

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Ms. Gudrun Fosse, a staff member of the United Nations Environment Programme (UNEP) contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision of the Chef de Cabinet accepting the Ethics Office's determination that there was no merit in Ms. Fosse's claim of retaliation. In Judgment No. UNDT/2021/124, the UNDT granted her application in part and awarded compensation for the violation of her right to have her complaint of retaliation properly handled and the harm caused by the unlawful administrative decision.

7. About two weeks after submitting her retaliation request to the Ethics Office, on 18 June 2019, Ms. Fosse filed a separate complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) referring to many of the same incidents identified as retaliation in her 7 June 2019 complaint.

8. On 27 August 2019, the Ethics Office notified Ms. Fosse that it had found a *prima facie* case of retaliation only with respect to some of the allegations and had referred the matter to the Office of Internal Oversight Services (OIOS) for investigation in terms of Section 8.1 of ST/SGB/2017/2/Rev.1. On 30 August 2019, about 80 days after the retaliation complaint was made, and following consultation with Ms. Fosse, the Ethics Office, pursuant to Section 8.3 of ST/SGB/2017/2/Rev.1, recommended to the Secretary-General, as an interim protection measure, that the Executive Secretary be removed from Ms. Fosse's reporting line and be replaced. This recommendation was implemented.

9. The reason for the Ethics Office limiting the investigation is set out fully in its written determination of 19 November 2020, handed down in terms of Section 8.4 of

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contract of employment. After further independent investigation, the Ethics Office concluded that there was not sufficient evidence establishing a *prima facie* case that the change involved any retaliatory motive or constituted detrimental action that adversely affected Ms. Fosse's terms and conditions of employment. Hence, the Ethics Office did not refer this aspect of the retaliation complaint to OIOS for investigation.

12. Ms. Fosse's third allegation of retaliation was that she had been subjected to an increasing level of harassment (o)-3 (y[ET] (h)-3.7 (1 F)- (s)(e)-4.3 (c)-07 (w8.7 (th)-3.7 (i)-3.1 (c)-0.6 (

in ST/SGB/2017/2/Rev.1. OIOS also noted that no disciplinary action would be possible against the Executive Secretary following her separation.

16. On 20 January 2020, the Ethics Office requested OIOS to complete its investigation into the retaliation complaint to enable the Ethics Office to make a final determination of whether retaliation had been established in accordance with Section 8 of ST/SGB/2017/2/Rev.1.

17. Ten months later, in late October 2020, OIOS forwarded its investigation report and supporting documents to the Ethics Office.

18. The OIOS report recorded that the fact-finding panel had found that the Executive Secretary's language was often unnecessarily harsh and demoralizing but was not personal being directed rather towards work performance and process issues. However, it was often communicated in a public way so that the impact was humiliating. Other staff members had provided testimony of a working environment that was fraught with tension and, in some cases, fear. Moreover, the Executive Secretary's abrasive management style and tendency to publicly criticize staff put everyone on guard and drained morale. However, the evidence further showed that Ms. Fosse seemed to have failed to perform her responsibility to produce budgetary documents for the COP14 at the requisite standard and that this had led to considerable tension between Ms. Fosse and the Executive Secretary and the deterioration of their relationship to the extent that they were no longer speaking to each other.

19. OIOS concluded on the basis of the various reports and testimony of other staff members that the Executive Secretary was "a driven and committed leader, whose difficult personality and management style clashed" with staff in the SCBD, including Ms. Fosse. However, the Executive Secretary's treatment of Ms. Fosse stemmed from perceived performance issues in the preparation of the budget for the COP 14 in November 2018 and her behaviour towards Ms. Fosse was consistent with her entrenched management style. The available evidence did not suggest that there was increasing harassment directed towards Ms. Fosse because of her cooperation with the fact-finding panel. The negative attitude of the Executive Secretary was recurring, ongoing and the specific incident referred to by Ms. Fosse was consistent with past behaviour and probably did not amount to retaliation.

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25. In her application to the UNDT, Ms. Fosse and her counsel conflated her allegations of harassment with her claims of retaliation. She complained about the delay in the OIOS investigation, the fact that she was not kept abreast of the investigation, and the failure of OIOS to interview her and to share information with her. While she persisted with her view that the change of her reporting line was not an operational decision, she made only general and sweeping statements about the nature of the evidence OIOS relied upon and claimed that the statements of senior managers about the relationship were not checked for accuracy or verified. Ms. Fosse did not in her application address the finding of the Ethics Office that there was insufficient evidence to support the allegation that the Executive Secretary wanted her “out” or the finding that the harsh treatment of her was part of a persistent pattern of harassment and could not be causally related to her engaging in the protected activity.

26. The essence of Ms. Fosse’s claim before the UNDT was stated in her application to be:

In the instant case, there was an institutional failure in addition to the emotional stress entailed in the harassment. There was no preventative action taken against continuing retaliation even months after the Ethics Office had made a finding warranting a formal investigation. The fact that the [Executive Secretary] was the harasser, and there was more than one complaint, should have resulted in heightened scrutiny. Since any action against the harasser in this case is now rendered moot by [the Executive Secretary’s] resignation, the Applicant has been denied the moral satisfaction of a finding in her case let alone the publication of a decision or judgment in her favour, which is often seen as an important element of redressing the effects of harassment.

As a consequence, the Applicant, who is a career international civil servant with more than 30 years of excellent service to her credit, has suffered severe repercussions that continue to affect her emotional and physical well-being.

27. Besides equating the claim of harassment with that of retaliation, Ms. Fosse did not in her written application provide specific examples of the alleged “continuing retaliation” beyond the three specific allegations dealt with by the Ethics Office in its determination. Nor did she elaborate upon the specific nature of the “severe repercussions” that were causally attributable to the contested administrative decision taken on 18 December 2020.

28. Ms. Fosse requested the UNDT to rescind the contested administrative decision and to pay her compensation in the amount of two years’ net base salary for “failing or refusing to respond repeatedly to her requests for protection from harassment” and “to take action to prevent on-going acts of harassment and retaliation or to address the hostile working environment” in which she

had to work. Ms. Fosse did not precisely identify the on-going acts of harassment and retaliation to which she referred. She further requested moral damages for the “continued stress to which she was subjected”.

29. The UNDT handed down judgment on 27 October 2021. In its Judgment it did not analyze the evidence of the alleged acts or incidents of retaliation. However, it held that all the allegations concerning matters that the Ethics Office did not find to have raised a *prima facie* case of retaliation fell outside the scope of the application. It held furthermore that the allegations with

37. He submits also that there was no legal basis to award compensation or moral damages as there was no evidence of harm arising from the alleged procedural irregularities or the contested decision as required by Article 10(5)(b) of the UNDT Statute.

38. The Secretary-General accordingly requests the appeal to be granted and for the Judgment of the UNDT to be reversed.

Ms. Fosse's Answer

39. Ms Fosse submits that the UNDT did not err in holding that the contested decision was vitiated by procedural irregularity. OIOS failed to justify the lengthy delay and the failure to interview Ms. Fosse and the Executive Secretary was fatal.

40. She argues that the contested decision was not only procedurally flawed but involved a fundamental failure by the Administration to apply its own regulatory framework for dealing with retaliation leading to the ultimate outcome being tainted with irrationality or unreasonableness.

41. She requests the Tribunal to dismiss the appeal and to award her costs of the appeal in the amount of USD 5,000.

Considerations

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problematic relationship that may or may not have involved harassment. Whether the action was harassment is not a matter that this Tribunal is called to decide in this appeal. The essential point though is that the Chef de Cabinet accepted the finding of the Ethics Office that the evidence did not sufficiently establish a causal link between the detrimental action and Ms. Fosse's protected activity. The question for review was whether that administrative decision was reasonable or rational and therefore lawful.

44. It is important to note that Section 10 of ST/SGB/2017/2/Rev.1 provides that the

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48. It might have been better for OIOS to have engaged more with Ms. Fosse and the

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Judgment

54. The appeal is granted, and Judgment No. UNDT/2021/124 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 29th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar