UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1310

Gudrun Fosse

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2021-1573
Date of Decision:	28 October 2022
Date of Publication:	5 January 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Amanda Stoltz/Rupa Mitra

JUDGE GRAEME COLGAN, PRESIDING.

1. This is an appeal against a Judgment of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal). It dismissed Gudrun Fosse's claims following the Organisation's refusal to continue with investigations of her complaints of discrimination, harassment and abuse of authority against the Executive Secretary of the Secretariat of the Convention on Biological Diversity (Executive Secretary and SCBD, respectively) and its refusal to investigate her complaint arising from the effects on her of the alleged harassment and retaliation. Ms. Fosse's appeal raises an increasingly common issue of what happens to such complaints when, as occurs not infrequently, the person complained against leaves the Organisation following the making of a complaint but before its conclusion.

2. For the reasons set out below, we dismiss the appeal and affirm the Judgment of the Dispute Tribunal.

Facts and Procedure

3. On 23 April 2018, Ms. Fosse joined the SCBD in Montreal, Canada, as the Head of the Administrative, Finance, and Conference Services Division (AFCD). She reported directly to the Executive Secretary.

4. In June 2018, Ms. Fosse sent a draft workplan for the AFCD to the Executive Secretary for approval. That draft workplan was to serve as the basis for Ms. Fosse's electronic Performance Appraisal System (ePAS) for 2018-2019. In an e-mail to the Executive Secretary dated 17 September 2018, Ms. Fosse expressed her concern at the lack of comments/feedback on, or approval of, the workplan for the AFCD and the direct impact on her ePAS for 2018-2019.

5. In early 2019, Ms. Fosse cooperated as a witness in an investigation into allegations of harassment and abuse of authority made by another SCBD staff member against the Executive Secretary. Ms. Fosse was interviewed by a fact-finding panel established by the Assistant Secretary-General for the Office of Human Resources (ASG/OHR) on 14 and 31 January 2019 and again on 26 February 2019.

6. By e-mail dated 20 February 2019, the Executive Secretary informed Ms. Fosse of her decision to change the latter's reporting line for the new ePAS cycle, which was to start on 1 April 2019, in order to "bring [Ms. Fosse's] situation in line with UN practice", meaning that each staff member should have a first reporting officer and a different second reporting officer. Consequently, for the new ePAS cycle, Ms. Fosse was to report to a new first reporting officer with the Executive Secretary acting as her second reporting officer. Ms. Fosse responded to the Executive Secretary's advice on 25 February 2019, voicing her concern that she was the only head of division within the SCBD singled out for reporting to another head of division, and that this had been done "without due process and in contravention of established administrative instructions concerning the management of financial, human and physical resources".

7. In March 2019, Ms. Fosse requested a conversation with the Director of the Corporate Services Division of the United Nations Environment Programme (DCSD and UNEP respectively). Ms. Fosse informed the DCSD of the difficult issues she was having with the Executive Secretary and requested the Office of Internal Oversight Services (OIOS) to audit the SCBD.

8. On 17 April 2019, Ms. Fosse requested a management evaluation of the decision to require her to report to a new first reporting officer. She claimed that the decision was inconsistent with the legal framework governing performance management and that it was arbitrary and discriminatory as she was the only head of division at the SCBD who would not report to the Executive Secretary directly.

9. On 1 May 2009, the Executive Secretary chaired a meeting attended by staff from her office, Ms. Fosse and three of Ms. Fosse's office staff. According to Ms. Fosse, the Executive Secretary engaged in highly unprofessional behavior, in particular towards two African staff working under Ms. Fosse's supervision, including shouting and making demeaning comments.

10. On 24 May 2019, the Executive Secretary reminded Ms. Fosse of the need to complete her ePAS for 2018-2019 and asked her to finalise her workplan by 30 May 2019. Ms. Fosse objected to the request on the basis that her workplan had not been approved in a timely manner and that it might therefore be "fruitless" to complete it after the end of the past performance cycle with no agreement on the goals, success criteria or performance expectations. On 30 May 2019, the Executive Secretary reiterated her request and stated that

she would proceed with the offline evaluation if Ms. Fosse did not enter her workplan for her ePAS in the electronic system known as *Inspira*.

11. On 3 June 2019, the Management Evaluation Unit rejected Ms. Fosse's 17 April request for management evaluation as not receivable, stating that the contested decision to change her reporting lines did not constitute a reviewable administrative decision, but rather an "operational decision", which did not produce any direct or negative consequences on her terms of appointment.

12. On 4 June 2019, Ms. Fosse attended a senior management meeting. According to Ms. Fosse, she was "publicly demeaned" by the Executive Secretary at the meeting.

13. From 3 to 20 June 2019, a three-member team from OIOS in Nairobi came to Montreal to audit the SCBD. In their report issued in August 2019, the OIOS team noted the "prevailing work environment" in the SCBD and made recommendations to address staff concerns and promote a healthy work environment. According to Ms. Fosse, there was no record of any subsequent action taken on this recommendation.

14. By e-mail dated 6 June 2019 to the Director of the Ethics Office, Ms. Fosse sought protection from retaliation, pursuant to the Secretary-General's Bulletin ST/SGB/2017/2/Rev. 1 titled "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations".[1] She alleged that she had been subjected to "persistent harassment" by the Executive Secretary for having cooperated with the authorised investigation and for having "[stood] up for the core values" of the Organisation. We will not deal in further detail with this claim of non-protection against retaliation as it is the subject of another UNAT Judgment issued at this same session of the Tribunal.[2]

15. By interoffice memorandum dated 18 June 2019, Ms. Fosse submitted to the ASG/OHR a complaint against the Executive Secretary of "prohibited conduct, including harassment, abuse of authority, and discrimination". She copied this to the Director of Investigation Division (ID), OIOS, and the Executive Director UNEP, pursuant to ST/SGB/2008/5 titled "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority".[3] She alleged that she had been the subject of an "increasing level of harassment

[1] ST/SGB/2017/2/Rev. 1 came into force on 28 November 2017.
[2] *Fosse v. Secretary-General of the United Nations*, Judgment No.2022-UNAT-1305.
[3] ST/SGB/2008/5 came into force on 1 March 2008.

and abuse of authority" by the Executive Secretary in the form of "a wide spectrum of acts of retaliation, harassment, racial discrimination, and abuse of authority" directed against her and other colleagues, especially those from African nations or of African heritage, over an extended period of time.

16. On 27 August 2019, the Ethics Office informed Ms. Fosse that, having completed "its preliminary review", it determined that "there is a *prima facie* case that [her] cooperation with the [fact-finding] Panel may have been a contributing factor in causing the alleged harassment and abuse of authority by the Executive Secretary", and that her case was being referred to the OIOS "for investigation". We note, however, that Ms. Fosse was also informed that the Ethics Office found that her complaint of 18 June 2019 did not raise a *prima facie* case of retaliation. On 30 August 2019, the Ethics Office recommended to the Chef de Cabinet that the Executive Secretary be removed from Ms. Fosse's reporting line and be replaced with an alternative Second Reporting Officer.

17. In an e-mail to the ASG/OHR dated 17 October 2019, the Director of ID/OIOS stated that, "after initial assessment", the ID/OIOS considered that the matter could be best handled by the Assistant General Secretary, Office of Human Resources (ASG/OHR). He also informed the ASG/OHR that the ID/OIOS had initiated an investigation into Ms. Fosse's ST/SGB/2017/2/Rev. 1 complaint, following a *prima facie* assessment by the Ethics Office, but had suspended its investigation pending the fact-finding panel's inquiries into Ms. Fosse's ST/SGB/2008/5 complaint, because of "the overlapping nature of the cases".

18. On the same day (17 October 2019), the Executive Secretary announced her resignation from the SCBD to take effect on 30 November 2019. According to the ASG/OHR, the Executive Secretary had resigned "[f]ollowing the conclusion of the fact-finding investigation and subsequent disciplinary process against [her]".

19. On 14 January 2020, the Acting Executive Secretary of SCBD issued a revised organisational structure in which Ms. Fosse's reporting line was changed back to the (new) Executive Secretary as her first (and again only) reporting officer.

20. By letter dated 21 January 2020, the ASG/OHR informed Ms. Fosse, in respect of her harassment complaint of 18 June 2019, that as the Executive Secretary had resigned from SCBD, "there is no longer any reason for you to fear further harassment, abuse of authority or

retaliation from [the Executive Secretary] or any other official in the [S]CBD". She also informed Ms. Fosse that she had recommended to the Acting Executive Secretary of SCBD to engage with Ms. Fosse to "seek to informally resolve [her] Complaint".

21. In an e-mail dated 3 February 2020, the Acting Executive Secretary explained to Ms. Fosse that since the former Executive Secretary had resigned, no reason existed for conducting a full investigation and that informal resolution meant that "we have to work jointly on ensuring that your working conditions are what they should be in a normal United Nations office". The Acting Executive Secretary noted that Ms. Fosse's former reporting lines and functions had already been restored, and since the former Executive Secretary was no longer in the office, "the matter can now be considered closed".

22. On 13 March 2020, Ms. Fosse submitted a request for management evaluation of the ASG/OHR's decision to close her harassment complaint "without an investigation, without any accountability for engaging in prohibited conduct and without taking any action to mitigate the effects of harassment and retaliation".

23. In a letter dated 8 June 2020, the Under-Secretary-General for Management Strategy, Policy and Compliance informed Ms. Fosse of the outcome of the management evaluation of her 13 March 2020 request, upholding the contested decision by the ASG/OHR to close her 18 June 2019 complaint.

24. On 27 June 2020, the Acting Executive Secretary informed Ms. Fosse that a performance evaluation for 2018-2019 had been completed offline by her previous supervisor with a "successfully met performance" grade.

25. Ms. Fosse appealed to the Dispute Tribunal against the ASG/OHR's decision not to pursue her harassment complaint or to address the effects of harassment and retaliation. In Judgment No. UNDT/2021/049 dated 3 May 2021, the Dispute Tribunal rejected her application. The UNDT interpreted Ms. Fosse's application as only challenging the decision not to investigate her complaint of prohibited conduct and to close the matter following a preliminary assessment, but considered that the applicable law was ST/SGB/2019/8, and not ST/SGB/2008/5, as Ms. Fosse insisted.[4] In this regard, the UNDT noted that Ms. Fosse filed

[4] Secretary-General's Bulletin ST/SGB/2019/8 titled "Addressing discrimination, harassment, including sexual harassment, and abuse of authority" came into force on 10 September 2019.

a complaint of prohibited conduct (harassment) on 18 June 2019 to the ASG/OHR with a copy to the Director of ID/OIOS, and that, four months later, on 19 October 2019, "after initial assessment", the Director of ID/OIOS referred that complaint to the ASG/OHR, who was tasked with making the decision to initiate or not to initiate an investigation. The Dispute Tribunal found that the ASG/OHR's decision not to investigate Ms. Fosse's 18 June 2019 complaint and to close the matter in preference of an informal resolution "fell within the Administration's margin of appreciation and was a reasonable exercise of discretion", in light of the alleged harasser's resignation.[5] The UNDT also found that Ms. Fosse was not entitled to monetary or other types of compensation under the applicable legal framework because there was no finding of misconduct or any illegality.[6]

26. Ms. Fosse appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) on 28 June 2021. The Secretary-General filed an answer to the appeal on 30 August 2021.

Submissions

Ms. Fosse's Appeal

27. Ms. Fosse requests that the Appeals Tribunal rescind the impugned UNDT Judgment and pay her two years' net base salary.

28. Ms. Fosse contends that the Dispute Tribunal overlooked certain facts including that the Executive Secretary had shouted and made demeaning comments at two African staff members under Ms. Fosse's supervision at a meeting that the Executive Secretary chaired on 1 May 2019, and that one of the African staff members present at the meeting subsequently filed a harassment complaint against the Executive Secretary.

29. Ms. Fosse also contends that the Dispute Tribunal's analysis in accordance with ST/SGB/2019/8 was misplaced and erroneous, because that Secretary-General's Bulletin was not issued until October 2019, four months after she had filed her harassment complaint. The applicable circular is ST/SGB/2008/5. The distinction is important because Section 5.14 of

Section 8.3 of ST/SGB/2019/8 reads: "Investigations initiated prior to the entry into force of the present bulletin shall continue to be handled in accordance with the provisions of Secretary-General's bulletin ST/SGB/2008/5. In all other respects, the present bulletin hereby supersedes ST/SGB/2008/5."
[5] Impugned Judgment, paras. 39 and 41.
[6] *Ibid*., paras. 43-44.

ST/SGB/2008/5 requires the responsible official to review the complaint "promptly", and it also provides for a range of interim measures for the protection of the complainant.

30. Ms. Fosse maintains that the UNDT made a fundamental error in concluding that it was reasonable not to initiate an investigation into her harassment complaint due to the resignation of the Executive Secretary, incorrectly citing the provisions of ST/AI/2017/1, which is for other forms of alleged misconduct.

31. Ms. Fosse argues that the inaction on the part of the Administration in light of numerous, well-documented complaints of a hostile working environment cannot be considered as reasonable. There has been no acknowledgement of any wrongdoing. There have been no steps to resume the reclassification of her post or address the damage to her career. The Executive Secretary's record remains unblemished. This is unacceptable on an organizational level and has caused her severe emotional and physical distress. In failing to hold the Executive Secretary accountable, the Secretary-General himself became accountable for the consequences.

The Secretary-General's Answer

32. The Secretary-General requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

33. The Secretary-General contends that the UNDT properly defined the decision that Ms. Fosse had challenged, and correctly found that the relevant governing legal framework was ST/SGB/2019/8 as well as ST/AI/2017/1 titled "Unsatisfactory conduct, investigations and the disciplinary process".[7] Ms. Fosse has failed to demonstrate any error in that finding. The mere fact that she cited ST/SGB/2008/5 in her 18 June 2019 complaint does not make that Bulletin applicable in her case. Nor is it legally relevant that ST/SGB/2019/8, which came into force on 10 September 2019, was not yet in force when she filed her complaint of prohibited conduct. Ms. Fosse's complaint was referred on 17 October 2019 to the ASG/OHR, who then conducted a preliminary assessment and determined that no investigation was warranted. Thus, ST/SGB/2019/8 clearly applied in the assessment of Ms. Fosse's case. The Appeals Tribunal should dismiss her claims in this regard.

[7] ST/AI/2017/1 entered into force on 26 October 2017.

34. The Secretary-General maintains that the Dispute Tribunal correctly concluded that the contested decision not to initiate an investigation due to the resignation of the Executive Secretary was lawful as part of a reasonable exercise of discretion, and that this finding was consistent with the jurisprudence of the Appeals Tribunal. Though the term "preliminary assessment" as in ST/SGB/2019/8 was not specifically used in the contested decision, it is clear that Ms. Fosse's complaint was assessed as a preliminary matter before considerations were made and the conclusion was reached that no investigation would be made. Ms. Fosse has failed to demonstrate error in this finding or present any legal argument to support her allegation that the actions of the Administration were unreasonable. Her arguments on appeal show that she is merely dissatisfied with the UNDT's decision. Simply expressing disagreement with a conclusion reached by the UNDT does not establish error.

35. The Secretary-General notes that, for the first time on appeal, Ms. Fosse has raised her claim about her completed 2018-2019 performance appraisal being "cancelled" in the *Inspira* system. In any event, Ms. Fosse has failed to show how any of her claims regarding her performance evaluations, even if true, are relevant to the UNDT's disposition of the case, let alone how they might make the UNDT Judgment a manifestly unreasonable one.

36. The Secretary-General also maintains that none of Ms. Fosse's other claims related to the change of her reporting line, the other staff members' complaints of a hostile working environment and the reclassification of her post, demonstrate any error on the part of the Dispute Tribunal.

Considerations

37. It is important to state at the outset that all United Nations staff are entitled to expect to work in a safe environment.[8] This is not simply safety from physical harms but includes psychological and moral safety. In particular, that expectation of safety includes an environment that is free of harassment and abuse of authority including on racial, ethnic or national origin grounds. That expectation also includes freedom from a generally hostile working environment. And the corollary of these uncontroversial expectations is that there is an effective complaint, investigative and enforcement mechanism that, among other things, protects complainants against retaliatory acts.

[8] This is encapsulated in Staff Rule 1.2(f).

38. It is important, also, to differentiate Ms. Fosse's complaints about her own treatment by the Executive Secretary, and the Appellant's complaints about the Executive Secretary's treatment of others, including staff who reported to Ms. Fosse and for whom she felt a degree of responsibility. The processes launched by Ms. Fosse were personal to her. While they enabled her to draw to the Administration's attention allegations of misconduct in respect of other staff and of a hostile work environment that Ms. Fosse attributed to the Executuve Secretary, Ms. Fosse could not insist upon the investigation by the Administration of these other complaints or certainly the commencement by the Administration of disciplinary proceedings against the Executive Secretary. Ms Fosse was entitled to complain as a person affected by the conduct of another staff member, or even to report misconduct that she had witnessed towards another or others. But she was not entitled to insist that the Administration instigate disciplinary proceedings as a consequence of her complaint or report.

39. Ms. Fosse's complaints about the Executive Secretary's conduct towards her were resolved by rectifying the unjustified consequences imposed upon her. Ms. Fosse complains that her career was damaged by these but, unfortunately for Ms. Fosse, the decision not to investigate her allegations prompted by the resignation decision of the Executive Secretary meant that there was no finding of loss upon which a claim for compensation might have been based.

40. Ms. Fosse also complains that, following her resignation and the closure of her complaint file, the Executive Secretary's career was "unblemished". While that may be so in a formally recorded sense, we repeat our earlier quotation from the Organisation's records of advice to Ms. Fosse that the Executive Secretary's resignation was tendered "[f]ollowing the conclusion of the fact-finding investigation and subsequent disciplinary process against [her]".

41. We do not accept the Appellant's submission that the Respondent's investigative and decision-making process was delayed by inaction so that Ms. Fosse was thereby unjustifiably disadvantaged. Even if Ms. Fosse is correct that the earlier Bulletin was in place and required the Organisation to respond to her complaint "promptly", we do not agree that there was what Ms. Fosse describes as "inaction" on the part of the Organisation which would give her grounds to establish that this imperative was breached, or that the UNDT was wrong to have found against this. While promptness in such matters is always important, so too is ensuring that those subject to complaints are allowed their due process rights and that investigations are

thorough and robust. Achieving such balances requires time and we are satisfied that undue time was not taken in this case.

42. We agree with the Secretary-General that the Dispute Tribunal correctly concluded that the contested decision not to initiate an investigation due to the resignation of the Executive Secretary was lawful as part of a reasonable exercise of discretion, and that this finding was consistent with the jurisprudence of the Appeals Tribunal. Though the term "preliminary assessment" in ST/SGB/2019/8 was not specifically used in the contested decision, it is clear that Ms. Fosse's complaint was preliminarily assessed before a decision was to be made about a substantive investigation. The conclusion was reached at that stage that no investigation would be undertaken.

43. While the previous Bulletin (ST/SGB/2008/5) may have been in force when she lodged her complaint and when it was the subject of a preliminary assessment, by the time it came to consider whether there would be an investigation, the substitute Bulletin (ST/SGB/2019/8) had come into force pursuant to its transitional provisions. It was then applicable to the decision whether to investigate or to recommend informal resolution. The UNDT did not err in law in so deciding.

44. The UNDT found correctly that the relevant governing legal framework was ST/SGB/2019/8 as well as ST/AI/2017/1 titled "Unsatisfactory conduct, investigations and the disciplinary process". Ms. Fosse's complaint was referred on 17 October 2019 to the ASG/OHR (after the 2019 Bulletin came into effect), who then conducted a further preliminary assessment and determined that no investigation was warranted. Thus, ST/SGB/2019/8 applied in the assessment of Ms. Fosse's case.

45. We would also note that, for the first time on appeal, Ms. Fosse has raised her claim about her completed 2018-2019 performance appraisal being "cancelled" in the *Inspira* electronic system. It is not permissible to introduce new issues in this way, but in any event, Ms. Fosse has failed to show how any of her claims regarding her performance evaluations are relevant to the UNDT's disposition of the case, let alone how they might make the UNDT Judgment a manifestly unreasonable one.

46. For completeness, we would add that none of Ms. Fosse's other claims related to the UNDT's Judgment about change of her reporting line, the other staff members' complaints of a hostile working environment and the reclassification of her post, demonstrate any error on the part of the Dispute Tribunal.

47. Ultimately, however, Ms. Fosse has not established that the administrative decision concerning the issues about which she complained and that she says were not addressed by the Administration (her complaints about the Executive Secretary's treatment of other staff), affected her terms and conditions of employment to her disadvantage. Following the Executive Secretary's resignation, the Administration rectified the wrongs to which Ms. Fosse had been subjected personally. At least one other staff member complained about the Executive Secretary's treatment of that other staff member and about which Ms. Fosse had also complained. That was the appropriate avenue for investigation and, if appropriate, redress for other staff members.

48. Most compellingly and succinctly, the decision to discontinue the investigation of Ms. Fosse's complaints was one taken for the reason given, and did not affect legally and adversely the Appellant's terms of appointment or her contract of employment. The Respondent put right the wrongs that had been done to Ms. Fosse. In these circumstances, the Appellant has no entitlement to further compensation from the Organisation.

Judgment

49. The appeal is dismissed and Judgment No. UNDT/2021/049 is affirmed.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan, Presiding	Judge Knierim	Judge Halfeld

Judgment published and entered into the Register on this 5th day of January 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar