



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1444

Yelena Goldenberg
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

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| Before: | Judge Katharine Mary Savage, Presiding Judge Kanwaldeep Sandhu Judge Abdelmohsen Sheha |
| Case No.: | 2023-1842 |
| Date of Decision: | 28 June 2024 |
| Date of Publication: | 10 July 2024 |
| Registrar: | Juliet E. Johnson |

Counsel for Appellant: Christopher Q. Davis

Counsel for Respondent: Rupa Mitra

JUDGE KATHARINE MARY SAVAGE, PRESIDING.

1. Ms. Yelena Goldenberg (Ms. Goldenberg or the Appellant), a staff member with the Division of Regional Operations (DRO), Department for Safety and Security (DSS), contested the decision of the Administration to deny her request to telecommute five days per week due to personal and medical circumstances (contested decision).
2. On 14 June 2023, by Judgment No. UNDT/2023/055 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) concluded that the contested decision was lawful and that the Administration properly exercised its discretion by denying Ms. Goldenberg's request to work from home five days per week.
3. The Appellant lodged an appeal against the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

5. At the relevant time of events, the Appellant served as Desk Assistant with the DRO, DSS on a continuing appointment at the G-5 level in New York, United States.
6. From mid-March 2020 to April 2022, staff members, including the Appellant, were permitted to telecommute on a full-time basis due to the COVID-19 pandemic.
7. In March 2022, in anticipation of the implementation of the "Next Normal" policy at the United Nations, which required that staff members be able to return to work at least two days per week, the Appellant sought permission to telecommute five days per week from her First Reporting Officer (FRO) for medical and personal reasons. The Appellant, who is in her late 50s, sought this permission on the basis that she is the primary caregiver for her 98-year-old mother, who suffers from dementia and requires assistance moving around, grooming, dressing, bathing, and serving her meals. In addition, the Appellant relied on her own disabilities as grounds for requesting such permission. These included chronic pain and numbness from her neck down to her left leg, with stiffness and muscle spasms experienced since 2010. She also stated that

¹ *Goldenberg v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/055.

she has previously undergone surgery and radiation for breast cancer, experiences episodes of vertigo, suffers from migraine headaches and, since 2019, has experienced short-term memory loss which has resulted in anxiety, depression, confusion, disorientation, and panic attacks. The Appellant noted further that, given her unblemished work record and performance history, allowing her to continue to telecommute five days a week would enable her to complete her domestic obligations as a mother of two and a wife.

8. The Appellant's request was rejected by her FRO.²

9. On 30 March 2022, the Appellant submitted another request, this time to the Director of her Division (Director), to be permitted to telecommute five days per week. Pending the review of her request, the Director permitted her to continue telecommuting five days per week.

10. In early May 2022, a meeting between the Director and the Appellant took place. During that meeting, the Director informed her that her request to telecommute five days per week would not be granted. In particular, regarding the medical bases she relied upon, the Director invited her to have her request reviewed by the Division of Healthcare Management and Occupational Safety and Health (DHMOSH). The Director summarized his meeting with the Appellant in an e-mail dated 4 May 2022, stating that:³

(...) I am following up in writing with the advice that I gave verbally. Requests for [five] days telecommute are considered exceptional and may only be approved if there are 'personal, compelling circumstances' justifying the request.

As we discussed, the medical conditions which you allude to may only be evaluated by a medical professional and, indeed, DHMOSH is the appropriate organization to review and advise from a medical perspective. I urge you to work with DMOSH at the earliest opportunity so that we may all be appropriately informed as to how we may support your need.

Whereas taking care of an elderly parent may be a compelling circumstance, it must be borne in mind that many staff are in the same situation taking care of elderly/frail parents, and typically such requests may be approved in instances where there is a sudden change in the parent's circumstance, requiring temporary support. (i.e., a fall, a surgery, etc.). In the

² E-mail from the Administration to Ms. Goldenberg dated 29 March 2022, Subject: Rejected Flexible Working Arrangement Request.

³ E-mail dated 4 May 2022 from the Administration to Ms. Goldenberg, Subject: RE: Compelling reasons for five days telecommute.

instance you have described, it appears that the situation appears to be permanent and not of temporary nature.

Pending the DMOSH review, I am willing to approve you[r] telecommute for [three] days per week, which is in line with the [Secretary-General's Bulletin], as, again, I must take into account equity and fairness to other staff members while also weighing your individual circumstances.

11. On 15 May 2022, Ms. Goldenberg requested DHMOSH's advice for the first time.
12. On 17 May 2022, DHMOSH informed Ms. Goldenberg by e-mail that it did not support her request, stating that "[their] view [was] that [she] [did] not require full time work from home to allow [her] to participate reasonably and equally with others at work". DHMOSH further observed that "this e-mail [could] be shared with [her] supervisor, who ha[d] authority for workplace accommodations with or without DHMOSH support".⁴ On the same day, Ms. Goldenberg sought a reconsideration of her case from DHMOSH. DHMOSH informed her that she needed to submit such a request to the Office of Medical Director, which she did on 2 June 2022.⁵ In support of her request, the Appellant submitted letters from her physician and neurologist, as well as relevant test results.⁶
13. On 30 June 2022, the Administration informed the Appellant by e-mail that, pending DHMOSH's decision, it agreed to "continue with an interim approval of the arrangement for the month of July, as a temporary measure".⁷
14. On 18 July 2022, the Senior Medical Officer (SMO), DHMOSH, informed the Appellant by e-mail that, following a review of her case, he did not recommend her working from home five days per week as there was no medical reason requiring it. Given that the matter had been reviewed twice by two different medical officers, he indicated that this outcome was considered to be final

⁴ E-mail dated 17 May 2022 from DHMOSH to Ms. Goldenberg, Subject: GOLDENBERG, Yelena – Workplace constraints – Recommendation (Ref# 2022-2012058034).

⁵ E-mail dated 17 May 2022 from Ms. Goldenberg to DHMOSH, Subject: RE: GOLDENBERG, Yelena – Workplace constraints – Recommendation (Ref# 2022-2012058034).

⁶ E-mail dated 2 June 2022 from Ms. Goldenberg to DHMOSH, Subject: Medical records – Yelena Goldenberg, p. 172 of 266. See also Doctor's letters dated 1 June 2022 and 26 May 2022.

⁷ E-mail dated 30 June 2022 from the Administration to Ms. Goldenberg, Subject: FWA Request for Review (Approval/Rejection) – Pending Action.

but noted that DHMOSH was only an advisor and that the Appellant's supervisor had full authority on flexible working arrangements (FWA).⁸

15. On 27 July 2022, the Appellant submitted to the Administration by e-mail a request to telecommute five days per week for the month of August. On 29 July 2022, the Administration informed the Appellant by e-mail that “[i]n order to approve [her] request, [she needed to] provide DHMOSH’s approval by (...) 2 August 2022”.⁹ On the same date, the Appellant replied to the Administration that her case was still under review by DHMOSH.

16. On 2 August 2022, the Administration followed-up with the Appellant by e-mail, mentioning that “since [it] ha[d] not received the DHMOSH’s approval until now, [she was] requested to report to the office (...) [on] 3 August 2022”.¹⁰

17. On 3 August 2022, the Administration inquired directly with DHMOSH regarding the status of the Appellant. On the same date, DHMOSH indicated that the Appellant had been advised on 18 July 2022 of its decision and further reiterated its conclusions.

18. On the same date, the Administration informed the Appellant by e-mail that her request to telecommute five days per week was denied as “[DHMOSH] ha[d] come back to [her] request and state[d] that [her] health condition [did] not prevent [her] to work in the office two days per week”.¹¹

19. On 11 August 2022, the Appellant requested management evaluation of the decision to deny her request for five days per week of telecommuting.¹²

20. On 30 August 2022, the Management Evaluation Unit (MEU) informed the Appellant by letter of its decision to uphold the contested decision.¹³

⁸ E-mail dated 18 July 2022 from the SMO to Ms. Goldenberg, Subject: Re: Workplace accommodation – Yelena Goldenberg 280706 SPECIAL CONSTRAINTS.

⁹ E-mail dated 29 July 2022 from the Administration to Ms. Goldenberg, Subject: FWA Request for Review – August 2022.

¹⁰ E-mail dated 2 August 2022 from the Administration to Ms. Goldenberg, Subject: FWA Request for Review – August 2022.

¹¹ E-mail from the Administration to Ms. Goldenberg dated 3 August 2022, Subject: Rejected FWA Request.

¹² Management evaluation request dated 11 August 2022.

¹³ Management evaluation response dated 30 August 2022.

21. On 31 October 2022, the Appellant filed an application with the Dispute Tribunal challenging the contested decision.

Impugned Judgment

22. On 14 June 2023, the Dispute Tribunal issued the impugned Judgment, dismissing the Appellant's application. The UNDT first rejected the Secretary-General's submission that Ms. Goldenberg's application was not receivable *ratione materiae* because she only contested DHMOSH's advice. The UNDT nevertheless concluded that although DHMOSH's advice was not an appealable administrative decision, it was still entitled to review the Administration's decision which took into consideration DHMOSH's advice.¹⁴

23. Turning to the merits of the case, relying on Secretary-General's Bulletin ST/SGB/2019/3 (Flexible working arrangements), the Dispute Tribunal found that it was not unreasonable nor unlawful to require Ms. Goldenberg to work from the office two days per week. In particular, regarding the medical component of Ms. Goldenberg's request, the UNDT found that, although she claimed that she was a person with disabilities, the Administration "reasonably based [its] decision (...) on DHMOSH's determination that they did not support the workplace accommodation of telecommuting five days a week".¹⁵

24. Concerning the personal component of her request, the UNDT highlighted that Ms. Goldenberg's situation was permanent and that ST/SGB/2019/3 was not "intended to provide staff members with the opportunity to work remotely full time for indefinite periods at their duty stations".¹⁶ Therefore, it held that "[w]hile it [was] understandable that [Ms. Goldenberg] wishe[d] to provide full-time care to her elderly relative, that wish [did] not create an obligation for the Administration to allow her to not report to the office".¹⁷

25. The Dispute Tribunal took into consideration the fact that Ms. Goldenberg had been able to work remotely on a full-time basis from March 2020 to December 2022 and that there was an operational need for her to return to work.¹⁸

¹⁴ Impugned Judgment, paras. 17-18.

¹⁵ *Ibid.*, para. 30.

¹⁶ *Ibid.*, para. 39.

¹⁷ *Ibid.*, para. 36.

¹⁸ *Ibid.*, paras. 36-37.

26. Therefore, the UNDT concluded that Ms. Goldenberg had been afforded reasonable accommodation for her situation and dismissed her application.

Procedure before the Appeals Tribunal

27. On 14 August 2023, Ms. Goldenberg filed an appeal against the impugned Judgment with the Appeals Tribunal, to which the Secretary-General responded on 23 October 2023.

Submissions

Ms. Goldenberg's Appeal

28. Ms. Goldenberg seeks the Appeals Tribunal to reverse the “UNDT rejection of [her] application”. She also requests an oral hearing before the Appeals Tribunal to “ensure that her arguments are fully understood and discussed”.

29. First, Ms. Goldenberg submits that the UNDT erred in law with regard to the standard the Administration must apply when considering whether an employee has compelling personal circumstances warranting telecommuting on a full-time basis. Ms. Goldenberg contends that the Administration should have examined together her medical *and* personal reasons submitted in support of her request to telecommute five days per week. By failing to do so, the Administration ignored the fact that “taking care of her elderly mother *while* suffering from the symptoms of her disability created a much more compelling basis to grant [her] request than either basis would individually”.¹⁹

30. Second, Ms. Goldenberg contends that both the Administration and the UNDT improperly narrowed the standard of “compelling circumstances” to amount to “sudden”, “unexpected” and “temporary” circumstances. In particular, Ms. Goldenberg argues that the Administration erroneously conflated the limitation on the length of FWA with a limitation on the duration of compelling personal circumstances, while ST/SGB/2019/3 only restricts the Administration’s ability to grant such requests for periods exceeding three or six months.²⁰

31. Third, relying on *Rechdan*,²¹ Ms. Goldenberg submits that the UNDT erred in finding that the Administration demonstrated operational needs justifying the denial of her request to

¹⁹ Emphasis added.

²⁰ Section 3.10 of ST/SGB/2019/3.

²¹ *Rechdan v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/009.

telecommute. On the contrary, she argues that the Administration failed to provide her with any “meaningful explanation of the operational needs that weighed against granting [her] request”, other than *a posteriori*, in the UNDT reply. She contends that there were no operational needs for her to be in the office two days per week as all of her duties are performed online and the in-person demands related to her position present no burden on other staff members.

32. Fourth, Ms. Goldenberg submits that the UNDT erred when it failed to consider whether the Administration ignored relevant matters and considered irrelevant ones relating to her need to care for her elderly mother. In this regard, Ms. Goldenberg points out that the Administration failed to address uniquely compelling circumstances, such as “the severity of her mother’s condition, her advanced age, and, most importantly, that she refuses care from strangers”, while it relied on “irrelevant and unsupported generalization that ‘many staff are in the same situation’”.²²

33. Last, Ms. Goldenberg contends that the UNDT erred by failing to consider whether the Administration ignored relevant elements related to her medical condition. In particular, she contends that the Administration only “rubber-stamped” DHMOSH’s recommendation to deny her medical basis in support of her request to telecommute, even though DHMOSH issued its recommendation without “any meaningful medical evaluation” and without conducting any independent investigation.

34. Therefore, by denying her request to telecommute five days per week, Ms. Goldenberg submits that both the Administration and the UNDT failed to honor their commitments in terms of gender parity and disability inclusion.

35. **The Secretary-General’s Answer**

36. The Secretary-General seeks that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal. With regard to Ms. Goldenberg’s request for an oral hearing, the Secretary-General does not submit any specific argument.

37. The Secretary-General submits that the UNDT applied the appropriate standard concerning the decision not to allow Ms. Goldenberg’s request to telecommute five days per week. The Secretary-General notes that Ms. Goldenberg never raised this argument before

²² E-mail dated 4 May 2022 from the Administration to Ms. Goldenberg, Subject: RE: Compelling reasons for five days telecommute.

and, therefore, it cannot be introduced for the first time on appeal.²³ Furthermore, the Secretary-General argues that Ms. Goldenberg's contention does not demonstrate any error in the impugned Judgment, but merely indicates that she disagrees with the UNDT's findings.

38. The Secretary-General contends that the UNDT did not err in "adopting the Administration's narrow interpretation of 'compelling circumstances'". The Administration was not obliged to grant Ms. Goldenberg's request to telecommute five days per week and to revisit her request every three or six months, especially as she had described "the bases of her request as being indefinite".

39. The Secretary-General submits that the UNDT correctly found that the Administration properly exercised its discretion in taking the contested decision considering, *inter alia*, that there was an operational need for Ms. Goldenberg to return to work. The Secretary-General asserts that Ms. Goldenberg's reliance on *Rechdan* is misplaced, as that case was clearly distinguishable from hers.²⁴ In the present case, the Secretary-General observes that the Administration did provide Ms. Goldenberg with the reasons for denying her request in an e-mail dated 4 May 2022, in accordance with the requirements set out in Section 2.1(d) of ST/SGB/2019/3.²⁵ The Secretary-General also notes that pursuant to Section 2.2 of this Secretary-General's Bulletin, managers are only required "to establish that the requested accommodations represent a disproportionate or undue burden on the workplace" if the advice from the Medical Director or Officer is rejected, which was not the case for Ms. Goldenberg. Furthermore, the Secretary-General contends that even if the UNAT were to consider that he should have included his considerations of the operational needs in his initial e-mail to Ms. Goldenberg, in *AAF*,²⁶ the UNAT considered that the delivery of such explanations in a reply to an application was sufficient to safeguard the staff member's due process rights.

40. The Secretary-General contends that the UNDT did not ignore relevant matters or consider irrelevant ones relating to Ms. Goldenberg's care of her mother and that her contentions in this regard constitute an attempt to reargue her case. Furthermore, the Administration's duty of care required it to take into consideration the equity and fairness to

²³ *Koffi Gilles Wilfried Amani v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1301, para. 61; *Ratnanjali Venkata Koduru v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1230, para. 35.

²⁴ *Rechdan* Judgment, *op. cit.*

²⁵ E-mail dated 4 May 2022 from the Administration to Ms. Goldenberg, Subject: RE: Compelling reasons for five days telecommute.

²⁶ *AAF v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1294, para. 53.

other staff members, especially as Section 3.5 of ST/SGB/2019/3 stipulates that “[c]are should be taken to ensure that telecommuting does not result in additional demands on other colleagues”.

41. Last, the Secretary-General submits that the UNDT did not err in finding that DHMOSH reviewed Ms. Goldenberg’s medical condition twice before reaching its conclusions. Furthermore, pursuant to Section 2.2 of ST/SGB/2019/3, there was no requirement for DHMOSH to physically examine a staff member before reaching a recommendation of workplace accommodation.

Considerations

Oral hearing

42. The Appellant sought an oral hearing of this appeal on grounds that this would ensure that the arguments raised by her on appeal were understood and considered by the Tribunal. Under Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure, the Appeals Tribunal may grant an oral hearing if it would “assist in the expeditious and fair disposal of the case”.²⁷ The Secretary-General filed no submissions regarding this request.

43. This Tribunal has refused oral hearings where the factual and legal issues arising from the appeal have already been clearly defined by the parties and an oral hearing would not assist in the expeditious and fair disposal of the case. An appeal is not a rehearing of the matter but an opportunity for the parties to address the issues which have been raised on appeal, including errors of law, fact, and jurisdiction. The factual and legal issues in this appeal have been clearly defined by the parties and we are not persuaded that an oral hearing would assist in the expeditious and fair disposal of the case. For these reasons, the request for an oral hearing is denied.

²⁷ *Lilian Ular v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1409, paras. 41-42.

Merits of the appeal

44. This appeal turns on whether the UNDT erred in finding that the Appellant had failed to demonstrate that the exercise of the Administration's discretion to deny her request to telecommute five days per week was legal, rational, reasonable, and procedurally correct. Article 2(1) of the Statute provides that this Tribunal is competent to hear and pass judgment on an appeal against a judgement of the Dispute Tribunal where it has: (a) exceeded its jurisdiction or competence; (b) failed to exercise jurisdiction vested in it; (c) erred on a question of law; (d) committed an error in procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision. An appeal must be brought within the parameters of the Statute, identifying specific grounds of appeal, with the appellant required to demonstrate in what way the impugned judgment is defective.²⁸ What is clear is that the appeals procedure is aimed at correcting an error made by a first instance tribunal and is not an opportunity for a party to relitigate their case afresh on new grounds raised for the first time on appeal.

45. In *Sanwidi*,²⁹ this Tribunal found that the scope of review of an administrative decision by the Dispute Tribunal is limited to determining whether the exercise of the Administration's discretion is legal, rational, reasonable, and procedurally correct, ensuring that it does not lead to unfairness, unlawfulness, or arbitrariness. Consideration must be given to whether relevant matters have been ignored and irrelevant matters considered in a manner which has led to the decision taken being absurd or perverse. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it, or to substitute its own decision for that of the Secretary-General.³⁰

46. Section 2.1 of ST/SGB/2019/3, which pertains to FWA, records, in relevant parts, that:

... Flexible working arrangements may be authorized subject to the following guiding principles:

(a) While there is no right to flexible working arrangements, such arrangements are in line with the efforts of the Organization to be responsive and inclusive and achieve

²⁸ *Sarah Coleman v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1225, para. 38.

²⁹ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

³⁰ *Ibid.*, para. 40.

gender parity, and therefore should be viewed favourably as a useful tool by staff and managers alike, where exigencies of service allow;

(b) Flexible working arrangements are voluntary arrangements agreed between staff and managers, such as first reporting officers;

(c) Managers should discuss the appropriate possibilities for staff members to avail themselves of flexible working arrangements. It is recognized that flexible working arrangement options may not be possible for some jobs and/or at certain periods of time;

(d) Staff members should seek written approval from their managers to avail themselves of the flexible working arrangements. When denying such requests, managers shall provide the basis for the non-approval in writing. Managers may suspend or cancel previously approved flexible working arrangements at any time due to exigencies of service or unsatisfactory performance. Staff members shall be informed of the basis for suspension or cancellation in writing. The Office of Human Resources shall monitor the implementation of the present bulletin and report on a regular basis to the Secretary-General on the Organization's usage of the different flexible working arrangements options;

47. Section 2.2 states that:

... Certain components of the flexible working arrangements may be advised by the Medical Director or a duly authorized Medical Officer as being suitable to accommodate medical restrictions or limitations as part of a time-limited return-to-work programme. In line with the general principles of reasonable accommodations for short-term disability, if that advice is rejected, the manager would be required to establish that the requested accommodations represent a disproportionate or undue burden on the workplace.

48. Recognized FWA options are specified in Section 3 of ST/SGB/2019/3. Sections 3.7, 3.8 and 3.10 provide that:

Working away from the office (telecommuting)

...

... A manager may allow a staff member to telecommute within the duty station up to a maximum of three days during the work week. Telecommuting may be authorized in units of half or full days, as an ad hoc or a regular arrangement.

...

... In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute within the duty station for more than the maximum number of days set out in section 3.7 above.

...

... In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute from outside the staff member's official duty station for an appropriate duration not exceeding six months. Managers may, in exceptional circumstances, consider an extension of the authorization to remotely telecommute for an additional period not exceeding three months. Remote telecommuting does not constitute a change of official duty station within the meaning of staff rule 4.8 (a).

49. It follows from the stated terms of this Secretary-General's Bulletin that a staff member is not entitled as of right to enjoy FWA and must seek written approval from their manager to work on such basis. A manager may allow a staff member to telecommute within the duty station up to a maximum of three days during the work week unless "compelling personal circumstances" warrant allowing such arrangement for more than three days per week for an appropriate period not exceeding six months, which in exceptional circumstances may be extended for an additional period not exceeding three months. Where a request to telecommute is refused, reasons for that refusal are to be given by the manager.

50. On appeal, the Appellant contends that the UNDT erred in not finding that the Administration had failed to examine her medical *and* personal reasons together and had improperly narrowed the standard of "compelling circumstances" to "sudden", "unexpected" and "temporary" circumstances, conflating the limitation on the length of FWA with a limitation on the duration of compelling personal circumstances. From the record of the decision taken by the Director, it is evident that regard was given to both the Appellant's personal and medical circumstances in refusing her request. It was recorded that DHMOSH had twice considered the Appellant's medical evidence advanced and twice recommended refusing her request. In doing so, DHMOSH considered and properly relied on the medical reports and other material placed before it by the Appellant, with no obligation under ST/SGB/2019/3 to conduct a medical examination of her.³¹ The Administration provided correspondence from which it is apparent that the Director had considered the recommendation of DHMOSH. In addition, he stated that he could not support the request on the basis of the personal reasons advanced by the Appellant. This was stated to be so on the basis that many staff members share similar situations and have caretaking responsibilities for elderly parents, spouses, minor children, or other relatives, and need to identify solutions that do not involve working from home five days per week. We are persuaded that even if the

³¹ Section 2.2 of ST/SGB/2019/3.

contested decision did not set out the reasons for it in a consolidated and detailed form, referring to both the medical and personal bases on which it was sought, having regard to the body of correspondence set out in the record, it is evident that both the Appellant's medical and personal reasons were considered and that the Appellant was made aware of the reasons for the decision taken on both bases.

51. Consequently, it cannot be suggested that the lack of consolidated reasons provided to the Appellant in a single letter from the Director impacted her due process rights or rendered the contested decision unlawful on this basis alone. Nor do we understand this to be the Appellant's contention.³² In any event, as was the case in *AAF*,³³ even where reasons are advanced for the first time in a reply before the UNDT, this still constitutes a sufficient opportunity to address and challenge such reasons. Therefore, any procedural error that may have arisen from the failure to provide reasons when issuing the administrative decision may not be significant enough on its own to render the contested decision unlawful.

52. From the record of correspondence between the parties, it is apparent that the Director had regard to both the medical and personal bases for the Appellant's request, and that both were considered in accordance with the Administration's requirements. Furthermore, reasons for refusing the request on both bases were provided in this correspondence. From these reasons, it is evident that all relevant material had been placed before the Director and appropriately considered by him when making the decision that he did. There is therefore no merit in the Appellant's contention that the Administration failed to consider the two grounds for her request together. Nor is there merit in the suggestion that the Administration improperly narrowed the standard of "compelling circumstances" to "sudden", "unexpected" and "temporary" circumstances, or conflated the limitation on the permissible length of telecommuting with a limitation on the duration of compelling personal circumstances.

53. In this regard, we agree with the Secretary-General's contention, that the general rule is that a party cannot raise new argument before the UNAT for the first time on appeal.³⁴ This is because this Tribunal, in performing its appellate function, is tasked with correcting errors made by the UNDT, and an error cannot be said to have been committed if the issue raised was

³² *AAF* Judgment, *op. cit.*, paras. 52-53.

³³ *Ibid.*

³⁴ *Koffi Gilles Wilfried Amani* Judgment, *op. cit.*, para. 61; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, paras. 24-25; *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049, paras. 13-15.

not one previously considered by the UNDT. Allowing an issue to be raised for the first time on appeal without good reason would permit a party to bypass the UNDT and undermine the two-tier United Nations system for the administration of justice.³⁵

54. However, despite this general rule, there are circumstances in which the UNAT may consider an argument raised for the first time on appeal, such as when it is raised in relation to a question of law where it is apparent from the appeal record that it has been drawn from the clear facts placed before the UNDT. This is precisely such a case. It follows that the issue, while permissibly raised by the Appellant, lacks merit.

55. From the express terms of ST/SGB/2019/3, it is clear that telecommuting is intended to be permissible for a maximum of three days per week unless “compelling personal circumstances” warrant allowing such an arrangement for more than this maximum number of days for an appropriate limited period. It follows that while ST/SGB/2019/3 clearly intends to provide staff members with the opportunity to work remotely on a limited basis to allow a healthier work-life balance and support staff, it does not permit telecommuting for more than three days per week, except for a limited period, even when “compelling personal circumstances” exist.

56. The Appellant’s submission that the Administration failed to consider that her request placed no burden on other staff members, and that it demonstrated no operational needs justifying the denial of her request, is without merit. It disregards the express terms of ST/SGB/2019/3, which specify that telecommuting is permitted for no more than three days per week unless compelling personal circumstances justify extending such days for a limited period. It places no obligation on the Director “to establish that the requested accommodations represent a disproportionate or undue burden on the workplace”,³⁶ unless the recommendation of the DHMOSH is rejected, which was not the case here. In this regard, the Appellant’s reliance on *Rechdan*³⁷ is of no assistance given the matter is distinguishable on the facts and, in any event, is not binding on this Tribunal.

57. In *AAL*,³⁸ it was recognized that there is no right to enjoy FWA, but that such arrangements should be viewed favourably “where exigences of service allow”. In that matter,

³⁵ *Koffi Gilles Wilfried Amani* Judgment, *op. cit.*, para. 61.

³⁶ Section 2.2 of ST/SGB/2019/3.

³⁷ *Rechdan* Judgment, *op. cit.*

³⁸ *AAL v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1342, para. 28.

the Administration was found to have properly exercised its discretion, with no evidence of any discriminatory practice against the staff member. Similarly, in *Nisreen Abusultan*,³⁹ this Tribunal found that the refusal of a request to telecommute constituted a valid and lawful exercise of the Agency's discretion, especially as COVID-19-related travel restrictions were lifted and a 30 per cent office attendance requirement was in place.

58. It was not required of the UNDT to decide whether the decision taken by the Administration was correct, nor would it have been permissible for it to substitute its own decision for that of the Administration. The UNDT correctly determined that the contested decision constituted a lawful, rational, reasonable, proportionate, and procedurally correct exercise of the Administration's discretion.⁴⁰ Furthermore, the Administration acted neither unreasonably nor unlawfully in requiring the Appellant to work from the office for two days per week. The contested decision was made in accordance with the terms of ST/SGB/2019/3, with due regard given to relevant considerations including her personal and medical circumstances, and irrelevant considerations excluded. The result was neither unlawful, irrational, unreasonable or arbitrary, nor absurd or perverse.⁴¹ In doing so, the Administration exercised its discretion in the manner required.

59. Furthermore, there is no error in the UNDT's finding that the Administration had not engaged in any differential or discriminatory practice or treatment of the Appellant, nor any evidence that the contested decision was biased or based on any improper motive, or that it was arbitrary, irrational, absurd, or perverse.⁴²

60. It follows that the Appellant has therefore failed to show, as is required by Article 2(1) of the Statute, that the impugned Judgment was defective in any manner or that it erred on a question of law or of fact in such way as to result in a manifestly unreasonable decision. Nor has the Appellant demonstrated that she received differential or discriminatory treatment compared to any other staff member.

61. For these reasons, it follows that the appeal must be dismissed.

³⁹ *Nisreen Abusultan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2023-UNAT-1353, para. 29.

⁴⁰ *Sarah Coleman* Judgment, *op. cit.*, para. 42; *Yolla Kamel Kanbar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1082, para. 30; *Sanwidi* Judgment, *op. cit.*, para. 40.

⁴¹ *Sanwidi* Judgment, *op. cit.*, para. 40.

⁴² *AAL* Judgment, *op. cit.*, paras. 38-39; *Nisreen Abusultan* Judgment, *op. cit.*, paras. 31-32.

Judgment

62. Ms. Goldenberg's appeal is dismissed, and Judgment No. UNDT/2023/055 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Savage, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Sheha

Judgment published and entered into the Register on this 10th day of July 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar