

# 2022-UNAT-1309, Emma Reilly

## UNAT Held or UNDT Pronouncements

UNAT endorsed the UNDT's holding that the decision to issue a press release in response to allegations that OHCHR had endangered the lives of Chinese human rights defenders who attended the Human Rights Council in Geneva in March 2013 fell within the discretion of the Organization and was a managerial prerogative. UNAT found that the specific part of it which concerned the issue of the provision of names of Chinese human rights activists to the Chinese government fell outside the scope of its judicial review due to the general nature of its content and to the fact that it embodied a managerial strategy to respond to what the Organization has perceived as being "damaging" of its own image. Under these circumstances, that part of the press release did not have a tangible individual direct impact on Ms. Reilly and consequently it was not an administrative decision subject to judicial review per Article 2(1)(a) of the UNDT Statute.

UNAT also endorsed the UNDT's further findings about the impact of the press release on Ms. Reilly's employment status, namely that it did not breach confidentiality of the investigations related to her complaints and it was not defamatory of her. In this regard, UNAT agreed with the Secretary-General that the maintenance of confidentiality to the maximum extent possible, after the information had already been made public, was the way the press release had been crafted, balancing between OHCHR's needs to promptly inform the public in response to extremely serious allegations and the requirement to protect the confidentiality of the investigations. OHCHR properly minimized Ms. Reilly's exposure by not providing any more information about her, without even naming her, than was necessary to sufficiently respond to and refute the substance of the allegations put forth publicly. UNAT concluded that under these same circumstances and balancing criteria, the issuance of the press release as a whole was a reasonable and hence lawful exercise of the Administration's relevant discretion and dismissed the appeal on that ground.

Turning to the issue of whether or not the UNDT erred in holding that the way in which the Administration had handled Ms. Reilly's complaints of harassment and abuse of authority, made under ST/SGB/2008/5, was lawful, the Appeals Tribunal recalled that while not clothed with jurisdiction to itself conduct ab initio an investigation of a harassment complaint, the UNDT was competent under its jurisdiction to determine if there was a proper investigation in terms of ST/SGB/2008/5 and to review whether any administrative decision arising from the process was in compliance with the terms of the aggrieved individual's terms of contract.

UNAT found that the UNDT had failed to give careful and fair consideration to some of Ms. Reilly's allegations, including the allegation that funding for a temporary position in a different section she had been recommended for, was immediately withdrawn when her name was being associated with the position; the allegation that she had been excluded from meetings of the three-person team she worked with on topics included in her terms of reference; and the allegation that there had been "ad hominem attacks" against her and that her performance evaluation was conducted in bad faith in retaliation for her management evaluation request. UNAT found that the UNDT should have determined whether there had been a proper and lawful investigation by the Panel into these elements of Ms. Reilly's allegation of harassment and abuse of authority, i.e. by examining for example whether the Panel had complied with its duty to interview relevant witnesses and drawn its own reasoned conclusions from the investigation report and the evidence on file, whether there had been irregularities such as the failure of the Administration to address the specific harassment complaints, and whether the specific incidents indicated in Ms. Reilly's complaint could be reasonably characterized as breaches of the Organization's policies and regulations, meriting a finding of abuse of power and harassment, as the UNDT properly did with regard to Ms. Reilly's other allegations. Finally, the UNDT should have weighed the evidence with a view to determining whether the findings of the Administration on these specific issues were supported by the available evidence, namely that there was a rational connection between the information before the responsible official and the contested decision that there was no prohibited conduct requiring further action.

Accordingly, UNAT granted the appeal on that ground. Since the specific allegations made by Ms. Reilly required factual findings in order to ascertain whether they were meritorious or not, UNAT remanded these discrete issues to the UNDT.

UNAT dismissed Ms. Reilly's appeal regarding the award of moral damages.

## Decision Contested or Judgment/Order Appealed

Before the UNDT, Ms. Reilly, a Human Rights Officer with OHCHR contested the “[o]ngoing workplace harassment based on protected activity for reporting and objecting to wrongdoing by management”, including the decision to conclude an investigation of harassment only with managerial actions. She also contested the violation of her privacy rights and defamation of character, including the related decision to state that her claims were found unsubstantiated in a press release. The press release at issue was a press release which OHCHR had issued in response to allegations that OHCHR had endangered the lives of Chinese human rights defenders who attended the Human Rights Council in Geneva in March 2013 and that the OHCHR staff member who had blown the whistle had faced reprisals.

By Judgment No. UNDT/2021/093, the UNDT partially granted the application and remanded the case back to the fact-finding panel for the sole purpose of interviewing the former Chief, Human Resources, OHCHR. The UNDT also granted Ms. Reilly compensation for moral damages in the amount of USD 3,000.

Ms. Reilly appealed.

## Legal Principle(s)

Article 2(1)(a) of the UNDT Statute confers jurisdiction upon the UNDT to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent Regulations and Rules and all relevant administrative issuances in force at the time of the alleged non-compliance.

A statutory burden is placed upon an applicant to establish that the administrative decision in issue was in non-compliance with the terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant's contractual rights.

An appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. Further, the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine.

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions.

Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision. What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

A staff member's concern with legality of administrative action is not regarded as an interest that is worth protecting in itself. Judicial review applications should be restricted to persons with direct and sufficient interest and should not be turned into *actio popularis* which allow any person to bring an action to judicially review the legality of the Administration's behaviour. Every litigant who approaches the tribunals must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

The threshold for instituting an application for judicial review is for the applicant to show, *inter alia*, that the object of his/her challenge is an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant's contractual rights. Under this proviso, the applicant justifies a sufficient interest in an application in order to be allowed access to the temple of justice. This would enable the Tribunal to assess the level of grievance against what is being challenged and to sieve out hopeless or censorious applications.

The Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision.

As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action. The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations. Only in particular situations (i.e., in a case of a serious and reasonable accusation) does a staff member have a right to an investigation against another staff member which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Appeals Tribunal Statute. However, the Administration's discretion can also be confined in the opposite direction. There are situations where the only possible and lawful decision of the Administration is to deny a staff member's request to undertake a fact-finding investigation against another staff member.

It is not necessary for any court, whether a trial or appellate court, to address each and every claim made by a litigant, especially when a claim has no merit, as an authority for his proposition that the UNDT has considered all evidence relevant to the issues before it. The UNDT has broad discretion to determine case management issues, including the admissibility of any evidence and the weight to be attached to such evidence.

Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases to enable cases to be judged fairly and expeditiously and

for dispensation of justice. We will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.

The UNDT is competent under its jurisdiction to determine if there was a proper investigation in terms of ST/SGB/2008/5 and to review whether any administrative decision arising from the process was in compliance with the terms of the aggrieved individual's terms of contract. It is, however, not clothed with jurisdiction to itself conduct ab initio an investigation of a harassment complaint. It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a de novo investigation into a complaint of harassment complaint.

An entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical or psychological report of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award. A compensation must be set by the UNDT following a principled approach and on a case by case basis. The Appeals Tribunal will not interfere lightly as the Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case.

The criterion for an award of moral damages is the degree of injury suffered by the individual staff member as a result of the unlawful decision. That the type of unlawful decision is the same as in a number of other cases does not establish that the degree of moral damage must be similar in each case. The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the tribunal.

## Outcome

Appeal granted in part; Case remanded

## Outcome Extra Text

The appeal succeeds, in part. The UNAT reversed Judgment No. UNDT/2021/093 insofar as it rejected Ms. Reilly's application relating to the specific elements of her complaint of harassment and abuse of authority, referred to in paragraph 115 in the UNAT Judgment. The UNAT remanded these issues to another UNDT Judge for reconsideration including, if appropriate, any compensation. The remainder of the UNDT Judgment is affirmed.

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Emma Reilly

## Entity

OHCHR

## Case Number(s)

2021-1610

## Tribunal

UNAT

## Registry

New York

## Date of Judgement

30 Dec 2022

## President Judge

Judge Raikos  
Judge Colgan  
Judge Sandhu

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Administrative decision

Definition

Compensation

Non-pecuniary (moral) damages

Disciplinary matters / misconduct

Investigation (see category: Investigation)

Evidence

Admissibility

Jurisdiction / receivability (UNDT or first instance)

Subject matter (ratione materiae)

## Applicable Law

Secretary-General's bulletins

- SGB/2008/5

UNAT Statute

- Article 2

UNDT RoP

- Article 2.1(a)

UNDT Statute

- Article 2.1(e)



## Related Judgments and Orders

2018-UNAT-821  
2020-UNAT-1073  
2020-UNAT-1004  
2014-UNAT-467  
2015-UNAT-582  
2017-UNAT-787  
2017-UNAT-733  
2018-UNAT-838  
2019-UNAT-960  
2022-UNAT-1196