

# UNDT/2020/097, Reilly

## UNAT Held or UNDT Pronouncements

Procedural issues Respondent's challenge to the admissibility of certain documents Art. 18 of the Tribunal's Rules of Procedure contains the set of norms applicable to evidence. However, except for article 18.6, there is no specific provision in relation to admissibility of evidence based on recordings made without consent. The Tribunal finds that the transcript of a meeting the Applicant recorded is not admissible in the proceedings because it is tainted by the fact that one of the participants at the meeting was not aware that the meeting was being recorded. The Applicant cannot make use of a piece of evidence that was illegally obtained. In fact, in a significant majority of legal systems worldwide, audio or video recordings are only admissible in restrictive circumstances: if consent has been obtained or if a judge has issued a warrant allowing it. Moreover, the Tribunal has also considered that this piece of evidence is not the only one available on file. The Applicant has not shown (and has not even alleged) that the minutes based on the audio-recording were the only way available to her to prove her case. As a consequence, the Tribunal will not take into account the minutes of said meeting since it results from an audio-recording that was made without the consent of the other party.

**Receivability** Does the determination by the Second Alternate Chair of the EPUN that the Applicant did not establish a prima facie case of retaliation constitute a reviewable administrative decision? The Tribunal recalls that the scope of its jurisdiction, as defined by article 2 of its Statute, is mostly and above all "administrative decisions" not procedures per se. Reviewing a procedure is necessarily linked to an administrative decision being contested before and reviewed by the Tribunal. The Tribunal finds that it is clearly established in ST/SGB/2017/2 that the UNEO recommendations are not reviewable administrative decisions and, as such, they fall outside the scope of the UNDT's jurisdiction. There is no legal provision allowing it to conclude that findings of no prima facie retaliation can be subject to judicial review and, moreover, such a provision would explicitly contradict the wording and the rationale of sec. 10. Even if it considers that the applicable framework is the old policy (ST/SGB/2005/21), the Appeals Tribunal's jurisprudence has, by majority, decided that the acts and

omissions of the UNEO do not constitute decisions taken by the Administration. Only the General Assembly, as the legislative body of the Organization, can establish and define conditions under which access to the internal justice system is granted to staff members. Providing direct access to the Tribunal in relation to UNEO findings of no prima facie retaliation remains a policy issue that should be resolved through a legislative act. In view of the foregoing, with respect to the finding of no prima facie retaliation, the Tribunal cannot adjudicate in relation to the alleged procedural flaws committed and delays incurred into by the UNEO, nor in relation to the alleged “conflict of interest” that led to the recusal of the former Ethics Advisor, UNEO, from the Applicant’s case, since it all falls out of the scope of its jurisdictional powers. Did the action or inaction of the Administration on the recommendations made by the Second Alternate Chair of the EPUN constitute a reviewable administrative decision? The applicable policy grants the complainants access to justice and this is an expression of the Secretary-General’s duty of care in relation to staff members. Has the Organization exercised its duty of care towards the Applicant? The evidence produced before the Tribunal, clearly shows that the Secretary-General, through the ASG, OHRM and OHCHR, has made all possible attempts to keep the Applicant working in suitable positions, in Geneva, outside the reporting lines of her former supervisor. As a consequence, the Tribunal finds that, according to the evidence produced at the hearing and available on file, there is no evidence of a breach of the duty of care towards the Applicant. Remedies The Tribunal cannot grant the first remedy requested, i.e., the referral of the case to OIOS and the transfer of the Applicant to a suitable position, for two reasons. First, because it does not have jurisdiction to review findings of no prima facie retaliation made by the Ethics Office and to replace that Office’s assessment with its own. Second, because there is no legal basis under the Tribunal’s Statute to grant such remedies as the Tribunal is not the decision-maker. In relation to the second remedy, the Tribunal underlines that the issue related to the Press Release is pending adjudication before it in Case No. UNDT/GVA/2017/052. Consequently, there is clearly a *lis pens* situation in relation to the requested remedy that prevents the Tribunal from adjudicating it in the current case. With respect to the third remedy requested, the Tribunal finds the fact that the Ethics Office took more than 45 days to complete its preliminary review of the Applicant’s complaint is not blatantly illegal or unlawful, due to the complex nature of the matter at stake. Moreover, a careful reading of both sec. 5.3 of the old policy and sec. 7.4 of the new policy as well as the use of the words “will” and “shall”, indicate that said deadlines are merely indicative. The Tribunal, having a sequence of events in mind, cannot but conclude that the Applicant also shares the

responsibility for the time taken to consider her complaint. While she was in her own right to request a review, she cannot then argue that she had nothing to do with period elapsed and attribute it exclusively to the Organization. The Tribunal is mindful that whenever new evidence was filed and a new review requested, a new deadline began. Such filings and further requests clearly reset the clock for the Organization to take a decision as it reinitiates the entire process. Consequently, the Tribunal is of the view that the Organization cannot be held accountable for alleged delays since they are to be attributed to the Applicant's initiatives. Finally, granting a compensation for moral damages depends on a first and foremost requisite: an illegal decision of the Organization. Without said essential element, the Tribunal cannot grant the Applicant any compensation in this regard.

## Decision Contested or Judgment/Order Appealed

The Applicant challenges "the procedure by which her request for protection from retaliation was processed, the failure to protect her from retaliation and the failure to follow up on Ethics Office recommendations subsequent to her request for protection from retaliation".

## Legal Principle(s)

The duties of a judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgement must necessarily refer to the scope of the parties' contentions (see Massabini 2012--UNAT-238, para. 25). According to section 10.1 of ST/SGB/2017/2, actions or inactions from the Administration following recommendations of the Ethics Office constitute administrative decisions subject to judicial review. Compensation for moral damages depends on three cumulative requisites: the elements of harm itself, an illegality and the nexus between the two. If one of these three elements is not established, compensation cannot be awarded. The Tribunals' case law requires that the harm be shown to be directly caused by the administrative decision in question.

## Outcome

Dismissed on merits

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Reilly

## Entity

OHCHR

## Case Number(s)

UNDT/GVA/2018/099

## Tribunal

UNDT

## Registry

Geneva

## Date of Judgement

24 Jun 2020

## Duty Judge

Judge Bravo

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Administrative decision

Ethics office

Jurisdiction / receivability (UNDT or first instance)

Remedies

## Applicable Law

Secretary-General's bulletins

- ST/SGB/2005/21
- ST/SGB/2005/22
- ST/SGB/2007/11
- ST/SGB/2008/5
- ST/SGB/2017/2

UNDT RoP

UNDT Statute

- Article 18.2

## Related Judgments and Orders

UNDT/2012/078

2012-UNAT-238

2015-UNAT-518

2010-UNAT-099

UNDT/2017/055

2014-UNAT-457

2016-UNAT-673

2010-UNAT-084

2018-UNAT-874