

# UNDT/2021/154, Rolli

## UNAT Held or UNDT Pronouncements

The IOO audit, indeed, did not have the character of a disciplinary investigation into any possible wrongdoing(s), including misconduct, of the Applicant. Rather, as argued by the Applicant, it appears that no disciplinary process whatsoever was undertaken. Consequently, the Applicant was not afforded any of the mandatory procedural safeguards outlined in para. 35(a)-(c) of the Judgment, namely (a) the right to be advised of the allegation of misconduct, (b) the right to comment thereupon, and (c) the right to be represented by a lawyer before the decision on misconduct was made and the disciplinary sanction imposed. The mandatory procedural safeguards cannot be rendered “moot” in the manner suggested by the Respondent. The situation is that before the WMO Secretary-General imposed the disciplinary sanction against the Applicant, the latter was never informed of the allegation of misconduct and, accordingly, not provided an opportunity to comment thereon in order to defend himself or be represented by a lawyer. These rights cannot be waived by the Applicant by admitting to having sent the 3 May 2018 email to the Audit and Oversight Committee. What is at stake is instead the appropriateness of the WMO Secretary-General deciding to summarily dismiss the Applicant without having as much as granted him a chance to defend and explain himself. The Tribunal notes that in the contested administrative decision dated 9 May 2018 by which the Applicant was summarily dismissed, as explained above, the WMO Secretary-General did not state that the legal basis for doing so was former WMO staff regulation 10.1 as he only referred to the former WMO staff regulations 1.1 and 1.2. This information was only provided in the Respondent’s closing statement. Also, the WMO Secretary-General did not specify what the exact reason(s) was/were for summarily dismissing the Applicant, namely whether this was because (a) his 3 May 2018 email to the Audit and Oversight Committee, (b) his involvement in the ERP/VSP, or (c) a combination of the two counts of alleged misconduct. 61. The Tribunal therefore finds that the contested administrative decision was not properly reasoned, which by itself as matter of access to justice, constitutes a due process infringement as per para. 35(d) of the Judgment. The situation as it stands is that the WMO Secretary-General took the contested administrative decision to summarily dismiss the Applicant without any type of forewarning and, as a result, no process whatsoever was undertaken leading up to this decision. Unless a possible disciplinary process was only intended as a charade, before deciding on how to react to the two alleged counts of misconduct, the WMO Secretary-General could not have known what the Applicant would have responded, had he been granted his basic due process rights to be presented with the allegations of misconduct and then allowed to comment thereupon, in particular if also represented by a competent legal counsel. Subsequently, it would have been impossible for the WMO Secretary-General to have known in advance what his final decision would have been in light of the Applicant’s response to the misconduct allegations. Also, not before the instant judicial proceedings did the Respondent present the WMO Secretary-General’s justifications for not launching a disciplinary process against the Applicant. These late explanations, however, do not cure the related irregularities retrospectively. Basically, the disallowed procedural safeguards are of such fundamental importance to a disciplinary process that they cannot be unilaterally waived by the decision-maker at her/his own discretion. Accordingly, even in consideration of the “no difference” principle, the Tribunal finds that the contested administrative decision was unlawful.

## Decision Contested or Judgment/Order Appealed

The administrative decision of the Secretary-General of WMO to summarily dismiss the Applicant.

## Legal Principle(s)

In Rolli 2019-UNAT-952, the Appeals Tribunal directed the JAB of WMO to “make findings” on a number “issues and questions” (see para. 34). The Appeals Tribunal thereby intended to ensure that the case is given the adequate attention and scrutiny that must be expected by an independent and impartial judicial mechanism. These directions were, however, not addressed to the Dispute Tribunal, which per definition constitutes such a mechanism. Consequently, as the primary fact-finder according to the Appeals Tribunal’s consistent jurisprudence (see, for instance, Gehr 2012-UNAT-234, Turkey 2019-UNAT-955 and Robinson 2020-UNAT-1040), the Tribunal found that it is not bound by these directions, but would, as appropriate, let itself be guided by them. The Appeals Tribunal has generally held that the Administration enjoys a “broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere” (see Ladu 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in Sanwidi 2010-UNAT-084, at para. 40, “when judging the validity of the exercise of discretionary authority ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”. The Appeals Tribunal, however, underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General” (see Sanwidi, para. 40). In this regard, “the Dispute Tribunal is not conducting a ‘merit-based review, but a judicial review’” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (see Sanwidi, para. 42). Among the circumstances to consider when assessing the Administration’s exercise of its discretion, the Appeals Tribunal stated “[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see Sanwidi, para. 38). The Appeals Tribunal has held that certain minimum standards inherently apply to a disciplinary process even if not explicitly stated in the relevant legal framework. In Abu Osba 2020-UNAT-1061, the Appeals Tribunal, for instance, held that “[a]lthough the [United Nations Relief and Works Agency for Palestine Refugees] Staff Rule does not specifically outline the requirements for due process in disciplinary cases, the common law requirements of due process in such instances should apply” (para. 68). Certain minimum standards and principles for due process with relevance to the present case have already been affirmed by the Appeals Tribunal: (a) Prior to taking any administrative decision imposing a disciplinary sanction, the subject shall be given “adequate notice of the allegations” (see Abu Osba, para. 68, as well as, for instance, Leal 2013-UNAT-337, para. 24; Rangel 2015-UNAT-535, paras. 72 and 75; Muindi 2017-UNAT-782, paras. 52-53; Elobaid 2018-UNAT-822, para. 28; Sall 2018-UNAT-889, para. 36); (b) Also, the subject shall have “the opportunity to respond to those allegations” before then (see Abu Osba, para. 68 as read together with Elobaid 2018-UNAT-822, para. 28, as well as, for instance, Leal 2013-UNAT-337; para. 24; Sall 2018-UNAT-889, para. 36); (c) The subject shall further have “the right to seek legal advice if requested” during the disciplinary process (see Abu Osba, para. 68); (d) “[A]ccess to justice is a norm of customary international law” (see Mindua 2019-UNAT-921, para. 27). A derivative right is that if an administrative and/or disciplinary sanction is imposed against a staff member, then s/he must be specifically informed of the correct legal basis therefor in the contested administrative decision. In line herewith, the subject must be fully apprised of the allegation(s) and facts underpinning each of the disciplinary sanction(s). Without such information, the subject will not be able to adequately ascertain the legal and factual background for the imposed disciplinary and/or administrative sanction(s) and appropriately defend her/his position within the internal justice system (similarly, see Muindi 2017-UNAT782, para. 54). Such error(s) may cause unnecessary uncertainty and delays. An audit and an investigation cannot be regarded as the same type of review, because they have different objectives and are conducted by different categories of professionals (auditors vis-à-vis investigators). The Appeals Tribunal has, at several instances, affirmed the so-called “no difference” principle. It therefrom follows that only procedural irregularities that impacted the contested administrative decision can render it unlawful (see, for

instance, Kallon 2017-UNAT-742, Allen 2019-UNAT-951, Ladu 2019-UNAT-956 and Thiombiano 2020-UNAT-978).

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

UNDT granted the application on its merits and decided that the issue of relief was to be determined in a subsequent judgment.

Full judgment

[Full judgment](#)

Applicants/Appellants

Rolli

Entity

WMO

Case Number(s)

UNDT/NY/2021/19

Tribunal

UNDT

Registry

New York

Date of Judgement

16 Dec 2021

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Dismissal/separation

Due process

Access to justice

Investigation

Right to comment/respond

Termination (of appointment)

Disciplinary sanction

Unsatisfactory service

Applicable Law

Staff Regulations

- Regulation 1.1
- Regulation 1.2

UNAT Statute

- Article 2.10