine injury not be recognized as service-incurred and that the applicant not receive compensation for permanent loss of function. The Secretary-General approved the recommendation.

23. The Tribunal found that article 17 provided for a specific process to determine a request for reconsideration of a claim for compensation and that it was mandatory to convene a medical board if the appealed touched on medical aspects. The administration failed to follow the correct procedure when it did not convene a medical board and could not rely on the independent medical evaluation as an alternative thereto. The Tribunal further stressed that the independent medical evaluation failed to address the issue of causation of the spinal injury and that the administration could not rely on the absence of evidence in that report to support a conclusion that the October 2006 accident had no impact on the applicant's back injury.

24. The Tribunal rejected the administration's submission that it was for the applicant to prove that his spinal injuries were attributable to the work-related accident; rather, it was for the administration to establish that the advice given by the ABCC was based on well-founded evidence. The obligation of the applicant was to demonstrate that the process provided for in the relevant article was disregarded. The Tribunal found that the ABCC made its recommendations based on uncertain facts and inferences which were derived, improbably, from the absence of evidence. As a result, the ABCC recommendations and consequent administrative decision were not well-founded.

25. The Tribunal considered it was not competent to make an award under Appendix D, as this would have involved making findings on medical matters, but could award compensation for material damage resulting from a violation of a staff member's rights and for moral damage for the impact of the breach on the applicant. When there were no alternative means of assessing material damage under Appendix D, it was necessary to consider the likelihood that, but for the procedural errors, the ABCC would have reached a different conclusion about the cause of a claimant's permanent injuries. That was not a medical assessment, but an evaluation of the claimant's loss of opportunity. Where the medical evidence about causation was in dispute, the probability that a claimant would have succeeded in his claim for compensation could be estimated at 50 per cent, which was the basis on which material damage had to be assessed.

26. The Tribunal, referring to *Mmata 2010-UNAT-092*, considered that the case was an exceptional one under art. 10.5(b) of its Statute, justifying an award greater than two years' net base salary. On the balance of probabilities that the ABCC would have reached a different conclusion had the proper procedure been followed, and since the medical issue of causation was in dispute, the Tribunal awarded USD 150,104 as material damages, corresponding to 50 per cent of the maximum amount the applicant would have obtained under article 11.3 of Appendix D for permanent loss of function. The UNDT also awarded three months' net base salary as moral damages. The Tribunal reiterated that the purpose of compensation was to place a staff member in the same position he/she would have been in had the Organization complied with its contractual obligations. To deprive the applicant of the appropriate level of compensation for loss of chance measured against the compensation he may have received under Appendix D and of any compensation for moral damage would have been unjust and warranted an exception under art. 10.5(b).

After Service Health Insurance – lack of continuous service – eligibility – interpretation of ST/AI/2007/3

27. In *Cocquet v. Secretary-General, UNDT/2014/112*, the applicant contested the administration's decision that she was ineligible for After-Service Health Insurance (ASHI). The applicant had held fixed-term appointments with the ICTY from October 2006 to August 2009 and with UNAKRT from October 2009 to November 2013, with a two-month voluntary break-in-service in between. Pursuant to section 2.1 of ST/AI/2007/3, if the applicant was deemed to have been recruited before 1 July 2007 she would need to have been a participant in the contributory health insurance plan of the UN common system for a minimum of five years in order to qualify for ASHI, while if recruited on or after that date, the requisite period of time would be a minimum of 10 years. The administration took the position that the applicant's effective recruitment date was that of her most recent re-employment with UNAKRT.

28. The Tribunal framed the issue for determination as whether to apply the starting date of the applicant's initial fixed-term appointment with ICTY, in which case she qualified for ASHI, or the starting date of her subsequent fixed-term appointment with UNAKRT, in which case she did not qualify. The UNDT observed that ST/AI/2007/3 was silent on the situation where a staff member had been employed by the UN before 1 July 2007 and again subsequently after that date, with a voluntary break-in-service in between. The Tribunal stated that the case was best resolved by the literal or plain meaning rule of construction, i.e., by establishing the plain meaning of the words in the context of the document as a whole, and that only if the wording was ambiguous should recourse be had to other documents or external sources to aid in the interpretation. The Tribunal found that the intended consequence of ST/AI/2007/3 was apparent from its face, and required cumulative contributory participation and not continuous service or continuous contributory participation. The UNDT found that the administration's reliance on Staff rule 4.17 was misguided, as it was not applicable to the question of ASHI.

