



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2016-UNAT-695



Faust  
(Appellant)

v.



Date: 28 October 2016

Registrar: Weicheng Lin

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Counsel for Ms. Faust: Self-represented

Counsel for Secretary-General: Nathalie Defrasne



... By email dated 9 September 2015 to the Executive Secretary, UNFCCC, the Applicant, noting that the investigation panel had postponed a second round of interviews and would not meet the 30 September 2015 deadline to submit its report, expressed her disappointment with the time taken to complete the investigation into her complaint. Additionally, the Applicant [drew] the Executive Secretary's attention to the fact that "the 60-day deadline for filing [her] submission on the matter of harassment and abuse of authority to the MEU began on 13 August 2015".

... By email of 14 September 2015 to the Applicant, the Executive Secretary, UNFCCC, replied that after consultation with the investigation panel members, based in Geneva, she was resetting "the deadline for submission by the investigators of the Panel report from 30.09.2015 to 30.10.2015", and that she would inform the Applicant of "the outcome of the Panel's report as soon as it is available".

... On 11 October 2015, the Applicant addressed a request for management evaluation to the MEU "on the basis of an 'implied' decision that no prohibited conduct took place", and asked the MEU to advise her whether:

- a. "[T]o wait for the outcome of the investigation" and then "proceed to MEU, should the outcome/decision taken by the [Executive Secretary] not be an acceptable decision"; or
- b. "[T]o proceed with the management evaluation, based on the 'implied' decision ... that no prohibited conduct took place".

... By letter dated 26 October 2015, the MEU replied to the Applicant that...

5. The Dispute Tribunal noted that the requirement to request management evaluation was a mandatory first step in the appeals process, and rejected Ms. Faust's argument that a request for management evaluation was not necessary because its main goal was met through other means.

6. The Dispute Tribunal also rejected Ms. Faust's submission that she was not required to request management evaluation as the contested administrative decision was taken pursuant to advice from a technical body. The Dispute Tribunal found that a fact-finding panel established to investigate a complaint of prohibited conduct under ST/SGB/2008/5 was not a technical body for the purposes of Staff Rule 11.2(b), and thus the exception to the requirement to submit a request for management evaluation contained in that Staff Rule did not apply.

7. On 9 May 2016, Ms. Faust filed her appeal and, on 30 June 2016, the Secretary-General filed his answer to the appeal.

8. On 29 July 2016, Ms. Faust filed a motion requesting leave to file an additional

body. The fact-finding panel provided advice upon which the Executive Secretary, UNFCCC, relied in making her decision on whether the complaint of prohibited conduct was substantiated.

11. The Dispute Tribunal erred by applying the Appeals Tribunal jurisprudence in *Gehr*.<sup>2</sup> The jurisprudence did not apply as the issue in that case was whether a rebuttal panel in the performance management process was a technical body. The Dispute Tribunal also erred by relying upon the Dispute Tribunal jurisprudence in *Gallo*, which found that the decision to accept the report of a fact-finding panel appointed to investigate the complaint of prohibited conduct did not fall under the exception in Staff Rule 11.2(b).<sup>3</sup>

12. Ms. Faust argues that the MEU cannot objectively and reasonably review the UNFCCC Executive Secretary's decision and the issue of whether the fact-finding panel acted in a fair and impartial manner. Also, the MEU's review of the decision would be an unnecessary additional administrative procedure, and the MEU cannot grant her compensation. Furthermore, to demand from victims of harassment to submit a request for management evaluation is discriminatory as it requires this category of staff members to undergo a "lengthier two-tier review process" of two complaints and two evaluations, before they may invoke their right to seek judicial review.

13. Finally, Ms. Faust contends that the Dispute Tribunal erred on a question of procedure by issuing a summary judgment. The Dispute Tribunal ought to have

bodies.<sup>4</sup> Ms. Faust has failed to establish that the Dispute Tribunal made any error in applying the jurisprudence of the Appeals Tribunal.

16. Contrary to Ms. Faust's submissions, the jurisprudence does not distinguish between "harassment decisions" and other categories of administrative decisions for the purposes of the requirement to submit a request for management evaluation established by Staff Rule 11.2. Ms. Faust unilaterally decided not to comply with the mandatory requirement to submit a timely request for management evaluation.

17. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Ms. Faust's Motion and Secretary-General's Observations on the Motion

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disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process *is not required to request a management evaluation.*

30. There was no evidence before the Dispute Tribunal (nor before this Tribunal) that the Secretary-General had made a determination pursuant to Staff Rule 11.2(b) designating investigation panels (facting-finding panels) established under ST/SGB/2008/5 as “technical bodies”.

31. The plain wording of the Staff Rule cited above makes it clear that the general rule that a request for management evaluation must be submitted prior to seeking judicial review of an administrative decision is only subject to two exceptions: i) when the administrative decision imposes a disciplinary or non-disciplinary measure following the completion of a disciplinary process; and ii) when the administrative decision is taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General.

32. As for all exceptions, these situations must be interpreted restrictively. The provisions may not be interpreted broadly such as to conclude, for example, that any technical body could be equated to a “technical bod[y], as determined by the Secretary-General” within the meaning of Staff Rule 11.2(b). Similarly, not every formal panel can be likened to a “technical body”. Therefore, an analogy cannot be drawn



omissions, can be challenged in their own right *via management evaluation* and before the Dispute and Appeals Tribunals”.

39. Therefore, Ms. Faust erroneously relied on the interpretation of what is considered to be a “technical body” for the purposes of Staff Rule 11.2(b). Notwithstanding the important role of investigation panels, in the absence of a determination by the Secretary-General that

conduct, neither the UNFCCC Executive Secretary nor the MEU could award financial damages to her, which means that she would still need to proceed to the UNDT. She also submits that offering compensation as part of mediation or an informal settlement would not be appropriate in cases of harassment, including sexual harassment, because it would be a matter of “hush money” to silence the victim. The primary goal of the requirement for management evaluation to avoid unnecessary litigation before the UNDT could thus not be achieved since “the main relief sought in harassment cases [as opposed to ‘contractual cases’] will be of financial nature” which only the UNDT can satisfy.

43. This assertion is erroneous because it should be borne in mind that the MEU could decide to uphold the administrative decision, or if it does not uphold the administrative decision, it could recommend payment of financial compensation, as has happened in a number of cases. For instance, in 2015, the Organization paid compensation in accordance with the recommendations by the MEU in 10 different cases and for diverse reasons, as shown in the report of the Secretary-General on the administration of justice at the United Nations.<sup>19</sup>

44. Besides, the MEU could also suggest an informal resolution such as mediation, which does not in any way involve an award of “hush money”, but has rather the objective of reaching a satisfying solution for both parties, provided that they are amenable to the efforts of an informal resolution of the alleged grievance.

45. In that regard, ST/SGB/2008/5 is a reflection of the general rule that informal resolution is suitable in many cases, as it offers an “opportunity to resolve a complaint or grievance in a non-threatening and non-contentious manner” (Section 5.5). To think otherwise could affect the credibility of the informal resolution system, which is at the core of the internal justice system, as established by the General Assembly.

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informally” (Rule 11.1(a)), as a first step; if this phase is unsuccessful, he or she shall “submit to the Secretary-General in writing a request for a management evaluation of the administrative decision” (Rule 11.2(a)) and only then file an application to contest the decision before the UNDT (Rule 11.4).

47. Moreover, Ms. Faust’s reliance on the prohibition of discrimination against victims of harassment is not warranted. In this regard, the gravamen of her argument is that the legal procedure discriminates against victims of harassment, when compared to complaints of other staff members. We do not find any merit in the appeal on these grounds, not only because the Tribunal has not been vested with the power to review general rules or regulations, including procedural ones, such as those set forth in ST/SGB/2008/5, but also because the appeal itself is based on the provisions of ST/SGB/2008/5.

48. Besides, the Appeals Tribunal understands that the special procedural provisions adopted by ST/SGB/2008/5 are purposely conceived to “treat the situation with sensitivity and confidentiality” (Section 5.8), in order to achieve the main objective clearly stated at the beginning of ST/SGB/2008/5, which advocates dign

been requested by Ms. Faust before she filed her application to the UNDT contesting the UNFCCC Executive Secretary's decision of 4 December 2015 that there was no evidence of prohibited conduct and that, therefore, she would close the case. In other words, Ms. Faust's submission in this case contradicts her own prior behaviour.

51. In light of the foregoing, there is no conceivable way that the Appeals Tribunal can disagree with the decision of the UNDT. The appeal rests upon misguided grounds and the Appellant has failed to demonstrate that the UNDT committed an error of law or procedure such as to affect the decision of the case.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of October 2016 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Knierim

Entered in the Register on this 20<sup>th</sup>