

2022-UNAT-1305, Gudrun Fosse

UNAT Held or UNDT Pronouncements

The Secretary-General filed an appeal.

UNAT held that the finding that there was no causal link between the protected activity of Ms. Fosse and the detrimental behaviour of the Executive Secretary was a finding that a reasonable administrator could make. The conclusion that there was no causal link was based on the OIOS's investigation, its engagement with other staff, the documentary information evidencing the essentially undisputed problematic relationship between Ms. Fosse and the Executive Secretary, the perceived poor performance of Ms. Fosse, and Ms. Fosse's insistence on working only during working hours. All these problems were documented as having occurred before Ms. Fosse engaged in the protected activity. UNAT found that it was probable that the Executive Secretary would have taken the alleged detrimental action absent Ms. Fosse's protected activity or that it was not engaged in for prohibited purposes. Consequently, the Ethics Office, and by extension, the Chef de Cabinet were obliged to find that retaliation had not occurred in accordance with the evidentiary standard required by Section 8.4 of ST/SGB/2017/2/Rev. 1.

Turning to the issue of procedural irregularity, UNAT found that the lengthy time delay was regrettable but not vitiating. UNAT noted that Ms. Fosse's reporting line was altered shortly after the preliminary investigation was completed and the Executive Secretary resigned not much later. These protective measures, UNAT held, effected relatively early in the process, significantly decreased and later obviated all risk of further possible retaliation. The delay in the investigation and determination of the retaliation thus posed no direct harm and did not materially influence the outcome of the process as to invalidate the final decision. UNAT concluded that there was consequently no basis to award compensation in terms of Article 10(5)(b) of the Statute of the UNDT.

Finally, UNAT found that the UNDT erred in awarding moral damages for harm allegedly caused by the contested decision. The medical reports indicating that Ms.

Fosse was distressed, anxious and depressed were issued six months before the contested administrative decision was taken. Thus, even if the contested administrative decision had been unlawful there was no causal nexus between it and the distress, anxiety and depression suffered by Ms. Fosse. The anxiety, distress and depression experienced by Ms. Fosse were pre-existing at the time of the contested administrative decision, which was in any event a lawful decision.

Therefore, UNAT granted the appeal and dismissed Ms. Fosse's request for costs.

Decision Contested or Judgment/Order Appealed

Ms. Fosse, a UNEP staff member, contested before the UNDT the decision of the Chef de Cabinet accepting the Ethics Office's determination that there was no merit in Ms. Fosse's claim of retaliation.

The UNDT held that all the first two allegations fell outside the scope of the application, so that the only instance of retaliation with which the UNDT was seized was Ms. Fosse's third allegation that after she had cooperated with the fact-finding panel, the Executive Secretary displayed "more anger" towards her. The UNDT concluded that the delays of OIOS in completing the investigation were procedurally unfair and evinced a measure of bad faith or negligence. This, the UNDT maintained, amounted to an egregious violation of ST/SGB/2017/2/Rev.1. It also held that the failure of OIOS and the Ethics Office to interview Ms. Fosse during and after the investigation, although not mandatory, and despite the Ethics Office having engaged with Ms. Fosse in the earlier stages of the process, was not in keeping with good practice and thus compounded the procedural unfairness. Additionally, the delay of the OIOS investigation meant that OIOS was unable to interview the alleged perpetrator of the retaliation as the Executive Secretary had resigned before the investigation got underway.

These procedural deficiencies led the UNDT to the conclusion that the Administration was unable to prove by clear and convincing evidence that no retaliation existed and thus the contested administrative decision was unlawful. The UNDT granted the application, in part, and awarded Ms. Fosse USD 5,000 for the "fatal procedural irregularities in this case" as well as USD 5,000 for "the improper handling" which caused Ms. Fosse distress and anxiety.

Legal Principle(s)

The purpose of ST/SGB/2017/2/Rev.1 is to afford staff members protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations. It provides that individuals who make such reports in good faith have the right to be protected against retaliation. The right to protection is thus a term of the contract of staff members of the Organization as constituted by the relevant administrative issuance.

Section 10 of ST/SGB/2017/2/Rev.1 provides that the recommendations of the Ethics Office (and by extension the recommendations of OIOS in its investigation report) do not constitute administrative decisions and thus are not subject to challenge before the UNDT. It is only the action, or non-action, of the Administration on a recommendation from the Ethics Office under Section 8 of ST/SGB/2017/2/Rev.1 that constitutes a contestable administrative decision provided it has direct legal consequences affecting the terms and conditions of appointment of the complainant. In other words, the recommendations and investigation findings are intermediate in nature and thus, lacking the requisite finality, are not reviewable administrative decisions. However, any irrationality or procedural unfairness in the determination of the Ethics Office or the investigation, though not directly reviewable, may operate in certain instances to contaminate the final administrative decision, resulting in the latter being reviewable on grounds of unreasonableness or procedural unfairness.

Outcome

Appeal granted

Full judgment

[Full judgment](#)

Applicants/Appellants

Gudrun Fosse

Entity

UNEP

Case Number(s)

2022-1644

Tribunal

UNAT

Registry

New York

Date of Judgement

29 Dec 2022

President Judge

Judge Murphy

Judge Sandhu

Judge Halfeld

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abuse of process before UNDT/UNAT

Costs

Administrative decision

Compensation

Non-pecuniary (moral) damages

Disciplinary matters / misconduct

Retaliation

Ethics office

Applicable Law

Secretary-General's bulletins

- SGB/2008/5
- ST/SGB/2017/2/Rev.1

UNDT Statute

- Article 10.5(b)