
**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

**Auda
(Respondent/Appellant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge Sabine Knierim
Case Nos.:	2017-1069 & 2017-1071
Date:	27 October 2017
Registrar:	Weicheng Lin

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2017-UNAT-787

... On 16 March 2015, the Special Assistant emailed the Applicant informing him that Mr. EC had recused himself in view of a conflict of interest and that an alternate investigator was being sought.

... On 27 March 2015, the Special Assistant emailed the Applicant to inform him that Mr. FS was appointed to the second FFP as an investigator.

... On 16 April 2015, Ms. MS and Mr. FS emailed the Applicant a memorandum informing him of their appointment taking over the investigation and inviting him to an interview.

... The Applicant responded to the email on 17 April 2015, requesting the terms of reference of the second FFP as signed by the Head of Department and stating:

This weekend will mark the third anniversary of this investigation... It is sad that the previous investigation panel has willingly decided and accordingly acted to delay[,] withhold, and not submit its report on the investigation and the records of the investigation. It is imperative that the terms of reference include a clear and explicit statement that the new panel has obtained and now holds all the records compiled by the previous panel, including, but not limited to, all the emails and correspondences exchanged, hand writings, and drafts.

... By email of 18 April 2015, Ms. MS and Mr. FS responded to the Applicant, attaching an email they received from the Special Assistant, which they believed set forth their terms of reference as “tasked by Mr. Gettu to continue the investigation and determine the facts of the complaint of harassment, and to prepare a detailed report addressed to Mr. Gettu.”

... On 20 April 2015, the Applicant sought an assurance that the second FFP had “already obtained and now holds all the records compiled by the previous panel.”

... On 20 April 2015, Ms. MS and Mr. FS emailed the Applicant, stating “[p]lease be advised that the records from the former panel have been provided to us by [the Special Assistant]. It is our understanding that the records provided to us are complete, except for one witness statement [that of the Special Assistant].”

... On the same day, the Applicant replied that “pending confirmation of completeness of records and given a previously scheduled appointment,” he was unavailable to meet as proposed.

... On the same day, Ms. MS and Mr. FS emailed the Applicant stating that “it is true that one witness [Ms. AL, the Special Assistant] has informed us that she did appear before the panel and was not sure whether her statement is on file. This is a matter for the panel to verify and pursue and cannot be the reason for declining to appear as scheduled before us.”

... On 26 June 2015, the second FFP submitted their investigation report to Mr. Gettu.

... By letter dated 8 September 2015, Mr. Gettu informed the Applicant that he had read the report of the second FFP. He provided a summary of the findings and conclusions of the report pursuant to [Section] 5.18 of ST/SGB/2008/5. The conclusions of the second FFP and the subsequent conclusions of Mr. Gettu, based on the report, were communicated as follows:

Conclusion

The second panel concluded, after reviewing all the evidence, that the working relationship between yourself and Mr. Baumann was especially difficult following your elevation to the post of Chief, [Office of the USG and ASG], with a different reporting line to the USG/[DGACM].

On your specific complaint, the Panel observed that your complaint cannot be viewed in isolation. Mr. Baumann produced evidence of his own complaints to the USG/[DGACM] against your own conduct.

The second panel concluded that none of the incidents cited by themselves can be viewed as abusive and/or offensive and, viewed as a whole they still fall short of amounting to harassment. Thus there was no prohibited conduct under ST/SGB/2008/5.

Following a review of the investigation report and supporting documentation, I have concluded that the record indicated that Mr. Baumann's conduct in the context of your complaints does not violate the provisions of ST/SGB/2008/5, and as this falls under [S]ection 5.18(a) of ST/SGB/2008/5, I therefore consider the case closed.

3. On 20 November 2015, Mr. Auda filed an application with the UNDT, challenging the decision of the USG/DGACM, Mr. Gettu, to close the investigation into his complaint without taking any further action (contested decision).
4. On 31 December 2015, Mr. Auda separated from the Organization.
5. On 28 September 2016, the UNDT issued Order No. 226 (NY/2016) denying Mr. Auda's motion requesting, *inter alia*, that the UNDT find that the panel was improperly constituted and its investigation was conducted in a manner that violated ST/SGB/2008/5. The Order stated, *inter alia*, that a "reasoned decision would be issued in due course".

6. On 1 February 2017, the Dispute Tribunal issued Judgment No. UNDT/2017/007.² The Dispute Tribunal concluded that Mr. Gettu's decision—i.e., to close Mr. Auda's complaint without further action on the basis of the second FPP's conclusion that no prohibited conduct had taken place—was improper. The UNDT held that "a responsible official cannot make a proper

Mr. Auda's Answer

13. Mr. Auda submits that the Dispute Tribunal acted within its jurisdiction and competence and was correct in law by issuing separate Judgments following consolidated proceedings. They address different procedural violations in connection with separate FFPs that, while sharing a common background, do not have the same facts.

14. The Dispute Tribunal did not substitute its opinion for that of the USG/DGACM. The UNDT applied the correct standard of review and correctly determined that the circumstances of the case demonstrated that the contested decision was improper as it was based on an investigation process tainted by serious breaches of procedural fairness. The UNDT correctly assessed the role of Ms. AL and concluded her actions constituted a breach of procedural fairness. The Secretary-General's contentions that the procedural irregularities did not affect the substance of Mr. Auda's complaint and that the UNDT erred by not limiting its examination to whether Mr. Gettu had committed a procedural error in reaching his decision are without merit. Mr. Gettu was the responsible official under ST/SGB/2008/5, whose responsibility encompassed all phases of the investigation and actions of his subordinates.

15. The Dispute Tribunal did not overly-or doubly-compensate Mr. Auda. The two awards were made for distinct procedural violations by the different FFPs. The award of USD 5,000 in this case was made for the harm resulting from the procedural breaches by the second FFP and the decision to improperly close the investigation; it was not made for the overall delay in the investigation, irrespective of whether or not the second FFP carried out a *de novo* investigation.

16. Mr. Auda requests that the Appeals Tribunal reject the Secretary-General's appeal in its entirety, except the quantum of compensation against which Mr. Auda filed an appeal.

Case No. 2017-1071

Mr. Auda's Appeal

17. Mr. Auda submits that the UNDT erred when it held that it was impossible for it to order either rescission of the contested decision or a referral for accountability. Neither the rescission of the contested decision nor a referral for accountability implies or necessitates a fresh investigation. ST/SGB/2008/5 establishes both organizational and personal responsibility for acts of misconduct. It is conceivable that Mr. Baumann could be reemployed by the

United Nations; in that event, the basis for the UNDT's refusal to grant such relief would no longer be valid. The UNDT's exercise of discretion in this regard was unreasonable and infringed Mr. Auda's right to due process. It has *de facto*

his other pleas. Therefore, contrary to the Secretary-General's contention, the appeal is receivable since Mr. Auda only partially prevailed before the Dispute Tribunal and is entitled to file an appeal to pursue the modification, annulment or vacation of its Judgment.

Merits

30. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.¹¹ The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.¹² Only in particular situations (i.e., in a case of a serious and reasonable accusation) does a staff member have a right to an investigation against another staff member which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Appeals Tribunal Statute (Statute).¹³ However, the Administration's discretion can also be confined in the opposite direction. There are situations where the only possible and lawful decision of the Administration is to deny a staff member's request to undertake a fact-finding investigation against another staff member.¹⁴

31. Concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, paragraph 2.1 of ST/SGB/2008/5 provides that: "every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse".

32. Section 2.2 adds that:

... The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to

¹¹ *Nadeau v. Secretary-General* (2005) UNAT 14, paras. 14-15.

any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

33. Section 5.3 of ST/SGB/2008/5 establishes that:

... Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

34. Sections 5.14 and 5.15 of ST/SGB/2008/5 provide:

... Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

... At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by [the Secretary-General's Bulletin] ST/SGB/2005/21 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)].

35. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and, in Section 5.17, the final report of those proceedings is referred to as follows:

... The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence (...). This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

36. Section 5.18(a)-(c) provides for the possible courses of action, one of which the responsible official shall take:

... If the report indicates that no prohibited conduct took place, the responsible official will close the case and will inform the alleged offender and the aggrieved individual;

... If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

... If the report indicates that the allegations were well-founded and that the

39. On the first issue, the UNDT found that the administrative actions performed by Ms. AL (the Special Assistant to the USG/DGACM and the former ASG/DGACM) for the second FFP were “incompatible with her status as a witness in the investigation”. Thus, the UNDT concluded that Ms. AL’s role in relation to the second FFP constituted a breach of procedural fairness owed to Mr. Auda under ST/SGB/2008/5.¹⁸

40. Specifically, the UNDT noted that:¹⁹

... While the fact that Ms. AL contacted the first FFP to seek feedback regarding the status of the investigation may be considered minor, it conflicts with her role as a witness interviewed in the course of the investigation into the Applicant’s complaint, and her role became substantively more important when she received custody of the record from the first FFP, was tasked to identify investigation members for a second FFP, communicated directly with the Applicant in respect of the matter and reached out to individuals to schedule appointments on behalf of the second FFP.

41. Further, the UNDT found that:²⁰

... [T]he fact that Ms. AL performed the following tasks is incompatible with her status as a witness in the investigation:

- a. She received the apparent custody of the investigation record from the first FFP, which did not contain a written statement of her own interview;
- b. She contacted potential investigators and identified available investigators for the second FFP;
- c. She prepared binders containing copies of the record from the first FFP, which she transmitted to the second FFP;
- d. She provided the second FFP with logistical and administrative support.

42. Under these circumstances, the UNDT concluded that:²¹

... All the tasks performed by Ms. AL lend themselves to an appearance of impropriety, which is not cured by Ms. AL’s claim that she did not see nor sign a copy of her witness statement given to the first FFP and that she refrained from reading the record that was transmitted to her for safekeeping by the first FFP. The fact, alone, that she copied the record in order to prepare two binders of the documents, which

¹⁸ *Ibid.*, paras. 73-74.

¹⁹ *Ibid.*, para. 71.

²⁰ *Ibid.*, para. 72.

²¹ *Ibid.*, para. 73.

role of the [Dispute] Tribunal to substitute its own decision for that of the Secretary-General.

...

... In exercising judicial review, the role

referred to OHRM. Under the specific circumstances of the case at hand, as found by the Dispute Tribunal, rescission of the challenged administrative decision was no longer possible.

50. Mr. Auda also raises, in his appeal, the failure of the UNDT to directly address the issue of the lawful and proper constitution of the second FFP. He asserts that its composition was improper, as it was composed of two individuals on the roster of OHRM who were no longer staff members, as they had retired, and were reportedly holding a consultancy or a “when actually employed” contract.

51. With respect to this issue, the Secretary-General asserts in his submissions that:

... (...) In the present case, as Ms. AL testified before the UNDT, it was necessary to appoint investigators from the OHRM roster since there were no investigators available within DGACM. Both of the investigators on the second FFP were listed on the OHRM roster (...) and both had successfully completed training in investigating allegations of prohibited conduct. Moreover, ST/SGB/2008/5 does not restrict panel members to current staff, and Ms. AL’s statement explained why the USG/DGACM considered it necessary to appoint two former staff members to the second FFP. The Appellant was notified of the constitution of the second FFP on 27 March 2015 and did not object to the members at that time, or in his request for management evaluation.

52. We agree with the Secretary-General’s submissions. Section 5.14 of ST/SGB/2008/5 requires that where a complaint warrants a formal fact-finding investigation, the responsible official shall promptly appoint a panel. The panel is to consist of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the OHRM roster. Therefore, the Section contemplates the selection of either an internal panel of staff members or one selected from the OHRM roster. It does not specify what the OHRM roster is but, unlike the case of the internal panel, it does not require that the persons on the OHRM roster be staff members.

53.

Compensation

54. Turning to the issue of the compensation awarded to Mr. Auda, we hasten to note that the history of this case presents a sorry picture of delay on the part of the Administration. There were two differently constituted panels to hear one complaint and a total of 41 months elapsed before a decision was given.

55. The Secretary-General challenges the UNDT's award of USD 5,000 as compensation, r9(m)(pres)-4.reation

59. This Tribunal has held that while not every violation of due process rights will necessarily lead to an award of compensation, damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.²⁹

60. However, General Assembly resolution 69/203, adopted on 18 December 2014, amended Article 10 of the UNDT Statute. Article 10(5) of the UNDT Statute now states in relevant part:³⁰

... As part of its judgement, the Dispute Tribunal may only order one or both of the following:

...

(b) Compensation for harm, *supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

61. In the instant case, the UNDT found that:³¹

... At the hearing, the [Dispute] Tribunal asked questions to the Applicant as to the harm he suffered. The Respondent's counsel objected to the statements made by the Applicant on the grounds she had not had a chance to cross-examine the Applicant. (...)

... The Applicant stated how he suffered harm to his reputation and general well-being, explaining how he was isolated and ostracized, how he suffered stress and anxiety during the investigation and in his pursuit of justice. (...)

62. Based on these findings, the UNDT awarded Mr. Auda USD 5,000 as compensation for harm as a result of a breach of investigation related procedures considering that it, together with this award, constituted adequate compensation for the harm that Mr. Auda had suffered.

²⁹ *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 41, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 33.

³⁰ Emphasis added.

³¹ Impugned Judgment, paras. 95-96.

63. We find that the UNDT erred in awarding compensation when Mr. Auda did not present any evidence, apart from his own unsworn testimony,³² to prove that he suffered any kind of harm as a result of the procedural irregularities.

64. We find further that Mr. Auda has not attained the threshold required for proof of harm to receive an award of compensation in accordance with the provisions of Article 10(5) of the UNDT Statute. Generally speaking, the testimony of an applicant alone without

Judgment

67. Mr. Auda's appeal is dismissed. The Secretary-General's appeal is granted in part. The UNDT's award of damages, ordered in Judgment No. UNDT/2016/007, is vacated.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Knierim

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar