

UNDT/2013/176, Nguyen-Kropp and Postica

UNAT Held or UNDT Pronouncements

The UNDT found that the decision that there was “reason to believe” that the Applicants may have committed misconduct was manifestly unreasonable, arrived at in breach of due process, and was thus unlawful. The UNDT found that the Applicants’ rights were not respected during the subsequent preliminary investigation. The UNDT found that the decision to conduct an investigation against the Applicants and the manner in which it was carried out was tainted by procedural irregularity and manifest unfairness. The UNDT found that the Applicants had engaged in protected activity, namely, reporting of a complaint of evidence tampering by their supervisor, the Acting Director of OIOS. The UNDT found that adverse actions were taken against the Applicants (including initiation of an investigation) and that the Respondent failed to discharge the burden of demonstrating by clear and convincing evidence that the actions taken against the Applicants’ would have been the same absent the protected activity. The UNDT ordered compensation in the amount of USD10,000 to each Applicant for economic loss in the form of legal costs (under art. 10.5 of the Statute) and USD40,000 to each Applicant for non-pecuniary (moral) damages.

Decision Contested or Judgment/Order Appealed

Two Applicants, investigators with the Office of Internal Oversight Services (“OIOS”), United Nations Secretariat, appealed the decision to investigate them.

Legal Principle(s)

Reason to believe that misconduct may have occurred: The test for establishing whether there is “reason to believe” that misconduct may have occurred is whether,

in the circumstances, such a conclusion would be reached by an objective and reasonable decision-maker. Standards that apply during preliminary investigations: The standards that apply during preliminary investigations include confidentiality, objectivity, impartiality, fairness, and avoidance of conflicts of interest (cf OIOS Investigations Manual (March 2009)). Due process during preliminary investigation: As the United Nations Appeals Tribunal stated in Appellant 2012-UNAT-209 and Powell 2013-UNAT-295, the full scope of due process rights envisaged by ST/AI/371 apply following the formal disciplinary charges. However, this does not mean that, during the preliminary investigation stage, staff members are not entitled to basic, fundamental due process rights and guarantees. Even OIOS Investigations Division's own Investigations Manual (dated March 2009) speaks of the following standards that apply during preliminary investigations: confidentiality, objectivity, impartiality, fairness, and avoidance of conflicts of interest (see pp. 17-18 of the Manual).

Retaliation: Retaliation has three essential elements: participation in a protected activity, being subject to a detriment, and a causal connection between the protected activity and the detriment suffered. The prohibition against improper motives, in particular retaliation, is not just a matter of law. It is to make certain that employees feel empowered to voice their concerns. An organization cannot function effectively when its employees are afraid to raise a concern or report an issue. The aim of the system of internal justice is to ensure that the United Nations continues to make every effort to ensure that improper motive does not taint its operational decisions and that its staff members are treated fairly, transparently and in a way that promotes justice, efficiency and human rights.

Test for retaliation: The objective test for identifying decisions tainted by retaliation may be stated in simple terms. If a staff member engages in a protected activity, for instance the filing of a complaint to the head of a department or office, and is thereby subjected to detrimental action such as a change in office space, an unprecedented and unjustified downgrading of a performance evaluation report, or a counter-complaint and investigation, then a causal link may exist. In appropriate circumstances, a finding of retaliation may be adequately sustainable in fact and in law.

Burden of proof in cases of alleged retaliation: ST/SGB/2005/21 specifically puts the burden of proof in a retaliation claim on the Administration. Section 2.2 states that "the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity". However, such a burden is only shifted onto the Administration once the individual complainant has made out a prima facie case of retaliation.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Only financial compensation

Full judgment

[Full judgment](#)

Applicants/Appellants

Nguyen-Kropp and Postica

Entity

OIOS

Case Number(s)

UNDT/NY/2010/107

UNDT/NY/2011/004

Tribunal

UNDT

Registry

New York

Date of Judgement

20 Dec 2013

Duty Judge

Judge Meeran

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Burden of proof

Ethics office

Retaliation

Investigation

Applicable Law

Administrative Instructions

- ST/AI/371

Secretary-General's bulletins

- ST/SGB/2005/21

UNDT Statute

- Article 10

Related Judgments and Orders

UNDT/2010/011

UNDT/2013/028

UNDT/2013/029

2010-UNAT-059

2010-UNAT-094

2010-UNAT-095

2011-UNAT-107

2011-UNAT-143

2012-UNAT-209

2012-UNAT-215

2012-UNAT-238

2012-UNAT-272

2013-UNAT-295

2013-UNAT-346

2013-UNAT-347