

Judgment No. 2015-UNAT-518/Corr. 1



Counsel for Ms. Oummih: Self-represented

Counsel for Secretary-General: Stéphanie Cartier

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2014/004, rendered in French by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 15 January 2014 in the case of *Oummih v. Secretary-General of the United Nations*. The Secretary-General appealed on 17 March 2014, and Ms. Amal Oummih filed her answer and cross-appeal on 16 May 2014. On 21 July 2014, the Secretary-General filed his answer to the cross-appeal.

Facts and Procedure

2. The following facts are uncontested:¹

... On 1 September 2009, the Applicant was granted a fixed-term appointment of two years as a Legal Officer at the P-3 level at [the Office for Staff Legal Assistance

... On her return from sick leave on 18 October 2011, the Applicant learned in the course of an e-mail exchange with the Chief, OSLA, that in her absence she had been replaced as counsel by another staff member of the Office in a case pending before the Appeals Tribunal to which she had previously been assigned.

... By e-mail of 19 October 2011 sent to the former Executive Director, OAJ, and the Chief, OSLA, the Applicant complained that another case for which she had been appointed as counsel had been reassigned in her absence to another staff member, without her being informed. The Chief, OSLA, replied to her by e-mail the same day, reproaching her for filing an application concerning the Office.

... Also by e-mail dated 19 October 2011, the Chief, OSLA, informed the Applicant that he would himself contact two applicants whom she had previously represented in order to advise them that she had been taken off their cases and that another staff member from the Office would thenceforth represent them. He also specified that he would inform the Dispute Tribunal of that fact and ordered the Applicant not to contact the Registry of the Tribunal or the two applicants concerned.

... On 25 October 2011, the Applicant wrote to the Information Systems Assistant, OAJ, noting that she had been deprived of access to the internal information-sharing service ("eRoom") by order of the Chief, OSLA. A little later the same day, she wrote to the Executive Director, OAJ, to inform him of that fact and request his intervention.

... On 28 October 2011, she enquired whether she could take back the cases that had been assigned to her Geneva colleague, whose secondment to OSLA was coming to an end. The Chief, OSLA, replied to her that, apart from some cases that would continue to be followed by that colleague, the cases in question would be assigned to other staff members from the Office.

... By letter dated 31 October 2011, the Applicant requested a management evaluation of the decision whereby she had been deprived of her functions and de facto evicted from the Office. By application dated 1 November 2011, the Applicant appealed the said decision under art. 2.1 of the Statute of the [Dispute] Tribunal.

... On 18 November 2011, the Chief, OSLA, completed the Applicant's 2010-2011 performance appraisal report, once again giving her an overall rating of "does not meet performance expectations". The second reporting officer, to wit the Executive Director, OAJ, signed the report on 21 November 2011.

... On 19 December 2011, the Applicant initiated a rebuttal process against the rating in her 2010-2011 performance appraisal. In its report dated 12 March 2012, the rebuttal panel found that the Applicant's 2010-2011 performance appraisal report should be deemed null and void and, in a supplement to the report dated 28 March 2012, changed the Applicant's overall rating to "successfully meets performance expectations".

... On 2 April 2012, the rebuttal panel submitted its report concerning the 2009-2010 performance appraisal report and again decided to change the Applicant's overall rating to "successfully meets performance expectations".

... On 17 April 2012, the Chief, OSLA, gave the Applicant a letter of reprimand that he said would be placed in her file along with any written comments she might make. Following a request for management evaluation, the Applicant was informed on 22 May 2012 that the letter of reprimand had been withdrawn and that all documents pertaining thereto would be removed from her file.

... On 25 April 2012, the Applicant was temporarily assigned to the Office of the United Nations High Commissioner for Human Rights until the end of July 2012.

... On 27 April 2012, the Applicant filed a complaint with the Deputy Secretary-General against her first reporting officer and supervisor, the Chief, OSLA, and against one of her former colleagues at OSLA, under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The alleged improper conduct included the following: deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, retaliation for having filed an appeal and for having

colleague at OSLA but that an investigation would be opened regarding the Chief, OSLA, solely with respect to some of the facts she had denounced, namely, those concerning the decision to take away from her the cases to which she had previously been assigned as counsel, the fact that certain messages exchanged with the Chief, OSLA, had been copied to other staff members, and finally the question of whether the Chief, OSLA, had created a hostile work environment for the Applicant.

... On the same day, 21 September 2012, the Director decided to open an investigation into a complaint of prohibited conduct made against the Applicant by the Chief, OSLA, and a colleague of the Applicant at OSLA.

... On 8 October 2012, the Director informed the Applicant and the Chief, OSLA, that the investigation into the facts alleged by the Applicant would be conducted by two former staff members on the roster established by the Office of Human Resources Management. That decision was reversed on 9 October 2012 following an objection by the Chief, OSLA, on the grounds of a conflict of interest.

... On 14 November 2012, the Director informed the Applicant of her decision to appoint Mr. B. C. and Ms. A. O., individuals outside the Organization, as members of a fact-finding investigation panel and on 16 November 2012 she engaged them as independent consultants.

... On 17 November 2012, the Applicant asked the Director for further information about the panel members, including confirmation that they were on the roster of the Office of Human Resources Management. The Director replied on 21 November 2012, without, however, indicating clearly whether the panel members were on the roster.

... On 20 November 2012, the Applicant requested a management evaluation of several decisions, including the Director's decision of 21 September 2012 to limit the scope of the investigation on harassment to certain of the facts she had alleged against the Chief, OSLA.

... In December 2012, the panel members travelled to Geneva and New York to interview witnesses, the Applicant and the Chief, OSLA.

... By e-mail of 10 December 2012, the Applicant once again asked the Director whether the panel members were on the roster of the Office of Human Resources Management before being selected to conduct the investigation and whether they had received internal United Nations training on investigating complaints filed under ST/SGB/2008/5. The Director replied on the same day that they were not on the roster in question and that they had not received the training provided by the Office of Internal Oversight Services ("OIOS").

... On 11 December 2012, the Applicant again conveyed to the Director her doubts about the conduct of the fact-finding investigation and asked that a third member, from OIOS, be added to the panel and that the two panel members

... By Order No. 155 (GVA/2013) of 17 October 2013, the Tribunal requested the Respondent to transmit the full fact-finding investigation report to it on an *ex parte* basis, which was done on 24 October 2013.

... By Order No. 186 (GVA/2013) of 28 November 2013, the Tribunal convoked the parties to a hearing on the merits to be held on 17 December 2013 on both Cases No. UNDT/GVA/2013/024 and No. UNDT/GVA/2013/050.

... On 16 December 2013 at 9.53 p.m. New York time, the Applicant requested the Tribunal to transfer her Case No. UNDT/GVA/2013/050 to its New York Registry. The request was rejected by Order No. 194 (GVA/2013) of 17 December 2013.

... On 17 December 2013, the hearing took place and was attended by the parties by videoconference.

3. On 15 January 2014, the UNDT issued its Judgment. The UNDT found that the Executive Director, OAJ, had “exceeded her role by undertaking a preliminary investigation and informing the individuals concerned, when that role was restricted to promptly assessing the complainant’s good faith and whether a fact-finding investigation was warranted”.² The UNDT held that “[t]he Director’s preliminary investigation of the alleged facts led her to distinguish between those claims that should be investigated by a fact-finding panel and those that did not warrant any follow-up. In taking this action, the Director substituted herself for the panel members whose mandate it was to do so.”³ The Dispute Tribunal concluded that the decision of 21 September 2012 whereby the Executive Director refused to open an investigation into all the allegations raised was a violation of Secretary-General’s Bulletin ST/SGB/2008/5 and should be rescinded.

4. The UNDT further found that the Executive Director’s decision of 26 April 2013 to take no further action on Ms. Oummih’s complaint against the Chief, OSLA, was a direct consequence of the decision of 21 September 2012 and was therefore also unlawful. Additionally, the decision of 26 April 2013 was also unlawful since the Executive Director mainly relied on a fact-finding investigation report prepared by two fact-finding investigation panel members who were unauthorized to do so.

² Impugned Judgment, para. 64.

³ *Ibid.*, para. 65.

5. The UNDT rescinded the two decisions and ordered that “[a] new decision must be taken concerning the complaint lodged by [Ms. Oummih]”.⁴ The UNDT also awarded compensation in the amount of CHF 8,000 for moral damages.

6. On 13 May 2014, Ms. Oummih filed a “Motion for Interim Relief” with the Appeals Tribunal in relation to the UNDT Judgment, and the Secretary-General filed his observations on 27 May 2014. On 27 June 2014, the Appeals Tribunal rendered Order No. 191 denying Ms. Oummih’s motion.

7. By Order No. 209 (2015), dated 9 February 2015, the Appeals Tribunal granted Ms. Oummih’s request for an oral hearing and informed the parties of the timetable for the hearing. On 19 February 2015, the Appeals Tribunal heard oral arguments with both Ms. Oummih and counsel for the Secretary-General attending in person.

Submissions

The Secretary-General’s Appeal

8. The UNDT erred in law and fact by improperly narrowing the scope of the responsible official’s discretionary authority in assessing a staff member’s complaint under Section 5.14 of ST/SGB/2008/5. Contrary to the UNDT’s finding, ST/SGB/2008/5 confers on the responsible official the discretion as to how to determine whether the complaint was made in good faith, and whether the grounds underlying the complaint are sufficient to meet the threshold of warranting a formal fact-finding investigation. In considering whether this discretion was properly exercised, t

10. The UNDT erred in law in finding that the Executive Director did not have the discretionary authority to make inquiries of the alleged offenders. The relevant provisions of ST/SGB/2008/5 do not expressly prohibit a responsible official from requesting such comments, nor do they expressly reserve this authority to a fact-finding investigation panel. The UNDT also erred by failing to consider whether the request for comments from the two alleged offenders prejudiced Ms. Oummih.

11.

15. Finally, the UNDT erred by ordering the Administration to rescind both decisions and to take a new decision concerning the complaint. There were no procedural flaws, and even if there were, they were not of such a nature as to vitiate the fact-finding investigation and the decision to close the case. A new investigation would present numerous additional challenges such as: (i) the appointment of investigators who present a conflict of interest; (ii) less accurate factual responses and findings given the passage of time since the complaint was submitted; and (iii) subjecting the alleged offenders to two investigations in the same case.

16. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its

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ST/SGB/2008/5 in requesting comments before reaching its decision as to whether the complaint may constitute abuse of authority. Furthermore, the UNDT decided that it was for the panel and not the Administration to decide which facts merited an investigation.

31. 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.⁶ The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations.

32. Sections 5.14 and 5.15 of ST/SGB/2008/5 read as follows:

5.14 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.

5.15 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 ST/SGB/2005/21.

33. The wording is clear and establishes that “the responsible official will promptly review the complaint or report to assess [...] whether there are sufficient grounds to warrant a formal fact-finding investigation”. This was done by the Executive Director.

34. The Executive Director asked for comments from the alleged offenders before making this assessment. Since there was no risk of undermining the investigation, hearing both sides before assigning the case to a panel adds transparency to the procedure. It is the obligation of the fact-finding panel, at the beginning of the investigation, to inform the alleged offender that an investigation will be conducted against him or

⁶ See *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

her. However, this is the latest he or she must be informed, and it does not mean that he or she cannot be informed at an earlier stage.

35.

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Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar