

Judgment No. 2022-UNAT-1309



Counsel for Appellant: Robbie Leighton

JUDGE DIMITRIOS RAIKOS , PRESIDING .

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Ms. Emma Reilly, a Human Rights Officer in the Office of the High Commissioner for Human Rights (OHCHR and High Commissioner, respectively), contested the “[o]ngoing workplace harassment based on protected activity for reporting and objecting to wrongdoing by management”, including the decision to conclude an investigation of harassment only with managerial actions; and the “[v]iolation of staff member privacy rights and defamation of character”, including the related decision to state that her claims were found unsubstantiated in a press release!

8. From 6 January to March 2015, Ms. Reilly was on a new temporary assignment with TESPDD, DESIB, Human Rights and Economic and Social Issues Section. From 15 April 2015 to 31 July 2015, namely during the 2015-2016 performance appraisal cycle, she was assigned to the Human Rights and Economic and Social Issues Section. From 15 April 2015 to 31 July 2015, namely during the 2015-2016 performance appraisal cycle, she was assigned to the Human Rights and Economic and Social Issues Section.

discussions with Ms. Reilly, who objected to have a Human Rights Officer at the P4 level as her FRO.

14. Ms. Reilly alleged in her ce

18. The Panel submitted its report to the High Commissioner on 6 December 2016 (investigation report). Ms. Reilly, her FRO and her SRO were informed on 5 January 2017, by memorandum dated 30 December 2016, of the High Commissioner's decision to close Ms. Reilly's complaint with only managerial actions aimed at reminding Ms. Reilly's FRO and SRO of their duty to ensure the proper and timely application of the performance management framework envisioned in ST/AI/2010/5 .

The press release

19. In 2015 and 2016, Ms. Reilly made requests for protection from retaliation to the Ethics Office under Secretary-General's Bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). She alleged retaliation by the Chief, Human Rights Council Branch, OHCHR, her FRO, her SRO, and Mr. V following reports of misconduct she had made between March 2013 and July 2016.

20. By memorandum dated 7 October 2016, the Ethics r oten,6a.5 (2)1a.loE2.98.9 (b)-3.7 (ad)- m6,rae.3 (.).6.

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30. The Administration submitted its -

35. Additionally, the evidence provided by Ms. Reilly's civil partner in Case No. UNDT/GVA/201(T)0.5 1441518(v)-(1)32945.22(d)327 JMT UND (3)2 (5)4578 F&BDC 17687.11288(C)-

In December 2019, the Appeals Tribunal published Judgment No. 2019-UNAT-975 dismissing Ms. Reilly's 4(.6]9J 0 Tc 0 Tc 0.019 82 111)--.55(6)0.7 N(6)0.7 D0 Tc 0 Tw 5.11j 2w T971 Is0951

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appearing before the Human Rights Council. Essentially, the last paragraph of the press release depicts Ms. Reilly as a serial complainer whose allegations have no substance. The misrepresentation was important evidence as to the motive for the last paragraph, and during hearings Judge Downing admitted in to evidence a witness statement from one of the individuals, whose name was given to the Chinese.

Administration and the UNDT. Ms. Reilly continues to consent to her counsel making arguments regarding that material even if she cannot be aware of the nature of such and is concerned that this material appears now to have been essentially excluded from proceedings as the result of her consent to a disclosure modality proposed by the Administration on completely different terms.

53. Ms. Reilly requests that, given the ruling that her counsel cannot advance arguments on appeal regarding this material, that the material be disclosed on an “under seal” basis. Ms. Reilly notes that no issue was taken with disclosing the investigation report concerning her ST/SGB/2008/5 complaint on this basis and considers it arbitrary that a different modality is required for the investigation report regarding her second complaint. Given that OHCHR chose to address the outcome of this investigation in a press release concerning Ms. Reilly it should not be available to them to at once argue that the press release was accurate, while at the same time not disclosing in a usable fashion what conclusions were drawn by OIOS in relation to that material.

54. While the investigation report should be dispositive of the issue as to whether Ms. Reilly’s second complaint was found “unsubstantiated” it remains clear, as agreed between the parties, that the investigation referenced in the press release were the ST/SGB/2008/5 one and her separate complaint. The fact that a whole separate hearing was required to address the outcome of her second complaint demonstrates that the investigation referenced in the press release was the one into her second complaint. It would be impossible for the press release to have referenced Ms. Reilly’s Ethics Office request as that request did not result in an investigation and it had not been closed at the time of the press release. In choosing to interpret the press release as referencing the Ethics Office request when it speaks of two investigations the UNDT ignored all evidence and arguments by both parties during the proceedings, the express contemporaneous words of one of those drafting the press release, as well as the evidence and *in camera* hearing where the parties discussed the outcome of the second complaint. The Judgment ignored the relevance of the investigation into Ms. Reilly’s second complaint which represents an error of law and fact resulting in a manifestly unreasonable decision.

55.

was confidential and should not have been included in the press release. The UNDT's conclusion that following the completion of an investigation report findings are no longer confidential is unfounded and runs clearly contrary to the UNDT's own decision to disclose information concerning the investigation report into Ms. Reilly's second complaint on a "for counsel's eyes only" basis discussed in an *in camera* hearing with Ms. Reilly excluded.

56. The UNDT erred in law and failed to exercise its jurisdiction by not addressing the allegation of conflict of interest on the part of Mr. V and erred in fact leading to a manifestly unreasonable decision by concluding he was not involved in the treatment of Ms. Reilly's ST/SGB/2008/5 complaint. The UNDT also erred in finding no conflict of interest on the part of Mr. L, and by stating that it had been demonstrated that he was not within the reporting lines of the Chief ME, the spouse of Mr. V. In fact, it was established by documentary evidence and Mr. L's own sworn testimony that the Chief ME was his SRO. Mr. L breached due process by not interviewing the husband of his SRO during the investigation. This meets the test for conflict of interest. Mr. L concluded no conflict existed relying on the determination of the Administration, and more specifically Mr. W, a named witness in the complaint. Ms. Reilly further alleged conflict of interest deriving from Mr. V's involvement prior to the investigation. Mr. V was named in the complaint by title and the office he headed was referenced 14 times. Yet, he was tasked to take action on the complaint. Contrary to the findings of the UNDT, Mr. V was contacted by the UNOG Legal Department regarding the Panel composition. Mr. V's response indicates a conversation took place with the UNOG Legal Department in which it was decided to contact Mr. L.

57. The UNDT erred in fact and law in evaluating the investigation regarding the recruitment against Vacancy 40485. The Panel did not adequately question the witnesses it interviewed about the recruitment process for Vacancy 40485 and, therefore, did not make adequate findings about that process. Mr. D created an "administrative fiction" by employing Ms. W against a different post from the one whose functions she performed specifically to render her eligible for recruitment on a fixed-term basis. Mr. D's evidence to the Panel was that Ms. W worked as a maternity cover until the return of the post's incumbent. The maternity cover was for exactly the post advertised on an FTA basis for which Ms. W should not have been eligible. The evidence of Mr. D was that Ms. Reilly did not perform the functions of the maternity cover, but that Ms. W did. Investigators did not ask Mr. D a single question regarding the post against which Ms. W was recruited, thus

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accordance with UNAT jurisprudence, that where Ms. Reilly had provided no grounds for her

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fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant's contractual rights.⁴

77. We recall our settled jurisprudence that an appealable administrative decision is a

the function performed or the power exercised. The question is whether the task itself is administrative or not. ⁷

80. Coming to the material facts of the case, in order to give some context to the events that led to the present dispute, it is common cause that OHCHR issued a press release in response to allegations by GAP and ICP that OHCHR had endangered the lives of Chinese human rights defenders who attended the Human Rights Council in Geneva in March 2013, and that in relation to this matter, it had subjected a staff member to reprisals.

81. Ms. Reilly argued before the UNDT that the press release had caused her reputational harm by divulging confidential private information, namely the fact that she had made the complaints, and by casting her in a negative light as an individual who made false allegations.

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84. Then, the UNDT proceeded to assess if the content of the press release had impacted Ms. Reilly's

press release, and that if any harm had been suffered, it originated from the early articles published by GAP and ICP.

88. The UNDT eventually held that the findings of the investigation were no longer confidential once the investigation had concluded without the imposition of disciplinary measures and after the subjects of the investigation had been informed of its conclusion. It further inferred from the evidence that Ms. Reilly herself had no issues with public exposure of her case. The UNDT did find that the press release was inaccurate on one single point: while the press release had stated that the allegations made by a staff member were not substantiated, the Panel did find Ms. Reilly's allegations that her supervisors did not properly conduct her performance evaluation were substantiated. However, the UNDT noted that this inaccuracy was minor because the Panel did not find that Ms. Reilly's allegations against her supervisors amounted to harassment or abuse of authority.

89. In her submissions in this appeal, Ms. Reilly takes issue with the Dispute Tribunal's approach and maintains, *inter alia*, that it erred in finding that her reputation was not harmed because her name and actions were already made known by the GAP and ICP publications. She claims that because the GAP and ICP publications described her positively, they did not harm her reputation, while the press

91. Notably, we agree with and endorse the UNDT's holding that, regardless of the source of the information published by ICP and GAP, the decision to issue a press release in response to publications falls within the discretion of the Organization and is a managerial prerogative and that the specific part of it which concerned the issue of the provision of names of Chinese human rights activists to the Chinese government fell outside the scope of its judicial review due to the general nature of its content and to the fact that it embodied a managerial strategy to respond to what the Organization has perceived as being "damaging" of its own image. Under these circumstances, that part of the press release did not have a tangible individual direct impact on Ms. Reilly and consequently it was (n M)-3 , -4.4 (q)y -0.65-1 (v)-1.6 (e)-4.(g)-5.7 (ani)-3.v.8

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101. 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. 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.¹⁴

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107. Next, Ms. Reilly asserts that the UNDT erred in law and fact in evaluating the investigation regarding recruitment against Vacancy 40485. In this context, she argues that the Panel had not adequately questioned the witnesses it interviewed about the recruitment process for Vacancy 40485 and, therefore, had not made adequate findings about that process. Ms. Reilly claims further that the UNDT erred in law and fact and failed to exercise jurisdiction in evaluating the propriety of the investigation of her complaint of harassment and abuse of authority. Specifically, Ms. Reilly argues that pursuant to her request for a management evaluation regarding the recruitment for Vacancy 40485 and its subsequent cancellation, she had been made the subject of retaliation in three ways: (a) the failure by her supervisors to conduct a performance evaluation; (b) the cancellation of a temporary vacancy to which she had applied; and (c) the creation of a hostile working environment. She finally raises a variety of challenges to the correctness and fairness of the UNDT's general approach and management of her case. In this respect she submits, *inter alia*, that the UNDT erred in its assessment of evidence as well as when it reversed its position and sought no further submissions in Order No. 109 (GVA/2021). She says it breached her due process rights when it decided that the recordings of the oral arguments and the written documentation were sufficient for the adjudication of the case and when it sought comments from the Administration on her choice of legal representation.

108. With regard to the allegations related to the recruitment against Vacancy 40485, the UNDT, following a thorough and careful analysis of the investigation report and of the witnesses' statements on record, held that the Panel had properly addressed Ms. Reilly's allegation, by examining this matter under the topic of "adverse actions related to performance matters", and interviewing not only Ms. Reilly but also the two subjects of the complaint who had been involved in that recruitment process, and had made sufficient findings on the recruitment exercise for Vacancy 40485.¹⁸ We find nothing in the appeal submissions to persuade us that the Dispute Tribunal erred in so concluding and accordingly, the Dispute Tribunal's finding on that score is upheld.

109. The UNDT addressed the rest of Ms. Reilly's allegations by holding that she had not provided sufficient evidence to the Panel, or to the UNDT, to support these allegations. Thus, the UNDT dismissed, altogether for lack of evidence, Ms. Reilly's assertions that the temporary vacancy had been cancelled because of her candidacy, rather than because of funding, as

117. As we held in *Mashhour*:²⁴

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

118. However, as evident, on the face of the impugned Judgment, the UNDT failed to do so and abide by the set standards of our jurisprudence. Notably, the Appeals Tribunal holds that the UNDT did not give careful and fair consideration to Ms. Reilly's above-mentioned allegations. In fact, the UNDT did not embark on an analysis of Ms. Reilly's said arguments. Effectively, Ms. Reilly's allegations appear to have been rejected under cover of paragraphs 161 to 165 of the impugned Judgment which rejected in a generic manner her challenge to the impugned administrative decision on these specific issues. The first instance Judge did not even make a separate passing reference to Ms. Reilly's specific claims in this paragraph or elsewhere. She just vaguely noted that "[the UNDT] cannot decide on a case based solely on general arguments and without a clear identification of the documents allowing for a critical assessment of their relevance" and that "it will not address matters related to the funding of the Applicant's post nor any other matters that fall outside the defined scope of review".²⁵

119. Even assuming *arguendo* that these UNDT rulings referred to said specific allegations of Ms. Reilly, the UNDT's approach to these distinct allegations made by Ms. Reilly was erroneous. The UNDT fell short of exercising its competence to judicially determine, under Article 2(1)(a) of its Statute, the lawfulness of the contested administrative decision on this score from the relevant procedural and substantive perspectives pleaded by Ms. Reilly in the way refined in our Judgment in *Belkhabbaz*²⁶, to wit on grounds of legality, reasonableness and procedural fairness or due process.

120. Thus, the UNDT should have determined whether there had been a proper and lawful investigation by the Panel into these elements of Ms. Reilly's allegation of harassment and abuse of authority, i.e. by examining for example whether the Panel had complied with its duty

Works Agency for Palestine Refugees in the Near East, Judgment No. 2016-UNAT-612, para. 21; *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-

to interview relevant witnesses in terms of Section 5.16 of ST/SGB/2008/5, and draw its own reasoned conclusions from the investigation report and the evidence on file, whether there had been irregularities such as the failure of the Administration to address the specific harassment complaints, and whether the specific incidents indicated in Ms. Reilly's complaint could be reasonably characterized as breaches of the Organization's policies and regulations, meriting a finding of abuse of power and harassment, as the UNDT properly did with regard to Ms. Reilly's allegations related to the recruitment for Vacancy 40485. Finally, the UNDT should have weighed the evidence with a view to determining whether the findings of the Administration on these specific issues were supported by the available evidence, namely that there was a rational connection between the information before the responsible official and the contested decision that there was no prohibited conduct requiring further action.

121. In view of the foregoing, the appeal succeeds on this ground. Since the specific allegations made by Ms. Reilly required factual findings in order to ascertain whether they were meritorious or not and this was not done, we are remanding these discrete issues to the UNDT, pursuant to Article s 2(4)(b) and 2(6) of our Statute.

The Quantum of the Moral Damages Award

122. Per our jurisprudence, an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical or psychological report of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award²⁷

123.

124. In the instant case, the UNDT awarded Ms. Reilly compensation for non-pecuniary (moral damages) in the amount of USD 3,000 as a result of the harm she “ha[d] suffered, at least between 2015 and 2017, from stress and anxiety due to the situation she faced in her work environment as a consequence of the way in which her complaint for harassment was handled and the inaccuracies in the press release”²⁹ The Dispute Tribunal assessed the testimony of Ms. Reilly’s partner and the medical certificates she had filed, as well as all evidence available to the UNDT, in the present case and in Case No. UNDT/GVA/2018/099 (*Reilly*), showing that she had been on certified sick leave for a significant period of time. Ms. Reilly argues this compensation is insufficient and requests it be increased by considering similar cases, like *Belkhabbaz*, where USD 10,000 was deemed appropriate compensation.

125. We hold that the UNDT did not commit any error of law in its assessment of the compensation award for stress and anxiety, which is evidenced in the relevant medical certificate and the evidentiary material on file, and we find it to be fair and reasonable. Having regard to all the matters of which the UNDT was apprised in the present case, we do not find that it erred in law or fact in its assessment of the moral damages to be awarded for stress and anxiety. Ms. Reilly has not demonstrated any error of law or manifestly unreasonable factual findings on the part of the Dispute Tribunal. In such circumstances, the Appeals Tribunal gives deference to the UNDT in the exercise of its discretion and will not lightly disturb the quantum of damages.³⁰

126. In addition, we reject Ms. Reilly’s argument that the award in the present case should be compared with awards in similar cases and that the UNDT erred by failing to do so. The criterion for an award of moral damages is the degree of injury suffered by the individual staff member as a result of the unlawful decision. That the type of unlawful decision is the same as in a number of other cases does not establish that the degree of moral damage must be similar in each case. The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the tribunal.³¹

²⁹ Impugned Judgment, para. 175.

³⁰ *Ho, op. cit.*, para. 34; *by 21-00 90*

127. Therefore, this ground of appeal falls to be dismissed.

Judgment

128. The appeal succeeds in part. We hereby reverse Judgment No. UNDT/2021/093 insofar as it rejected Ms. Reilly's application relating to the specific elements of her complaint of harassment and abuse of authority, referred to in paragraph 115 of o (.)]TJ/TT4 1 Tf 0 Tc 0 Tw 1.7se