



Judgment No. 2019-UNAT-931



Counsel for Mr. El-Awar: Mohamed Abdou, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against J

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Submissions

Mr. El-Awar's Appeal

18. Mr. El-Awar complains that the UNDT precluded him from calling appropriate witnesses and adducing relevant evidence and, moreover, it failed to afford him a fair trial and due process by improperly denying his request for an oral hearing. Those decisions were unreasonable and led to serious errors, which materially affected the outcome of the case.

19. None of the witnesses, whose statements were produced by the Secretary-General, were active members of the GWOPA Steering Committee. Those statements were hearsay. Moreover, they contained numerous inconsistencies, inaccuracies and incorrect statements and lacked the requisite spontaneity and indicia of reliability and truthfulness.

20. It was therefore necessary for the UNDT to call witnesses who had direct knowledge of the relevant facts. But his request to call one or two Steering Committee members was denied. The hearing was necessary because of the important factual discrepancies between the parties regarding the motives and circumstances surrounding the contested decisions and the lack of contemporaneous records establishing the context for the decisions. An oral hearing would have enabled Mr. El-Awar to testify in person, test the evidence produced by the opposing party, clarify his acts and provide a detailed account of the events. By denying him such an opportunity, the UNDT failed to give effect to the principles of fairness and due process and substituted its own views for those of Mr. El-Awar's.

21. The reliability and probative value of Mr. Cox's statement and the joint statement of five witnesses are questionable, because those two statements were framed as a response to Mr. El-Awar's arguments and not as an objective statement of facts. The averment of truthfulness in both statements was substantially different from the requirements of Article 17(3) of the UNDT Rules of Procedure (RoPs). Furthermore, the joint statement by five witnesses was a "clear indication of co-witness contamination" and undue influence and highly problematic and manifestly improper. Lastly, the fact that a signature was missing from the joint statement, that Mr. Cox signed the joint statement in addition to filing a separate witness statement, and that the representative of the Secretary-General before the UNDT proceedings also signed the joint statement as a witness raises further questions about the reliability and truthfulness of the joint statement.

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by consultations with Mr. El-Awar in Nairobi from 13 through 15 February 2015 where the issues of concern were raised and discussed.

32. The contested decisions no doubt had an impact on Mr. El-Awar's performance of his duties. The UNDT accurately delineated Mr. El-Awar's job description as requiring him to work under the direct supervision of the Senior Advisor to the Executive Director and conferring responsibility on him for: i) managing the GWOPA Secretariat; ii) supervising the Secretariat staff members; iii) leading the development of the strategic direction of GWOPA; iv) implementing the workplan of the GWOPA Secretariat; v) leading resource mobilization efforts; vi) liaising with donors and other relevant partners; and vii) representing UN-Habitat and GWOPA in various international, regional and national fora. The authorities delegated to Mr. El-Awar were not essential to the fulfilment of the functions delineated in his job description and were, for the most part, exceptional in nature. The withdrawal of the delegations did not unduly detract from Mr. El-Awar's core functions, though his discretion to interact with various stakeholders was significantly restricted by limiting his scope of action and subjecting him to closer supervision. But it cannot be said that the introduced constraint was disproportionate in effect. Mr. El-Awar could continue with his work activities as before; he was merely constrained by a firmer level of accountability and closer scrutiny of his performance while the management review was under way.

33. No other evidence is of any distinct relevance or value. In the ultimate analysis, not much turns on the admissibility, evidentiary weight and different interpretations of the various witness statements and documentary evidence. The submissions of the parties in that regard are largely irrelevant. The UNDT accordingly did not act improperly in the exercise of its discretion in terms of Article 9(2) of the UNDT Statute by holding that further oral evidence would not assist in clarifying the issues in contention over and above identification of some inaccuracies, the resolution of which would not disturb the essential factual findings and the reasons for the decisions.

34. In matters involving no disciplinary sanction, Tribunals are required to defer appropriately to the managerial process and to reasonable exercises of managerial discretion necessary to run, manage and operate the Organization. The UNDT correctly held that the Executive Director was best placed in this instance to understand the legitimate managerial needs of the Organization and enjoyed a margin of appreciation. Managerial decisions should be

sustained provided they are free from invidious or improper motivations and are based upon the exercise of reason and proper judgment.

35. In the premises, the undisputed facts sufficiently demonstrate that there was a rational connection between the information available to the Executive Director, the reasons given for the contested decisions and the purpose for which the decisions were taken. The decisions to subject Mr. El-Awar to stricter supervision were, moreover, tailored proportionally to the desired outcome of ensuring GWOPA's continued presence in Barcelona without unduly restraining Mr. El-Awar from carrying out his job. As such, the contested decisions were a legitimate, rational and proportional exercise of the managerial prerogative. We can put it no better than the UNDT, which concluded correctly as follows:¹

The Tribunal finds that the administrative measures were rational and proportionate to address the concerns expressed by management. Faced with a situation where the Applicant was taking initiatives that were perceived to be against the interests of UN-Habitat without any consultation with his hierarchy, it was appropriate to curtail his authority and to subject him to more stringent control. Further, it has not been established that the measures were disproportionate to the objective they sought to

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37. The appeal is dismissed and Judgment No. UNDT/2018/116 is hereby affirmed.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Lussick

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar