
**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

Before: Judge Katharine Mary Savage, P

Counsel for Appellant: Christopher Q. Davis

Counsel for Respondent: Rupa Mitra

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

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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.

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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

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

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

... In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute from outside the staff member's

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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

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

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