


UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1373



Mihai Nastase
(Appellant)

v.

Secretary -General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Graeme Colgan Presiding Judge Kanwaldeep Sandhu Judge Gao Xiaoli
Case No:	2022-1718
Date of Decision:	30 June 2023
Date of Publication:	4 August 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Francisca Lagos Pola

JUDGE GRAEME COLGAN , PRESIDING .

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6. On 12 May 2020, Mr. Nastase sent an email to the UNOPS Senior Programme Manager (UNOPS SPM), highlighting his disagreement with the CIOS' assessment of his performance.
7. On 22 June 2020, Mr. Nastase filed a harassment complaint with the Office of Internal Oversight Services (OIOS) pursuant to Secretary General's Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority). In his complaint, the Appellant set out the correspondence between the Appellant and the CIOS in a chart. That same day, Mr. Nastase was sent a response email requesting him to supplement his harassment complaint with additional information if he wanted to pursue a complaint of prohibited conduct against the CIOS.
8. On 15 July 2020, Mr. Nastase sent OIOS an email supplementing his harassment

12. On 28 August 2020, the USG/DOS informed Mr. Nastase that a preliminary assessment of his complaint had revealed no information of prohibited conduct under ST/SGB/2019/8, and as a result, the complaint had been closed without opening a formal investigation.

13. On 18 September 2020, the UNOPS SPM informed Mr. Nastase that his appointment would not be renewed beyond 30 November 2020 due to lack of funding.¹

14. On 27 October 2020, Mr. Nastase filed a request for management evaluation of the decision of the USG/DOS to close his complaint of prohibited conduct against the CIOS after a preliminary assessment, without opening an investigation. By memorandum dated 2 December 2020, Mr. Nastase was informed that the contested decision had been upheld

15. On 28 February 2021, Mr. Nastase filed an application before the UNDT challenging the decision not to open an investigation.

16. On 13 June 2022, the UNDT issued Judgment No. UNDT/2022/056. The UNDT held that a decision to close a complaint of alleged prohibited conduct is discretionary in nature, and that the USG/DOS' decision not to investigate the harassment complaint was lawful. The UNDT held that there were no indicia of harassment in the e-mails and follow-up actions that were the object of Mr. Nastase's complaint, and that the CIOS' emails to him stated nothing more than a performance issue that needed to be addressed and the followup measures taken by his supervisors were well within their managerial discretion. The UNDT thus dismissed the application.

17. On 10 August 2022, Mr. Nastase filed his appeal with the UNAT, and the Secretary-General filed his answer on 14 October 2022.

¹ As already noted, Mr. Nastase has filed a separate appeal in relation to this decision which was also decided during the UNAT's 2023 summer session. See *Mihai Nastase v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1367.

Submissions

Mr. Nastase's Appeal

18. Mr. Nastase contests the UNDT Judgment on grounds that the UNDT has erred in fact, resulting in a manifestly unreasonable decision.

19. In particular, Mr. Nastase submits that the UNDT erred in finding that he had expressed concern about being the subject of retaliation by the CIOS as a result of a "disagreement" that arose between them during a recruitment exercise in December 2019. In his application to the UNDT, Mr. Nastase described in detail that the circumstances did not show a "disagreement" but a "blatant case of misconduct" on the part of the CIOS; misconduct, which has also been recognized by the Chairperson of the Ethics Panel of the Organization which decided that the prompt reporting by Mr. Nastase of the CIOS' misconduct was a protected activity and the UNDT was informed about this decision.

20. Mr. Nastase further contends that the UNDT erred in stating what his "principal contentions" were. The UNDT failed to include essential facts that clearly document that the CIOS knowingly based his unfair underperformance statements on a performance measuring tool that was inaccurate and was undergoing changes to adapt to the team's new processes. In particular, the UNDT ignored the essential and documented fact that the CIOS repeatedly and knowingly based his underperformance statements on an inaccurate performance measuring tool to measure the performance of Mr. Nastase's reduced team and the team's new processes as documented before the UNDT.

21. Mr. Nastase submits that the UNDT erred in finding that his claim that the CIOS had used his influence to successfully remove him from the CDT and to place him on a PIP was speculative in the absence of any evidence in this regard. Mr. Nastase did provide to the UNDT details of the meetings in which the UNOPS SPM mentioned that the CIOS had initiated and demanded these actions against Mr. Nastase. The detailed minutes of these meetings with the UNOPS SPM were shared with, and not contested by, the UNOPS SPM, and were also shared as requested by the UNDT, although in a different but related case (case no. UNDT/GVA/2021/20).

22. Mr. Nastase contends that the UNDT erred in finding that his complaint concerned one specific incident, i.e., the "underperformance" e-mails sent by the CIOS, which resulted in his

taken by the CIOS, but rather by his supervisors. Instead, further to the CIOS' initiative communicated to the UNOPS SPM to remove Mr. Nastase from the team and to place him on a

qualify the CIOS' actions as harassment. The three e-mails from the CIOS only refer to Mr. Nastase's u(e)

29. The Secretary-General contends that Mr. Nastase's submissions regarding the CIOS' involvement in placing him on a PIP and removing him from the CDT, are inaccurate. Nowherein the record of these proceedings is there any evidence that the CIOS influenced the UNOPS SPM to implement a PIP or remove him from performing his functions in the CDT. The "evidence"

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the original decision in the UNDT as Mr. Nastase has done. The Tribun.

Abuse of authority

1.8 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses their influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation, working conditions or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

46. Despite the breadth of the definitions set out above, ST/SGB/2019/8 provides at Section 1.1(Definitions) :⁴

Prohibited conduct

1.1 For the purposes of the present bulletin, discrimination, *harassment*, including sexual harassment, and *abuse of authority* shall collectively be referred to as "prohibited conduct". *Disagreement on work performance or on other work -related issues is normally not considered prohibited conduct and is not dealt with* ~~by~~ ~~the~~ ~~tribunal~~ ~~in~~ ~~its~~ ~~decisions~~ ~~under~~ ~~rule~~ ~~1.1~~ ~~(b)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(c)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(d)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(e)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(f)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(g)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(h)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(i)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(j)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(k)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(l)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(m)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(n)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(o)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(p)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(q)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(r)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(s)~~ ~~and~~ ~~rule~~ 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~~(ng)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nh)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(ni)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nj)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nk)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nl)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nm)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(no)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(np)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nq)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nr)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(ns)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nt)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nu)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nv)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nw)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nx)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(ny)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(nz)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(oa)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(ob)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(oc)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(od)~~ ~~and~~ ~~rule~~ ~~1.1~~ ~~(oe)~~ ~~and~~ ~~rule~~

appointment in breach of established recruitment policies. This characterisation of those earlier events was said to have been accepted by the Ethics Panel which found that the report of those was a protected activity.

49. The Respondent's answer to this ground is that it cannot be considered on appeal because his complaint relating to the 2019 recruitment events was first made as part of his management evaluation request and then as part of his case before the UNDT. However, the Secretary-General says it is inadmissible because it was not part of his complaint of harassment and abuse of authority in relation to his performance review complaint and so could not have been taken into consideration when the decision to close that complaint was made. It was, nevertheless, considered by the UNDT and referred to in its Judgment.

50. Although Mr. Nastase asserts error by the UNDT at paragraph 18 of its Judgment, that was the Dispute Tribunal's summary of his case before it and focussed relevantly on the claim of retaliation. We do not read the UNDT as having decided that there had been a mere disagreement in 2019 about the recruitment issue. The nature of those events may be relevant to whether there was undue influence or bias exercised against him subsequently, but this was an issue for the UNDT to be addressed elsewhere in its Judgment.

51. a B D C

53. This was how the UNDT dealt with what was a claim of bias and abuse of authority in the process that led to the impugned decision to close the complaint file. The Appellant's claim at first instance failed because it was not proven, but in any event, we infer from paragraph 40 that it would have been dismissed for irrelevance. We are not persuaded that this was an erroneous conclusion by the UNDT.

54. We move to the next broad ground of appeal, whether the manner in which the Appellant's work performance issues were dealt with by the Administration constituted harassment and/or abuse of authority.

55. A staff member's dissatisfactions about criticisms of his or her work performance do not normally alone constitute harassment of, or abuse of authority against, the staff member whose work performance is criticized. That is not to say that the way critique is exhibited cannot constitute such misconduct: rather, what is described as "normal" performance management interactions should be addressed in that, and not in a disciplinary, context. Staff members subject to adverse work performance assessments will naturally and even inevitably be concerned about them and may frequently disagree with the assessments, including the appropriateness of the mechanism used to make those assessments. Those, and other related concerns such as whether the adverse performance is that of the individual staff member or of his/her team (as Mr. Nastase alleged) are matters that the system of performance management allows to be aired.

56.

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Judgment

59.