



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1319

**Asr Ahmed Toson
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Dimitrios Raikos
Case No.:	2022-1688
Date of Decision:	24 March 2023
Date of Publication:	11 April 2023
Registrar:	Juliet Johnson

Counsel for Mr. Toson: Non-represented

Counsel for Secretary-General: Amanda Stoltz

JUDGE MARTHA HALFELD, PRESIDING.

1. The Secretary-General appeals against Judgment No. UNDT/2022/021 by which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted Mr. Asr Ahmed Toson's application in part, finding that Mr. Toson's claim challenging the refusal to provide him with the investigation report (closure report) regarding his complaint against the Regional Director (RD), Arab States Regional Office (ASRO) was receivable and well founded and that Mr. Toson had the right to receive the report from the Administration.
2. For the reasons set out below, the appeal is granted, and the UNDT Judgment is reversed.

Facts and Procedure

3. Mr. Toson is a staff member of the United Nations Population Fund (UNFPA). He serves as the Organization's Representative to Libya within the ASRO, holding a fixed-term appointment at the P-5 level.
4. On 7 June 2019, Mr. Toson filed a complaint with the Office of Audit and Investigation Services (OAIS) against the RD/ASRO, UNFPA.
5. On 24 June 2021, Mr. Toson received the following communication from the Director, OAIS:

Dear Mr. Toson,

Please be advised that the Office of Audit and Investigation Services (OAIS) had completed its investigation of your complaint filed with OAIS on 07 June 2019, of sexual exploitation and abuse, sexual and workplace harassment, abuse of authority, favouritism and fraudulent travel requests against ... [the RD/ASRO, UNFPA].

In the course of the investigation, OAIS collected all available testimonial and documentary evidence related to the compl[ai]nt made. The evidence was carefully reviewed and analyzed[.] The evidence was considered by OAIS to be insufficient to substantiate the above reference[d] allegations against [the RD] and/or OAIS found that the actions described in your complaint did not rise to the threshold of harassment and abuse of authority, as defined in sections 3.1, 3.2, 3.4 and 3.5 of UNFPA Policy on the Prohibition of Harassment, Sexual Harassment, Abuse of Authority and Discrimination.

Having concluded its investigation, the matter is now considered closed at the level of OAIS. Please note that the closing of the case does not preclude OAIS from reconsidering this case at any time in the future, including by re-opening the case and initiating further investigation if further details and/or information are subsequently disclosed.

I would also like to thank you for the cooperation you afforded OAIS during the investigation.

6. On 25 June 2021, Mr. Toson asked OAIS for a copy of the investigation report and its exhibits. He cited the OAIS letter to him which stated that “[t]he closing of the case does not preclude OAIS from reconsidering this case at any time in the future, including by re-opening the case and initiating further investigation if further details and/or information are subsequently disclosed”. Mr. Toson stated that in order to be able to assess, and possibly efficiently report, what could be considered as “further details and/or information subsequently disclosed”, he needed to know the scope and evidence considered in the investigation.
7. On the same day, OAIS replied refusing the request and stated: “Pursuant to our internal framework, closure reports are internal, confidential documents. As the matter has now been closed by OAIS, any further enquiries should be directed to the Legal Unit.”
8. On 3 September 2021, Mr. Toson filed an application with the UNDT challenging i) the decision to close the investigation into his complaint of 7 June 2019, and ii) the decision to deny him access to the investigation report and its attendant annexes.
9. On 4 March 2022, the UNDT issued Judgment No. UNDT/2022/021, granting the application in part. As to the first claim, the UNDT found the application not receivable *ratione materiae* because it concerned a conclusion by OAIS and not by the Administration, which had not yet closed the case definitively, and as such the challenged decision was still preparatory and not final. As to the second claim, the UNDT found it receivable and well founded and held that Mr. Toson had the right to receive the report from the Administration.
10. On 3 May 2022, the Secretary-General filed an appeal. Mr. Toson did not file an answer.

Submissions

The Secretary-General's Appeal

11. The Secretary-General contends that the UNDT erred in law by applying the incorrect legal framework and exceeded its jurisdiction in finding that the Administration was obliged to provide Mr. Toson with additional information regarding the investigation. The UNDT found that under Section 5.18 of the “then applicable” Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), Mr. Toson had the right to receive “the summary report”. However, since UNFPA is one of the separately administered funds and programmes of the United Nations, administrative issuances of the United Nations Secretariat are not applicable to UNFPA unless otherwise stated. ST/SGB/2008/5 includes no such statement and UNFPA has not expressly accepted its applicability. The relevant legal framework is therefore not ST/SGB/2008/5, but the UNFPA Disciplinary Framework and the UNFPA Policy on Prohibition of Harassment, Sexual Harassment, Abuse of Authority and Discrimination (UNFPA Harassment Policy).

12. The Secretary-General avers that the UNDT erred in law in its interpretation of Section 12.6.1 of UNFPA’s Disciplinary Framework. This provision makes clear that OAI is not obliged to disclose the details of any investigation but simply confirms that the nature of the obligation is limited to providing an update on the “status” of the matter. Contrary to the findings of the UNDT, this language does not create an expanded obligation on the part of the Administration to provide the complainant with a summary of the closure report. The UNDT’s interpretation fails to give effect to the clear and ordinary meaning of this provision, and also conflicts with the provisions in Section 12.5.1 of the UNFPA Disciplinary Framework and Section 5.3.7 of UNFPA’s Harassment Policy, which apply specifically in the event of the closure of the case. Under the applicable legal framework, Mr. Toson was entitled to be informed of the closure of the case, and, specifically, to be informed, “as appropriate of the status and outcome” of the investigation regarding the complaints. UNFPA complied with its obligations when it adequately informed Mr. Toson of the closure of the case and the status and outcome of the investigation in its letter of 23 June 2021. The UNDT erred by failing to provide any reason why the explanations presented in that letter were insufficient.

13. In addition to the UNDT's finding being an error of law, its finding is also unclear. While the UNDT granted Mr. Toson's application with respect to the contested disclosure decision, Mr. Toson had requested disclosure of the entire "investigation report and its exhibits". The UNDT's Judgment therefore could be understood as ordering the Administration to provide the full closure report. However, elsewhere in its Judgment, the UNDT refers variously to the Administration's obligation to provide the complainant with "the summary report", with "a summary of the report", and with "the report (although a summary only)".

14. The UNDT's various and compounded errors have resulted in the imposition of an obligation on the part of the Administration, which is not supported by, and is in conflict with, the applicable legal framework. The UNDT, therefore, also exceeded its jurisdiction by expanding the entitlements of Mr. Toson and by imposing additional obligations on the Administration of UNFPA beyond what is provided for in the legal framework applicable to UNFPA.

15. The Secretary-General requests that the UNAT reverse the UNDT's findings on this issue and dismiss Mr. Toson's application in its entirety.

Considerations

16. The only issue on appeal is the contested *disclosure* decision, that is to say, whether the UNDT erred when it found that the Administration was obliged to provide Mr. Toson with the investigation report and its annexes relating to his complaint against the RD/ASRO. The decision to close the investigation into Mr. Toson's complaint against the RD/ASRO is not subject to the present appeal.

17. From the outset, the Appeals Tribunal makes it clear that the UNDT committed an error of law, firstly by applying the improper legal framework. As correctly argued by the Secretary-General, the relevant legal framework is not ST/SGB/2008/5, but the UNFPA Disciplinary Framework and the UNFPA Harassment Policy. This is because UNFPA, being one of the separately administered funds of the Organization, has its own legal framework; it is not regulated by the Secretariat's general administrative issuances such as ST/SGB/2008/5, unless otherwise stated or unless it has expressly accepted their applicability, which was not the case here.

18. This interpretation derives from Secretary-General's Bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), which at Section 2.3 provides that "[a]dministrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability". The Appeals Tribunal has also already upheld this understanding.¹

19. Accordingly, administrative issuances do not apply to UNFPA, unless their applicability is expressly provided for in the administrative issuance or expressly accepted by UNFPA being a separately administered fund. Section 2.4 of ST/SGB/2008/5 states that "[t]he present bulletin shall apply to all staff of the Secretariat"; there is no provision on its applicability to the funds, organs and programmes. Also, there is no evidence that UNFPA expressly accepted its applicability. Therefore, the applicable legal framework remains within the authority of UNFPA, that is to say, the UNFPA Disciplinary Framework and the UNFPA Harassment Policy.

20. Secondly, it is clear that, as a general principle, an affected individual may contest the outcome of an investigation. Specifically, Section 18.1 of the UNFPA Disciplinary Framework provides that

a staff member who wishes to formally contest an administrative decision taken to impose a [d]isciplinary or non-disciplinary [m]easure ... following the completion of a [d]isciplinary [p]rocess shall submit an application alleging non-compliance with his or her contract of employment or terms of appointment to the United Nations Dispute Tribunal under conditions as further prescribed in its statute and rules.

21. The Appeals Tribunal has also established that once the investigation has been concluded, its outcome and administrative consequences, as well as any related acts or omissions, can be challenged in their own right via management evaluation and before the Dispute and Appeals Tribunals.²

¹ See *Weerasooriya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-571, para. 20, citing *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-483 (where the Appeals Tribunal held that UNICEF had not promulgated any administrative issuance incorporating ST/AI/2002/3 and therefore the UNDT erred on a question of law and fact by concluding that ST/AI/2002/3 applied to UNICEF).

² *Masyllkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412, para. 18; *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-786, para. 35.

22. Once established that an affected individual has the right to appeal the outcome of an investigation, the Appeals Tribunal must then determine the scope of the relevant information which should be made accessible to the complainant, in order to allow him or her to file a meaningful claim when the Administration decides to close the case. Section 5.18(a) of ST/SGB/2008/5 clearly provides that if the findings of the report conclude that no prohibited conduct has taken place, the case is closed. The responsible official is duty bound in such a case to “inform the alleged offender and the aggrieved individual” of the outcome by “giving a summary of the findings and conclusions of the investigation”.³ In turn, Section 5.6 of the Secretary-General’s Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) stipulates that “[w]here an affected individual or alleged offender has grounds to believe that the *procedure* followed in respect of the handling of a formal report of prohibited conduct was improper, upon being informed of the outcome of the matter ... the affected individual or alleged offender may contest the matter”.⁴

23. However, as established earlier, ST/SGB/2008/5 and, for the same reason, ST/SGB/2019/8 are not applicable to the present case, which shall be determined under UNFPA’s internal provisions as cited below. These provisions read as follows:⁵

UNFPA Disciplinary Framework

12.5 Case closure:

12.5.1 If, in the view of the Director, OAIS, the information obtained during Investigation (i) does not give rise to a reasonable conclusion that Misconduct occurred or (ii) would not otherwise merit the continuation of an ongoing Investigation, the Director, OAIS, may *close the case, recording the reasons in writing, and inform the complainant accordingly.*

12.6 Notifying the complainant within six months:

12.6.1 In accordance with the terms of the UNFPA Policies and Procedures Manual, Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding Activity, paragraph 7(b)(iii), the Organization is required to inform the complainant of the status of the matter within six months. Accordingly, the

³ See also *Ivanov v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-519, para. 17.

⁴ Emphasis added.

⁵ Emphases added.

Director, OAI, will notify the complainant within such time frame, provided that the individual disclosed his or her identity and accurately indicated the way he or she can be contacted. *Such notification is required only with regard to the status of the matter. There exists, therefore, no obligation on the part of OAI to disclose the details of any Investigation.*

UNFPA Harassment Policy

5.3.7. The alleged victim shall be *informed as appropriate of the status and outcome of the investigation*. The alleged offender shall also be informed of the outcome of the investigation.

24. Therefore, the UNDT erred when it found that Mr. Toson’s request to have access to the investigation report and its attendant annexes was well-founded.⁶ According to the provisions contained in the applicable legal framework, the complainant is only entitled to be informed of: i) the status of the matter; ii) the outcome of the investigation; iii) closure of the case with a record of the reasons. The expression “as appropriate” contained in Section 5.3.7 should not be interpreted as discretionary, but rather as a mandatory procedure for informing the aggrieved individual about his or her complaint.

25. It follows that, despite the right to appeal, the scope of the information provided to UNFPA staff members contesting the outcome of a complaint is restricted, no mention having been made to the full content of the investigation report or to its annexes, not even a summary of the findings and conclusions of the investigation (as is the case regarding ST/SGB/2008/5), but rather only to the status of the matter, outcome of the investigation and closure of the case with the record of the reasons, without any obligation on the part of OAI to disclose the details of the investigation.

26. The UNDT thus committed an error of law, as Mr. Toson was not entitled to be provided with a copy of the investigation report or its annexes.

27. Having said the above, in the present case there appears to be an inconsistency in the information provided by the 23 June 2021 letter, relating to the fact that, on the one hand, the letter states that an investigation had indeed been opened and completed, while on the other hand, the “actions described in [his] complaint” – and we note, whether proven or not – “did

⁶ Impugned Judgment, para. 15.

not rise to the threshold of harassment and abuse of authority, as defined in sections 3.1, 3.2, 3.4 and 3.5 of UNFPA's Policy on the Prohibition of Harassment, Sexual Harassment, Abuse of Authority and Discrimination".

28. Most importantly and without prejudice to the outcome of the present case, the Appeals Tribunal is of the view that the right to appeal pursuant to Section 18 of the UNFPA disciplinary framework cannot be effectively exercised in cases where the information provided to the complainant is purely generic in nature to the extent that it could be given to a number of individual complaints, particularly when such complaints are found to be unsubstantiated. This bad practice of generic communication, while based on the current applicable legal framework, does not enforce the principles of transparency and accountability, as established by the Organization,⁷ nor does it promote access to justice in the internal justice system.

29. Further, it appears that there is an inconsistency in the current framework concerning the scope of the information to be provided upon closure of the investigation. Section 12.5.1 of the UNFPA Disciplinary Framework provides that in order for a case to be closed, the information obtained during an investigation cannot give rise to a reasonable conclusion that misconduct occurred. However, Section 5.3.7 of the UNFPA Harassment Policy restricts the information to be provided to the alleged victim to the status and outcome of the investigation. The Administration may wish to consider making the necessary changes *de lege ferenda* in order to render the system more effective.

⁷ *Utkina v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-524, para. 18.

Judgment

30. The Secretary-General's appeal is granted, and Judgment No. UNDT/2022/021 is reversed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Raikos

Judgment published and entered in the Register on this 11th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar