

UNDT/2018/005, Sarwar

UNAT Held or UNDT Pronouncements

The Tribunal is of the view that in light of the oral evidence presented to the factfinding panel by the FRO and SRO, instead of them following the recommendations of the second rebuttal panel to initiate and provide real support to the Applicant at every stage of the process, they continued their negative behavior towards the Applicant and they did not temporarily rotate/assign him to another position in a different Unit for the following six months (up to one year starting from 19 March 2014), and to allow for the continuation of his third probationary year. The Tribunal concludes that the Applicant's due process and substantive rights and his real chances to improve his performance under the guidance of other supervisors, which he was entitled to, were denied to him. The Tribunal considers that in the absence of such a statement relating to the nature of the duties and length of service, a former staff member may be prejudiced against because s/he cannot prove having been employed by the Organization when applying for a position with a new employer, including the United Nations. The Tribunal concludes that the Applicant's right to receive such a statement referring to the nature of his duties and length of service within the United Nations was breached. This Tribunal agrees with the majority decision taken in Kallon and considers that, in the present case, the Applicant suffered moral harm as a result of the unlawful decision which breached his due process right to have his complaint fully and fairly considered by the Administration as proved by the totality of evidence according to the standard of proof established by the Appeals Tribunal in Kallon, "[t]he evidence to prove moral injury of the first kind may take different forms. The harm to dignitas or to reputation and career potential may thus be established on the totality of the evidence". The Tribunal considers that the present judgment, together with an amount of one year's net-base salary at the P-2 level, step 8, represents a reasonable and sufficient compensation for the moral harm caused. The establishment of the fact-finding panel was, pursuant to the Applicant's complaint, delayed until after his effective separation occurred, which prevented the Administration from taking measures to keep him under contract until the

completion of the investigation and until the investigation results were communicated to him. Furthermore, the results of the investigation report were communicated to him to a wrong email address, and reached him (to a correct email address) one year and three months after his separation.

Decision Contested or Judgment/Order Appealed

The rejection of the Applicant's formal complaint of harassment and abuse of authority.

Legal Principle(s)

The Tribunals' scope of review in a case concerning rejection of a misconduct complaint: The Tribunal is entitled to review a misconduct complaint, even if the decision-maker concluded after reviewing the investigation panel's report and the supporting documentation that the record indicated that the conduct did not violate the provision of ST/SGB/2008/5. In this type of case, the Tribunal's task is to review the alleged facts and determine if they are established. Subsequently, the Tribunal must consider if the established facts can be regarded as acts of discrimination, harassment and abuse of authority. Right not to be separated following two consecutive e-PAS reports with "C – partially meets performance expectations": Staff members having received two consecutive e-PAS reports with "D – unsatisfactory performance" that rebuttal panels are subsequently upgrading to a "C – partially meets expectations" should not be separated from the Organization. Right and expectation of staff members selected in the young professional programme ("YPP") to be rotated/re-assigned on a second assignment: Selected candidates from the YPP are required to serve for a minimum of two years in the position of their initial assignment and are expected to serve in two different assignments: the initial assignment and a second, additional assignment, in accordance with secs. 7.11 and 8.2 of ST/AI/2012/2/Rev.1. Right to have an investigation conducted promptly after the lodging of a complaint and before the complainant's separation, and to have the results of the investigation communicated to the complainant before the separation - arts. 4.6, 5.3, 5.9 of ST/SGB/2008/5:

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Sarwar

Entity

DESA

Case Number(s)

UNDT/NY/2016/047

Tribunal

UNDT

Registry

New York

Date of Judgement

12 Jan 2018

Duty Judge

Judge Greceanu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Applicable Law

Administrative Instructions

- ST/AI/2012/2/Rev.1

Agreements, conventions, treaties (etc.)

- American Convention on Human Rights of the Organization of American States
- International Covenant on Economic, Social and Cultural Rights

GA Resolutions

- A/RES/63/253

Secretary-General's bulletins

- ST/SGB/2008/5

Staff Rules

- Chapter XI

UN Charter

- Article 101.3

UNAT Statute

- Article 10.5
- Article 2.1(a)

UNDT RoP

- Article 7.1
- Article 7.2
- Article 7.3
- Article 8.4

UNDT Statute

- Article 10.5(a)
- Article 10.5(b)
- Article 3.1(a)
- Article 3.1(b)
- Article 8.1(b)
- Article 8.1(c)
- Article 8.1(d)(i)-(iv)