



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2018-UNAT-822

Elobaid  
(Respondent/Applicant)

v.

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

JUDGMENT

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Before:	Judge Martha Halfeld, Presiding Judge John Murphy Judge Deborah Thomas-Felix
Case No.:	2017-1111
Date:	22 March 2018
Registrar:	Weicheng Lin

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Counsel for Mr. Elobaid:	Robbie Leighton, OSLA
Counsel for Secretary-General:	Amy Wood

JUDGE MARTHA HALFELD , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/054, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 13 July 2017, in the case of

conversation that Mr. A benefited financially from the hotel while organizing the program, he responded, inter alia , as follows: “I would not make any assertion in my official capacity. I would voice out a lot of frustration in relation to how Mr. [A] had been organizing the human rights trafficking project. There was a suspicion that something was not right. I do not have hard documents or evidence. But this was a gut feeling—something was not right.” Ultimately,] OIOS found no evidence that Mr. A was involved in misconduct [and the investigation into possible misconduct by Mr. A was closed].

... OIOS thereafter commenced a new investigation, case no. 0100-15, whereby the Applicant was now the subject. In this connection on 8 May 2015, the Applicant was required to participate in a further interview with OIOS Investigators, Mr. Vittone, and Ms. Elisa Reuter. [Before his interview, Mr. Elobaid was provided with a copy of the record of his 10 April 2014 interview with OIOS and he confirmed having received and read it. He stated that he did not recall the incident or having made any specific comment, in particular in view of the time that had elapsed since the conference, and did not remember the names of the persons being present during the subject coffee break. In the context of this investigation, OIOS also conducted interviews with four potential witnesses of fact.]

... Based on the evidence gathered during the investigation, OIOS[, in its report issued on 29 July 2015,] made the following findings:

- a. During a coffee break, the Applicant approached a group of participants and queried them about Mr. A. He also voiced allegations of corruption against Mr. A.
- b. While the Applicant claimed no recollection of having raised such allegations against Mr. A., OIOS noted that the Applicant did not actually deny having raised these allegations.
- c. The Applicant confirmed that, during the material time, he had been frustrated with Mr. A. and the way in which he had been handling a project.
- d. The Applicant raised allegations of corruption against Mr. A while having no good faith belief in their veracity or otherwise having willful disregard for their truth or veracity and the reputational harm likely to be caused to Mr. A as a result of raising such allegations.

... On 28 September 2015, Mr. Kyle Ward, Chief Programme Support and Management Services [(PSMS)], OHCHR, issued to the Applicant a communication titled ‘Intention to issue written reprimand’ (...). [The communication informed Mr. Elobaid that OHCHR had received a report from OIOS concerning allegations of possible misconduct by him and asked him to provide comments. The memorandum summarized the findings and conclusions of the OIOS report, inter alia , as follows:

[W]e have received an Investigation Report (...) from [OIOS] concerning allegations of misconduct which were made against you.

(...) Specifically, it was alleged that during a break at a conference being held in Doha, Qatar from 10 to 12 December 2013, you publicly accused Mr. [A] (...) of engaging in corrupt activities.

(...) The Report found that at the conference in Doha, during a coffee break, you approached a group of participants and queried them about Mr. [A]. You also reportedly voiced allegations of corruption against Mr. [A].]

... On [12 and] 27 October 2015, the Applicant provided his [comments on] the 'Intention to issue written reprimand' (...). [In his e-mail dated 12 October 2015, Mr. Elobaid stated that the decision "seem[ed] to rely entirely on hearsay evidence, namely that [he] did not deny saying something that [he] could not remember" and he asked for "access to the entire evidence on the basis of which the decision is made". In his 'Response to the Intention to Issue Written Reprimand' dated 27 October 2015, Mr. Elobaid further elaborated his arguments on hearsay evidence and stated that he had been informed by Mr. Ward that he had no right to full disclosure of the evidence, mainly the OIOS report, as it was no disciplinary case but a managerial matter, which Mr. Elobaid argued violated his due process rights.]

... On 6 November 2015, Mr. Ward issued another communication titled 'Intention to issue written reprimand' (...)[, justifying, inter alia, the decision not to provide Mr. Elobaid with a copy of the OIOS Investigation Report].

Administrative Instruction ST/AI/292 (Filing of adverse material in personnel records) to provide “any written statement or explanations [he] might wish to give in response to the reprimand, which will also be placed in [his] Official Status File”.]

... On 7 January 2016, the Applicant requested management evaluation of the decisions to reprimand him and not to provide him with a copy of the OIOS Investigation Report (...).

... On 12 February 2016[,] the Applicant received a response from the Management Evaluation Unit upholding the decision (...).

...

... On 12 May 2016, he filed an application [with the Dispute Tribunal] to contest the decision to issue him a written reprimand and to withhold an investigation report. He [requested] a disclosure of the report and rescission of this decision.

... The Respondent filed a reply to the application on 16 June 2016. The Respondent [requested] the [Dispute] Tribunal to uphold the decision.

3. The UNDT rendered its Judgment on 13 July 2017. First, the UNDT found that the decision to issue the reprimand was *ultra vires* as it had not been taken by the competent organ. It considered that under paragraph 5 and Annex II of Administrative Instruction ST/AI/234/Rev.1 (Administration of the staff regulations and staff rules) as amended, the “head of office” J in this case the High Commissioner for Human Rights J had delegated authority to issue Mr. Elobaid with a written reprimand. However, in light of unsuccessful attempts by the UNDT “to clarify the matter with the [Secretary-General’s] counsel”, the UNDT found that it was “left with no option but to take the reprimand on its face as originating [in actuality] from Mr. Ward [, the Chief, PSMS, OHCHR,]”<sup>2</sup> who lacked the necessary delegated authority.

4. Second, the UNDT concluded that “[c]onsidering that a reprimand is issued upon a finding of misconduct and that it entails lasting negative consequences, (...) due process guarantees applicable to disciplinary measures are not *prima facie*”<sup>3</sup>.

investigative report to the extent needed to mount a defence<sup>77</sup> and the Administration failed to



provisions established by the Administration which does not fall within the Dispute Tribunal's or the Appeals Tribunal's authority as stated by established jurisprudence.

10. Moreover, the Secretary-General contends that the UNDT exceeded its competence and erred in law in holding that the facts of the case had not been established to the requisite standard of proof. In this regard, the UNDT again misconstrued the character of the administrative reprimand and erred in requesting a finding of misconduct. The decision to issue the written reprimand was not arbitrary, but based on reliable factual findings supported by the evidence in the case. The UNDT, however, erred in law and exceeded its competence by engaging in what amounted to a de novo review of the OIOS investigation.

11. Finally, the Secretary-General submits that the UNDT erred in fact resulting in a manifestly unreasonable decision in finding that the decision to issue the written reprimand was ultra vires because it had not been taken by the competent organ. As accepted by the UNDT in the impugned Judgment, Annex II of ST/AI/234 /Rev.1 as amended provides that written reprimands may be issued by the "head of office" at offices away from Headquarters and the High Commissioner for Human Rights may be considered as such and thus had the delegated authority to issue Mr. Elobaid with a reprimand. The UNDT erred in fact, however, when it considered that the Chief, PSMS, OHCHR, was in fact the "decision-maker". Contrary to the UNDT's finding, it was the High Commissioner who took the decision which was merely communicated by the Chief, PSMS, OHCHR "on behalf of the High Commissioner" in the memorandum dated 9 November 2015 containing the written reprimand. In order for the reprimand to have been "issued" by the High Commissioner within the meaning of ST/AI/234/Rev.1 as amended, his signature was not required. Even assuming that the memorandum should have been personally signed by the High Commissioner, the UNDT exceeded its competence by ordering rescission of the decision to issue the reprimand as not every procedural irregularity leads to the unlawfulness of the respective decision and the UNDT should have sent the matter back for correction of the procedure pursuant to Article 10(4) of the UNDT Statute.

12. Based on the foregoing, the Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment in its entirety.





interviewed as a witness on 10 April 2014. The absence of any justification for the refusal to provide Mr. Elobaid with the evidence against him on the sole basis of the Administration's choice of an administrative rather than a disciplinary measure renders this action arbitrary.

17. Moreover, Mr. Elobaid claims that the UNDT correctly held that the facts of the case had not been properly established. The UNDT's conclusion that the facts upon which a reprimand is based must be proved to a certain level is not dependent on whether those facts amount to a finding of misconduct or otherwise. The burden of proof referenced in the reprimand itself is "reasonable grounds" which is the applicable burden to initiate an investigation and thus cannot be the same for taking a decision with such significant negative consequences as issuing a reprimand. The UNDT correctly found that the decision-maker had failed to assess the evidence and to form a conclusion in the memorandum containing the reprimand as to what had in fact occurred and nonetheless issued the reprimand. Mr. Elobaid further disputes the Secretary-General's contention that the UNDT substituted its own judgment for that of the Administration arguing that the UNDT instead "remained firmly rooted in the contents of the reprimand reviewing the decision making process".

18. In view of the foregoing, in particular of the fact that "absent the [Appeals] Tribunal's intervention [Mr. Elobaid] will continue to be impacted by negative consequences flowing from the decision to reprimand him", he requests that the appeal be dismissed and the impugned Judgment be upheld.

#### Considerations

19. The issue on appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision to issue Mr. Elobaid with a written reprimand was unlawful.

20. The questions to be answered in this appeal are the following:

- i. Did the UNDT err in law in finding that the investigation had not been carried out in accordance with Mr. Elobaid's due process rights?
- ii. Did the UNDT err in fact, resulting in a manifestly unreasonable decision when it found that the decision to issue a written reprimand had not been taken by the competent organ?

- iii. Did the UNDT exceed its competence and/or err in law in holding that the facts of the case had not been established to the requisite standard of proof?

The Appeals Tribunal will address these questions in turn.

(i) Respect of due process rights

21. Here, we will examine whether the UNDT erred in finding that Mr. Elobaid's due process rights were violated.

22. In disciplinary cases, only when the preliminary investigation stage is completed and a disciplinary process has begun is the staff member entitled not only to receive written notification of the formal allegation, but also to be given the opportunity to assess the evidence produced against him or her.

23. As Staff Rule 10.3(a) states<sup>13</sup>



30. In light of the foregoing, the UNDT erred in law when it found that there was a breach of Mr. Elobaid's due process rights, as Mr. Elobaid was correctly apprised of the allegations against him, which could lead to an administrative action, and was afforded the opportunity to make representations before the measure was taken. We highlight the well-crafted and thought-provoking arguments of the UNDT, although we disagree in substance with it.

(ii) Competent delegated authority?

31. Regarding the competence, there is no dispute that it was the High Commissioner for Human Rights (head of the office), under Staff Rule 10.1(c) and paragraph 5 and Annex II of ST/AI/234/Rev.1, who had the necessary authority to issue the reprimand in the present case.

32. The relevant question is whether the memorandum dated 9 November 2015, signed by Mr. Ward, fulfills the mandatory condition of having been issued by the competent authority. The answer to that question does not demand much reasoning: Even though Mr. Ward signed the memorandum, the decision was taken "on behalf of the High Commissioner", whose signature was not necessary. This would be a formal constraint not required by the applicable provisions.

33. Therefore, when the UNDT inferred that Mr. Ward was the decision-maker, it made

(iii) Facts established to the requisite standard of proof?

35. Finally, the UNDT erred in a matter of law, when it held that the facts of the case were not established to the requisite standard of proof. Although we agree that the applicable standard of proof in this case is that of “preponderance of evidence”, as it deals with simple administrative action and not a disciplinary measure, we hold that the reprimand was issued on the basis of a definitive administrative finding of misconduct – and not just that of a possible failure to comply with the required standards of conduct.

36. Moreover, the evidence produced before the UNDT demonstrates that the reprimand was based on “reasonable grounds”, which is, in the present case, sufficient to establish the facts to the applicable standard of proof. In this regard, our view of the terms of the reprimand differs from that of the UNDT. While

UNDP. And Hotels managers were asking why we were not following the same procedure of [UNODC] UAE.

...

(...) UNDP should be the one to deal with hotels for arranging programmes, such as booking rooms and other facilities. Since UNODC was doing it by themselves, I would not be surprised if they were gaining in some way.

38. We do not agree with Mr. Elobaid's assertion that the only rebuttal available during his investigation was to deny the allegations against him, first because he knew what he was accused of and the reasons therefor, having received a copy of his own 10 April 2014 interview; and second because, if the facts, as contained in the transcription of his first interview, were not accurate, then he should have provided some other explanation as to what really occurred, particularly bearing in mind his duty to cooperate with the administrative investigation pursuant to Staff Rule 1.2(c). He did not do that, despite having had this opportunity in his second interview during the investigation into allegations against him.

39. The fact that the investigation into possible misconduct of Mr. A was closed and that there is no indication in the records against that decision suggests that there was no evidence of his involvement in misconduct. Mr. Elobaid himself had stated during his interview that he had no evidence whatsoever to prove Mr. A's alleged misconduct.

40. The fact that Mr. Elobaid cast aspersions on Mr. A out of personal frustration based solely on hearsay and without any evidence during a coffee break at a conference, regardless of the fact that only one person heard them clearly (others could have heard; therefore the declaration was not private), demonstrated his poor judgment and therefore justified a measure of admonition from the Administration, particularly in view of the probability of causing serious damage to the other person's reputation.

41. In view of the foregoing, we consider that the issuance of the reprimand was a proper exercise of the discretion vested in the Administration.

Judgment

42. The appeal is upheld and Judgment No. UNDT/2017/054 is hereby vacated.

Original and Authoritative Version: English

Dated this 22<sup>nd</sup> day of March 2018 in Amman, Jordan.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Thomas-Felix

Entered in the Register on this 23<sup>rd</sup> day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar