



Judgment No. 2018-UNAT-873



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Counsel for Secretary-General: Wambui Mwangi

JUDGE JOHN MURPHY , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/ 016, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 5 February 2018, in the case of Belkhabbaz v. Secretary-General of the United Nations . The Secretary-General filed the appeal on 6 April 2018, and Ms. Amal Belkhabbaz filed her answer on 8 June 2018.

Facts and Procedure

2. The facts and background to this appeal are comprehensively dealt with in the Judgment of the UNDT. The UNDT Judgment refers to a number of disputes between Ms. Belkhabbaz and the Administration regarding her employment which have been the

recommended that Ms. Belkhabbaz's contract, which was due to expire on 31 August 2011,

6. By another e-mail of 19 October 2011, the former Chief of OSLA informed Ms. Belkhabbaz that he would contact two staff members whom she had previously represented to advise

meeting expectations” and this rating was upheld by the rebuttal panel which noted that the relationship between Ms. Belkhabbaz and the former Chief of OSLA had at that stage deteriorated dramatically. Her 2012-2013 appraisal rated her again as “partially

16. The investigators presented their final report on 9 April 2013. On 26 April 2013, the former Executive Director of OAJ, having reviewed the investigation report, decided that no further action should be taken on Ms. Belkhabbaz's complaint against the former Chief of OSLA. Ms. Belkhabbaz requested management evaluation of that decision and later filed an application with the UNDT on 11 September 2013. In January 2014, the UNDT found that the decision not to take further action on Ms. Belkhabbaz's complaint against the former Chief of OSLA was unlawful and further found that the fact-finding panel had not been constituted in accordance with Section 5.14 of ST/SGB/2008/5. It found

Executive Director of OAJ informed Ms. Belkhabbaz that she intended to appoint a panel in accordance with the Appeals Tribunal's order.

19. On 19 May 2015, the former Executive Director of OAJ appointed two retired staff members from the roster maintained by OHRM as members of the panel to investigate Ms. Belkhabbaz's complaint. The investigators reviewed the documents provided by Ms. Belkhabbaz and the former Chief of OSLA and interviewed 17 witnesses, in addition to Ms. Belkhabbaz. The former Chief of OSLA responded in writing to the questions posed by the panel but refused to be interviewed. On 6 September 2016, the panel submitted its report to the OiC ASG/OHRM. The report stated that there was no evidence that: a) the reassignment of Ms. Belkhabbaz's cases was of a retaliatory nature

The UNDT Judgment

22. The UNDT concluded that the contested decision to take no further action on Ms. Belkhabbaz's complaint was unjustifiable and unlawful. Its conclusion was based on various findings of procedural unfairness and unreasonableness.

23. Firstly, it held that the former Executive Director of the OAJ should have recused herself from appointing the second panel, essentially because she had taken a prejudicial view of Ms. Belkhabbaz as evident in her e-mail of 13 May 2013 setting out her reasons for non-renewal of the contract. The former Executive Director of the OAJ eventually did recuse herself on 13 July 2015 for reasons that remain unknown, but only after she had appointed the panel, defined its terms of reference and met with its members. The UNDT considered that the act of recusal itself was an admission of a conflict of interests on the part of the former Executive Director of the OAJ and such gave rise to a reasonable apprehension of bias in contravention of Section 3.2 ST/SGB/2008/5 (which requires complaints about prohibited conduct to be investigated in a fair and impartial manner) with the further consequence that the panel was not constituted in accordance with Section 5.14 of ST/SGB/2008/5. The appointment of the panel was therefore illegal and void ab initio .

24. Secondly, the UNDT held that the panel had not been appointed in accordance with the prescripts of Section 5.14 of ST/SGB/2008/5 which requires the appointment of a fact-finding 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

etc. before resorting to the roster. As there was no evidence indicating that attempts had been made to identify and appoint individuals in the department etc., the UNDT concluded that there had been no compliance with Section 5.14 of ST/SGB/2008/5.

26. The UNDT went on to find that although the procedural irregularity was not so material as to warrant invalidity, in light of the Appeals Tribunal judgment, it was reasonable to expect strict adherence with the requirements of Section 5.14 of ST/SGB/2008/5. The disregard of these constituted “an additional factor giving rise to a reasonable apprehension of bias” on the part of the former Executive Director of OAJ.

27. The third ground of review sustained by the UNDT was that the former Executive Director of OAJ improperly limited the scope of the investigation. The original scope of the investigation was set out in an e-mail of 21 September 2012 from the then Executive Director of OAJ. It formulated the complaint as being whether the former Chief of OSLA engaged in prohibited conduct within the meaning of ST/SGB/2008/5 by : i) reassigning Ms. Belkhabbaz’s cases; ii) copying others on confidential communications to Ms. Belkhabbaz; and iii) creating hostile working conditions for Ms. Belkhabbaz within OSLA through his direct e-mail and verbal communications with her. Ms. Belkhabbaz challenged this limitation of the scope of

Appeals Tribunal, the former Executive Director of OAJ, in the apparent opinion of the UNDT, exceeded her authority in that she had no authority to do such and unfairly and unreasonably narrowed the scope of investigation.

29. The fourth allegation of irregularity upheld by the UNDT was that the panel failed to interview the former Chief of OSLA, in contravention of Section 5.16 of ST/SGB/2005/8, and such failure amounted to a violation of the basic requirements of procedural fairness as it allowed him to testify in writing without having his evidence tested and challenged. Section 5.16 of ST/SGB/2005/8 explicitly provides that a fact-finding investigation “shall include interviews” *inter alia* with the alleged offender. The panel attempted to interview the

31. The UNDT also held that the OiC ASG/OHRM applied the wrong standard for determining whether the facts established by the panel amounted to harassment and failed to consider whether they could amount to abuse of authority. The second conclusion of the

THE UNITED N

39. Accordingly, the UNDT rescinded the contested decision to take no further action and remanded the case to the ASG/OHRM to institute disciplinary procedures against the former Chief of OSLA in accordance with Section 5.18(c) of ST/SGB/2008/5, which provides that if the report indicates that the allegations of prohibited conduct are well founded, the responsible official shall refer the matter to the ASG/OHRM for disciplinary action. The UNDT seemed to reason that Section 5.18(c) of ST/SGB/2008/5 formed part of Ms. Belkhabbaz's terms of appointment and thus it had jurisdiction to order the ASG/OHRM to institute disciplinary action. Although, the UNDT made no reference to the provisions of the UNDT Statute conferring such remedial powers, we assume it exercised the power to order specific performance under Article 10(5)(a).⁴ Additionally, without referring to the provision of the UNDT Statute upon which it relied to do so, the UNDT issued an order declaring that the former Chief of OSLA committed prohibited conduct under ST/SGB/2008/5.

40. The UNDT also ordered that Ms. Belkhabbaz be paid moral damages in the amount of USD 20,000 for the psychological harm she suffered as supported by medical evidence, as
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Submissions

The Secretary-General's appeal

42. The Secretary-General submits that the UNDT erred in law and fact by finding that the panel was not constituted in accordance with Section 5.14 of ST/SGB/2008/5 and thus illegal and void ab initio. In particular, the UNDT erred by concluding that the former Executive Director of OAJ had a conflict of interest when she appointed the panel because she had been the decision-maker in the decision not to renew Ms. Belkhabbaz's contract beyond 11 June 2013. The Appeals Tribunal had remanded the case to the former Executive Director of OAJ to establish a new fact-finding panel in accordance with ST/SGB/2008/5 and she accordingly appointed two retired staff members from the roster maintained by OHRM as members of the panel to investigate Ms. Belkhabbaz's complaint, in compliance with that judicial order. The responsible official is not involved in the investigation or how the panel conducts its investigation.

43. The Secretary-General contends that the UNDT erred in findings that the former Executive Director of OAJ did not comply with ST/SGB/2008/5 and created a reasonable apprehension of bias when she appointed two retired staff members on the OHRM roster. The UNDT erred in law in its application of Section 5.14 of ST/SGB/2008/5 and misinterpreted the jurisprudence of the Appeals Tribunal. Panel members can be appointed, if necessary, from the OHRM roster. Appointing staff members of OAJ to the panel risked the perception of bias or conflict since both Ms. Belkhabbaz and the former Chief of OSLA were part of OAJ. Therefore, it was necessary to venture outside OAJ to find an impartial panel.

44. The UNDT erred by finding that the former Executive Director of OAJ unjustifiably limited the scope of the investigation. The Administration has a degree of discretion in dealing with a complaint and may decide whether to undertake an investigation regarding all or some of the allegations. The Appeals Tribunal did not specify the terms of reference that the former Executive Director of OAJ should apply in establishing the panel and conducting the investigation de novo. Accordingly, the former Executive Director of OAJ did not violate Judgment No. 2015-UNAT-518/Corr.1.

45. The UNDT erred in finding that the panel had violated Section 5.16 of ST/SGB/2008/5 by failing to interview the former Chief of OSLA in person. He responded to the panel's questions in writing. Section 5.16 does not prescribe that "interviews" must be done face-to-face. All that is required is that interviews take place. The panel posed questions in writing to both the former Chief of OSLA and Ms. Belkhabbaz, to which they were asked to respond in writing. There is no evidence to support the UNDT's finding that the former Chief of OSLA was not "interviewed" by the panel or that the evidence he provided was not capable of being tested or challenged by the panel.

46. The Secretary-General further submits that the UNDT exceeded its jurisdiction by substituting its own judgment for that of the panel and the Administration. Specifically, the UNDT erred when it concluded that the Panel had failed to consider relevant material in its investigation, i.e. the UNDT Judgment No. UNDT/2012/111 (Applicant).⁵ While the UNDT in Applicant found the reassignment of Ms. Belkhabbaz's cases unlawful because it had deprived her of the right to perform the work for which she had been recruited, it did not rule on whether such action was retaliatory. The UNDT further erred when it made its own finding that the actions of the former Chief of OSLA had amounted to prohibited conduct under ST/SGB/2008/5 and, based on its conclusions, remanded the case to the ASG/OHRM to institute disciplinary procedures against the former Chief of OSLA. The Appeals Tribunal has held that it is not the role of the Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it nor is it the role of the Tribunal to substitute its own decision for that of the Administration. It was the

compensation. Second, Ms. Belkhabbaz did not lose an opportunity to have her complaint properly investigated. In fact, Ms. Belkhabbaz was provided with every opportunity to give the panel all the information that she considered to be relevant. In addition, the panel had found that Ms. Belkhabbaz was not subjected to harassment. In the absence of a breach of rights, Ms. Belkhabbaz was not entitled to any compensation for moral damage.

48. In view of the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

Ms. Belkhabbaz's Answer

49. Ms. Belkhabbaz submits that the Secretary-General has failed to demonstrate that the UNDT erred in concluding that the decision to close her complaint against the former Chief of OSLA for prohibited conduct under ST/SGB/2008/5 was unlawful.

50. The UNDT correctly held that the former Executive Director of OAJ had a conflict of interest when she appointed the panel. Her non-renewal decision preceded her establishing the panel. This gave rise to a reasonable apprehension of bias. Her subsequent resignation as the responsible official without giving reasons and without revoking her decision constituting the panel denied the new responsible official the opportunity to influence the composition of the panel.

51. The Secretary-General's explanation for the alleged impossibility of appointing a panel from OAJ, without a perception of bias or conflict, is hypothetical and unsubstantiated by evidence. The UNDT did not err when interpreting the meaning of "department, office or mission" pursuant to Section 5.14 of ST/SGB/2008/ 5. The obligation in Section 5.14 relating to the "department, office or mission concerned" is not limited to OAJ and the UNDT did not err in finding that there was no evidence that any consideration was given to appointing current staff members in OAJ or any other department or office before resorting to the roster.

52. The UNDT did not err in law and in fact by finding that the former Executive Director of OAJ unjustifiably limited the scope of the investigation by adding the requirement that "such conduct was retaliatory for seeking recourse in the formal system of justice" and that copying the e-mails embarrassed her in order to constitute prohibited conduct. Therefore, the UNDT correctly determined that the former Executive Director of OAJ had "set

THE UNITED NATIONS APPEALS T

it was within the UNDT's discretion to rema nd the case to the ASG/OHRM to institute disciplinary procedures, after having drawn it s own conclusions from the panel's report.

56. Finally, the UNDT did not err in awarding compensation. The Secretary-General's contention that the UNDT erred by failing to appreciate that Ms. Belkhabbaz had contributed to several months of delay is factually incorrect as the UNDT considered any delays possibly attributed to Ms. Belkhabbaz and concluded that it had a limited impact on the overall length

59. Article 2(1) confers jurisdiction on the UNDT to hear and pass judgment in applications: a) to appeal an administrative decision allegedly not in compliance with an applicant's terms of appointment or contract of employment; b) to appeal an administrative decision imposing a disciplinary measure; and c) to enforce a mediation agreement.

60. This case involves an application to appeal an administrative decision as contemplated in Article 2(1) (a) of the UNDT Statute.

61. The word "appeal" when used in a statute can mean one of three things. It can refer to: i) an ordinary appeal (in the narrow sense) which involves a rehearing and redetermination of the merits but limited to the record of evidence on which the decision was originally given; ii) an appeal in the wide sense being a rehearing and redetermination of the merits de novo, with or without additional evidence

64. The appeal under Article 2(1)(a), being a judicial review, involves a determination of the validity of the administrative decision on grounds of legality, reasonableness or procedural fairness. As just mentioned, all review grounds fall within one or other of these three categories. In municipal legal systems, the review grounds have evolved either casuistically or are codified in statutes. However, there is little variance in the scope and purpose of the grounds of review in different legal systems.

65. The grounds of review falling under the rubric of legality include: i) lack of or exceeding authority; ii) improper delegation of authority; iii) unlawful dictation or referral; iv) discretion distorting or jurisdictional errors of law or fact; v) ulterior motive; vi) mala fides; vii) failure to take account of relevant considerations; viii) reliance on irrelevant considerations; xi) unlawful fettering of discretion; and x) arbitrary and capricious decision-making.

66. Review on the grounds of reasonableness examines the substantive rationality of a decision and occasionally may involve consideration of the merits of the decision and can thus look like an appeal. However, a review on grounds of reasonableness, unlike an appeal, does not ask whether the decision is right or wrong. It asks whether the decision is one which

a reasonable person might have reached. The difference is subtle and it is here that the reviewing tribunal must observe a measure of deference or restraint. In assessing reasonableness, a court does not substitute its own view about what is right or wrong, but defers to an administrator's decision provided it is reasonable, rational or proportional.

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former Executive Director of OAJ.⁹ In the result, they unreasonably failed to investigate and determine the relevant issues and thus did not give proper effect to the purpose and precepts of ST/SGB/2008/5.

77. That finding is fortified by the fact that the panel did not comply with its duty to interview relevant witnesses in terms of Section 5.16 of ST/SGB/2008/5. The blanket limitation it imposed on the number of witnesses called by Ms. Belkhabbaz was arbitrary and inconsistent with its duty to interview relevant witnesses. A panel may opt to limit the testimony it hears, but it must do so on reasonable and proper grounds. Moreover, its failure to draw an adverse inference from the un-cooperative attitude of the former Chief of OSLA impacted on the ultimate rationality of the contested decision. The limitation it imposed on the number of Ms. Belkhabbaz's witnesses and its failure to take reasonable steps to interview the former Chief of OSLA contravened Section 5.16 of ST/SGB/2008/5 and contributed to the unreasonableness of the contested decision.

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by individuals from the department, office or mission and only exceptionally from the OHRM roster. The provision does not introduce a mandatory condition. It is directory; and merely professes a preference, as a matter of policy and practice, that individuals from within the department etc. should be sought first before resorting, if necessary, to the roster. Non-compliance with that preference will not lead to the nullity of any appointment from the roster provided the selection is not unreasonable. There is no evidence supporting any claim that the selection from the roster was unreasonable.

with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

87. This provision imposes a duty on the responsible official to refer well-founded allegations to the ASG/OHRM for disciplinary action. If the allegations of harassment or abuse of authority are well-founded and disclose possible misconduct, the responsible official shall refer the matter to the ASG/OHRM for disciplinary proceedings who will proceed in accordance with applicable disciplinary procedures. The failure to act may be remedied by an order of specific performance in terms of Article 10(5) of the UNDT Statute. The order of specific performance does not involve the UNDT substituting its decision for that of the Administration. It is an order enforcing the obligation to act. Consequently, the order of the UNDT remanding the matter to the ASG/OHRM to proceed with discipline is within the competence of the UNDT. However, the directive in paragraph (c) of the UNDT's order directing the ASG/OHRM to "institute" disciplinary proceedings impinges upon the discretion of the ASG/OHRM. The appropriate order is one directing the ASG/OHRM to act in terms of Section 5.18(c) of ST/SGB/2008/5 in accordance with the findings of this judgment. The order of the UNDT must accordingly be modified to that extent.

88. Ms. Belkhabbaz produced medical certificates and reports showing that she

the loss of opportunity to have her complaint fully and properly investigated as a result of the impossibility to conduct a third investigation at this stage in the amount of USD 10,000.

90. Compensation must be determined following a principled approach and on a case by case basis. The medical evidence convincingly establishes that Ms. Belkhabbaz suffered psychological harm from the harassment and the manner of the investigation of her complaints. However, Ms. Belkhabbaz contributed to several months of delay, by not making herself available for interview for over four months from the date the panel was established. Moreover, Ms. Belkhabbaz did not lose an opportunity to have her complaint properly investigated. She was provided with ample opportunity to give the panel all the information that she considered to be relevant. An award of moral damages in the amount of USD 30,000 is excessive in the circumstances and should be reduced to USD 10,000.

91. In the premises, the appeal partly succeeds and the order of the UNDT must accordingly be modified.