29. In the result, the Tribunal held that since the applicant entered into the UN common system in October 2006, she satisfied the eligibility criteria for ASHI. The Tribunal rescinded the administrative decision and directed the administration to enroll the applicant in ASHI retroactively from 1 December 2013.

Proportionality of disciplinary measure – mitigating circumstances

30. In *Ogorodnikov v. Secretary-General, UNDT/2014/059*, the applicant, a civil affairs officer with INAMA, sought rescission of a decision to separate him from service, with compensation in lieu of

notice and with termination indemnities, as a disciplinary measure. Apparent irregularities in documents relating to his re-entry date to Afghanistan from leave prompted an investigation, on the basis of which it was found that the applicant had forged a stamp in a copy of his UNLP and provided false information in his annual leave report. The applicant did not contest the facts but rather the proportionality of the disciplinary measure.

31. The Tribunal examined whether the procedure followed was regular, whether the facts in question were established, whether those facts constituted misconduct and whether the sanction imposed was proportionate to the misconduct committed. Upon review, the Tribunal concluded that the applicant did not commit the misconduct of providing false information in his annual leave report but that the facts for the remaining charge of the misconduct were correctly established. However, the administration did not fully or correctly take into account all the mitigating circumstances when determining the appropriate disciplinary sanction.

32. The UNDT identified as mitigating factors the fact that the applicant never sought to obtain any personal gain or to prejudice the Organization, had continued to work with UNAMA for two more years after the conclusion of the investigation, had received a positive performance appraisal for the 2008-2009 and 2009-2010 cycles, was selected and appointed to a new position with MINUSTAH starting in early 2011 and the delay between the initiation of the disciplinary process and the application of the sanction. The Tribunal found that the applicant's continued employment with UNAMA and his performance evaluations clearly contradicted the conclusion that his conduct was incompatible with further service and that the trust between the applicant and the Organization was not temporarily or irremediably affected by his misconduct.

33. The Tribunal found that the disciplinary measure was disproportionate to the misconduct and unlawful. The Tribunal rescinded the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnities and replaced it with a written censure plus a fine of one month's net base salary. The administration was ordered to pay compensation for loss of earnings starting from 2 February 2011 until the date of expiration of the applicant's contract with MINUSTAH on 2 January 2012, less the fine of one month's net base salary and the amount of termination indemnity already paid to the applicant. In the event that the administration decided not to reinstate the applicant, the Tribunal ordered compensation in the amount of USD 5,000 plus compensation for loss of one year's net base salary and entitlements.

Appendix III: Pronouncements of the UNAT

1. Summaries of selected legal pronouncements made by UNAT in judgments rendered in 2014 are provided below. They are for illustrative purposes only and are not authoritative, representative or exhaustive. The complete set of UNAT judgments issued in 2014 is available on the OAJ website (http://un.org/en/oaj/appeals).

Non-interference by management and judiciary in United Nations staff union election matters – prevailing party cannot appeal a judgment

2. In *Saffir and Ginivan v. Secretary-General, 2014-UNAT-466,* the applicants voted in the elections for the 44th Staff Council and Leadership for the United Nations Staff Union (UNSU) on 7-9 June 2011 organized and conducted by UNSU polling officers. Both applicants alleged that polling officers and the chairperson committed numerous violations in the conduct of the election.

3. The UNSU Arbitration Committee reviewed their complaints and found that they were unsubstantiated. The applicants then requested the Secretary-General to conduct an investigation into the alleged irregularities of the elections, asserting inadequacy of the UNSU's internal arbitration mechanism. In the absence of a reply, the applicants filed requests for management evaluation. The Under-Secretary-General for Management responded with a letter to applicants' counsel explaining that management would not interfere with UNSU internal election matters. The applicants filed applications with the UNDT.[14]

4. The UNDT found that the claims regarding the UNSU's elections and, in particular, the claims for relief, were not receivable, but that the refusal to carry out the requested investigation was an administrative decision subject to review. On the merits, the UNDT noted that the UNSU Arbitration Committee had already examined and rendered a binding decision on the matter. Finding that neither the UNSU statute nor the jurisprudence indicated that the Secretary-General was obligated to intervene in the conduct of UNSU elections, the UNDT found that the administrative decision not to investigate the UNSU elections was lawful. The Secretary-General appealed the UNDT's determination that the decision not to investigate UNSU election matters was receivable.

5. The Appeals Tribunal found by majority[15] that the appeals were not receivable, based on jurisprudence that a party may not appeal against a judgment in which it has prevailed.[16] The Appeals Tribunal noted that although the UNDT reviewed the merits of the decision despite the Secretary-General's argument that the decision was not receivable *ratione materiae,* the UNDT held in favour of the Secretary-General. As there was no negative impact to the Secretary-General, there was no right to appeal even if the judgment contained errors of law or fact, including with respect to its jurisdiction or competence. The Appeals Tribunal held that a party must present a concrete grievance as a direct consequence of the outcome of the contested decision that could be addressed by the appellate body through a change in the decision.

6. The dissenting opinion noted that the Secretary-General had appealed on two valid grounds under article 2 (1) of the UNAT Statute, *i.e.*, the UNDT erred on a question of law and the UNDT exceeded its competence in finding that it had jurisdiction *ratione materiae*. The dissenting opinion considered

[14] *Saffir v. Secretary-General of the United Nations* Judgment No. UNDT/2013/109 and *Ginivan v.Secretary-General of the United Nations* Judgment No. UNDT/2013/110, respectively.
[15] Judge Luis María Simón, Presiding, Judge Rosalyn Chapman, (dissenting) and Judge Mary Faherty.
[16] *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048.

that the UNDT erred in law and failed to properly apply the correct definition of an appealable administrative decision. The dissenting opinion also considered that the appeal should have been heard for purposes of providing guidance to the UNDT and to avoid future applications challenging staff elections and election procedures by staff members.

Binding nature of UNAT jurisprudence - obligation to respect a UNDT order until overturned by the Appeals Tribunal – inherent judicial powers relating to contempt - referral for accountability

7. In *Igbinedion v. Secretary-General, 2014-UNAT-410*, the applicant was a staff member of UN-Habitat who contested the decision not to extend his appointment. The UNDT granted the applicant's request for suspension of action of the contested decision. The respondent filed an appeal to vacate the order following the MEU's determination that the applicant's request for management evaluation was time-barred. The UNDT then issued another order granting suspension of action until the case was reviewed on the merits. UN-Habitat did not extend the applicant's appointment, in contravention of the order. The applicant filed an application with the UNDT for UN-Habitat to be held in contempt for its failure to comply with an order of the UNDT.

8. In its judgment[17] the UNDT concluded, *inter alia*, that three UN-Habitat officials and the Office of Legal Affairs were in contempt of its authority and made referrals for accountability of two of the officials and the said office under the UNDT Statute. The respondent appealed.

9. In a prior decision,[18] the UNAT had held that the UNDT order violated article 2(2) of the UNDT Statute, which provides for suspension of the implementation of a contested decision during the pendency of the management evaluation, and article 10(2) of the UNDT Statute which prohibits the suspension of the implementation of the contested decision in cases of appointment, promotion, or termination.

10. In a decision by the full Bench, the UNAT found that the legislative intent in establishing a two-tier system was that the jurisprudence of the Appeals Tribunal would set precedent, to be followed in like cases by the Dispute Tribunal. The UNAT held that the UNDT did not act lawfully in issuing an order in direct contravention of established UNAT jurisprudence that the UNDT cannot order a suspension of action of a contested decision beyond the pendency of a management evaluation.[19] However, the UNAT also held that parties before the UNDT must obey its binding decisions and that a decision by the UNDT remained legally valid until such time as the UNAT vacated it. Noting that its jurisprudence was clear on this point,[20] UNAT found the respondent's refusal to comply with the UNDT's order to be vexatious.

11. The UNAT considered that the ability to promote and protect the court, and to regulate proceedings before it, was an inherent judicial power and was essential to, *inter alia*, a tribunal's case management and ability to conduct hearings. A tribunal must be able to find natural persons appearing before it, whether as parties, counsel or witnesses, in contempt if their conduct is improper or they fail to comply with its strictures. Similarly, legal persons, including the Organization, must conduct themselves appropriately and must comply with orders and judgments of the court.

[17] *Igbinedion v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/024.
[18] *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-159.
[19] *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.
[20] *Igunda v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-255; *Villamoran v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160.

12. The UNAT addressed the authority of the Tribunals to refer cases for accountability under their Statutes and stated that it included the referral of individuals within the context of a case. The UNAT held that the statutory power of referral for accountability was independent of inherent judicial powers relating to contempt and did not require a finding of contempt. The UNAT vacated the referrals for accountability as it considered that the UNDT exercised its statutory authority improperly in invoking article 10(8) under the guise of sanctions for contempt.

Selection from the roster without prior consideration of non-rostered candidates

13. In *Charles v. Secretary-General, 2014-UNAT-416*, the applicant, a staff member of the UN Secretariat in New York, contested two non-selection decisions which were adjudicated in Judgment No. UNDT/2013/040 and Judgment No. UNDT/2013/041, respectively. In both selection exercises, the hiring manager selected a staff member from a pre-approved roster list and did not take into consideration any of the other candidates for the post, including the applicant, who was not on the roster list for either post.

14. For each of the selection exercises, the UNDT awarded the applicant USD 1,000 in compensation for the breach of his right to receive full and fair consideration and for the resultant harm. The UNDT held that the selection of a rostered candidate without consideration of other candidates was contrary to the requirements of article 101.3 of the United Nations Charter and Staff regulation 4.2. The UNDT considered that Staff regulation 4.2 did not provide for priority consideration of rostered candidates, but only exempted them from referral to the central review bodies for approval. However, given that the applicant was only one of 153 and 128 candidates applying for the respective posts, the UNDT considered it speculative to estimate his chances of success. The UNDT dismissed the applicant's claims of bias and discrimination or harm due to the late response to his request for management evaluation.

15. The UNAT held that the plain wording of section 9.4 of ST/AI/2010/3 made it clear that the head of department/office had the discretion to make a selection decision from candidates included in the roster. It considered that there was no requirement in section 9.4 for the head of department to first review all the non-rostered candidates, noting that section 9.4 had been amended to specifically remove such a requirement. The UNAT held that the UNDT erred in law in deciding that the selection of a rostered candidate prior to reviewing all non-rostered candidates was contrary to ST/AI/2010/3 and vacated the award of damages in favour of the applicant.

Findings of the Ethics Office – whether constitute administrative decisions

16. In *Wasserstrom v. Secretary-General, 2014-UNAT-457,* the applicant, a former staff member with UNMIK, filed a complaint to the Ethics Office alleging that he had been retaliated against for whistleblowing pursuant to ST/SGB/2005/21.

17. The Ethics Office found a prima facie case of retaliation and referred the case to the Investigations Division of OIOS which conducted an investigation into the matter. OIOS found that no retaliation had occurred and presented its report to the Ethics Office. The Ethics Office accepted the OIOS report and concluded that there could not be a finding of retaliation. The applicant challenged that determination.

18. A preliminary issue was whether the decision taken by the Ethics Office was an "administrative decision" within the meaning of article 2(1)(a) of the UNDT Statute. The UNDT found that the determination of the Ethics Office that there was no retaliation was an administrative decision within

the meaning of the UNDT Statute. The UNDT, in its judgment on liability,[21] upheld the applicant's complaint of retaliation and found that the Ethics Office had not reviewed the investigation report. The UNDT considered that the Ethics Office did not make inquiries into factual inconsistencies in the report and its annexes and that it erred in law by simply accepting the report's conclusion. In a separate judgment on relief,[22] the UNDT awarded the applicant USD 50,000 for moral damages and USD 15,000 as costs against the respondent for manifest abuse of proceedings.

19. The UNAT, with one Judge dissenting,[23] held that the Ethics Office was limited to making recommendations to the administration and therefore its recommendations were not administrative decisions subject to judicial review. The Tribunal further considered that the applicant had not been precluded from seeking management evaluation of several of the alleged retaliatory actions taken by the administration, yet had not done so. The award for moral damages was vacated. The award against the respondent for costs was upheld.

UNRWA – termination of appointment for misconduct by submitting a degree from a "diploma mill"

20. In *Walden v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2014-UNAT-436*, the applicant was appointed to the post of senior procurement officer with UNRWA on 20 July 2000. His Personal History Form (PHF) and curriculum vitae (CV) submitted with respect to this appointment indicated that he had a Master of Business Administration from a particular college. On 16 October 2007, as a result of having applied for a P-5 post and submitted his PHF and CV, the applicant was notified that the college was on the list of a report entitled "Diploma Mills: A Report on Detection and Prevention of Diploma Fraud" by the UN Office for Human Resources Management.

21. An investigation was carried out regarding the applicant's degree. On the basis of the investigation report, the Commissioner-General determined that the applicant had committed misconduct by submitting a non-accredited degree in support of his application and had thereby misrepresented his academic credentials, in direct violation of a statement that he had signed in his PHP. The applicant's case was referred to the Staff Joint Disciplinary Committee (JDC) which found that the applicant had knowingly misrepresented his academic qualifications and recommended dismissal. By letter dated 27 May 2009, the Commissioner-General informed the applicant of her agreement with the JDC's findings and the decision to terminate his appointment for misconduct effective 1 June 2009.

22. The UNRWA Dispute Tribunal reversed the decision, finding that there was no clear and convincing evidence that the applicant had knowingly misrepresented his academic qualifications and that the facts did not establish misconduct and therefore the sanction was disproportionate. The UNRWA Dispute Tribunal also found that the decision was tainted and prejudiced and that the applicant was denied due process. The UNRWA Dispute Tribunal ordered re-instatement of the applicant in his post or in the alternative, and bearing in mind the exceptional circumstances of the case, an amount of compensation of two years' net base salary plus six months' net base salary as compensation.

23. On appeal, the UNAT found it was undisputed that the applicant knowingly presented non-existent credentials despite having questioned the ethics of accepting a diploma based on

[21] *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/092.

[22] *Wasserstrom v. Secretary-General of the United Nations* Judgment No. UNDT/2013/053.

[23] Judge Faherty, Presiding (dissenting), Judge Weinberg de Roca and Judge Chapman. The dissenting opinion held that the Ethics Office's determination of no retaliation clearly and unequivocally impacted on the applicant's terms and conditions of employment and thus was a reviewable administrative decision.

"recognition of prior learning" with no attendance requirement. The UNAT found that the facts established that the applicant failed to meet the high standard of integrity required for an international civil servant as set forth in the UN Charter. The UNAT noted that International Staff Regulation 10.2 provided that the Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory and further, that he may summarily dismiss a staff member for serious misconduct. The UNAT considered that termination was not disproportionate to the offence, taking into account that the applicant's recruitment, in the first instance, was based on a non-degree which would not have qualified him for selection by the Organization.

UNJSFP – execution of court order for spousal support

24. In *Gonzalez-Hernandez v. United Nations Joint Staff Pension Board, 2014-UNAT-465*, the applicant, a national of Portugal, retired from UNIDO on 31 October 1999 after 32 years of service. He opted for a reduced retirement benefit, taking out a lump-sum. In 2005, the applicant was living in Portugal while his wife and two sons were living in Austria. His wife sued him for alimony and sole custody of their children in an Austrian court. She subsequently contacted the United Nations Joint Pension Fund (UNJSPF) to request the application of article 45 of its Regulations on the basis of a judgment by an Austrian court providing for spousal support. On 3 March 2011, the applicant obtained a divorce from his wife in a Portuguese family court, with no alimony to be paid to her.

25. On 13 May 2012, the applicant provided the UNJSPF with a copy of a final and executable judgment from an Austrian Appeals Court ordering the applicant to pay, in addition to child support, spousal support as of the beginning of January 2009 for an undetermined period. The applicant claimed that he was no longer subject to the Austrian court judgments; however, his Portuguese divorce judgment stated that Austrian law applied in the divorce.

26. On 17 December 2012, the UNJSPF concluded that the documents on file fully established that the applicant had a legal obligation to pay spousal and child support and decided to apply article 45 in the case. Thus, a percentage of his monthly gross pension benefit was to be paid directly to his ex-spouse on a prospective basis. On 25 March 2013, the applicant appealed the decision to apply article 45 to the Standing Committee of the Pension Board. The Standing Committee affirmed the decision of the UNJSPF.

27. The UNAT noted that in accordance with article 2(9) of its Statute, an appeal before it submitted against a decision adopted by the Standing Committee of the Pension Board could only succeed if it was found that the Regulations of the UNJSPF were not observed. The UNAT stated that the applicant bore the burden of satisfying the Tribunal that the impugned decision was defective. The UNAT found no error of law or fact that would vitiate the contested decision, which established the deduction of a percentage of the applicant's monthly pension benefit and payment of that amount directly to his former spouse.

28. In particular, the UNAT held that the UNJSPF correctly applied article 45 of its Regulations and relied on an internationally binding judgment about spousal and child support, issued by an Austrian court, which was not contradicted by the divorce decree issued by the Portuguese court. The UNAT found that there was no basis for the applicant to question the validity of the Austrian court judgment or the binding obligations imposed on him by order of the Austrian court. The UNAT considered that the UNJSPF acted properly and within its statutory remit after obtaining the necessary information and adopted a reasoned and well-founded decision. The appeal was dismissed in its entirety.

ICAO - termination of appointment- trier of fact has broad discretion in the admissibility of evidence - breaches fundamental in nature - moral damages

29. In *Diallo v. Secretary General of the International Civil Aviation Organization, 2014-UNAT-430*, the applicant appealed the decision taken by the Secretary General of ICAO to terminate her appointment due to the abolition of her post as a result of cost-cutting measures. At the time the contested decision was taken, the applicant worked as a G-7 field operations assistant in the Technical Cooperation Bureau (TCB), in a newly created Project Financing and Development (PFD), to which she had been reassigned from the Field Operations Section (FOS).

30. The letter informing the applicant of the contested decision indicated that ICAO would endeavour to find alternative employment for her within ICAO, but if such employment could not be found, her appointment would end on 31 July 2011 and she would be paid termination indemnity in the amount of three months' net base salary. After administrative review which upheld the contested decision, the applicant appealed to ICAO's Advisory Joint Appeals Board (AJAB).

31. The AJAB determined that: a) there were no grounds to uphold the applicant's assertion that she was retaliated against by ICAO's Secretary General because of an appeal by her husband; b) ICAO's decision to restructure the TCB by the abolition of certain posts was within its discretion and not tainted by improper motives; c) as of 31 July 2011, the applicant still held her post in FOS and the decision to abolish her post was partly based on an error of fact since the ICAO administration attempted to abolish a post in PFD that had never been established; d) ICAO did not show good faith in its efforts to find the applicant an alternative post; e) the applicant failed to adduce substantive evidence of harassment and threat by the ICAO Secretary General; and f) ICAO violated the applicant's right to have access to all pertinent documents in her personnel and confidential files.

32. The AJAB recommended to the ICAO Secretary General that ICAO pay the applicant her full salary and entitlements from the date her contract was terminated on 31 July 2011 through the end of her contact on 11 December 2011 as well as compensation in the amount of two months' net base salary. The ICAO Secretary General, while not fully concurring with the Board's conclusions, accepted the recommendations to pay the above amounts, conditioned upon the applicant agreeing to waive her appeal rights and make no further claims against ICAO in this matter.

33. The applicant challenged the ICAO Secretary General's decision on the grounds that the AJAB failed to render her full justice as the compensation was not commensurate with the loss of career opportunities as well as with her "level of suffering, due to [her] abusive dismissal". The applicant further averred that the AJAB erred in procedure and in fact, resulting in a manifestly unreasonable decision, by rejecting the written testimony of her immediate supervisor and the evidence of her second reporting officer which clearly showed that the Secretary General planned "to get rid of [her]".

34. The UNAT found merit in the applicant's appeal against the quantum of compensation awarded her in terms of moral damages. The AJAB had made a number of findings in her favour which indicated that her rights as a staff member were abused during the restructuring process. The UNAT considered those breaches to be fundamental in nature so as to warrant an award of moral damages and substituted the AJAB-recommended award of two months' net base salary with the sum of six months' net base salary. The UNAT did not disturb the award of the payment of her full salary and all entitlements up to the end of her contract on 11 December 2011.

35. The UNAT found no merit in the applicant's appeal of AJAB's rejection of the testimonies of her immediate supervisor and her second reporting officer. It considered that the approach of the AJAB was consistent with its jurisprudence in *Messinger*[24] and *Larkin*.[25] The UNAT held that the AJAB, in a position similar to that of an adjudicating tribunal or trier of fact, had broad discretion to determine the admissibility of any evidence and the weight to attach to such evidence. The UNAT affirmed the finding by the AJAB that the applicant could not adduce substantial evidence of harassment and threat by ICAO's Secretary General and that the applicant's claim that ICAO's Secretary General had targeted her for dismissal could not be supported.

[24] *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.
[25] *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134.