

2022-UNAT-1291, Korkut Yavuz

UNAT Held or UNDT Pronouncements

UNAT upheld the UNDT's conclusion that the Administration's decision not to set up a fact-finding investigation panel against Mr. Yavuz's FRO and SRO was lawful, as the incidents described in Mr. Yavuz's complaint did not provide sufficient grounds they had engaged in prohibited conduct (harassment, abuse of authority) but fell in the realm of workplace disagreements. UNAT found that Mr. Yavuz did not show that the incidents mentioned in his complaint with regard to the conduct of his FRO and SRO were in any way motivated by any of the characteristics or traits (or similar) listed in Section 1 of ST/SGB/2008/5, or in which way Mr. Yavuz was treated unfairly compared to other categories of staff members, or the improper use of a position of influence, power or authority against him by his FRO and SRO, other than a normal exercise of managerial powers by them,

Mr. Yavuz claims that the UNDT applied an incorrect definition of harassment. Specifically, Mr. Yavuz cites Section 1.2 of ST/SGB/2008/5, which states that "[h]arassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person". Based on this provision, Mr. Yavuz argues that the "second part of this test is purely subjective, requiring that the action 'be perceived to cause offence or humiliation' without enquiry as to the reasonableness of such". He contends, further, that, as long as an individual finds conduct unwelcome and feels offended and humiliated by it, the conduct is automatically to be considered harassment or at least possible harassment and would require an investigation. In support of his arguments, Mr. Yavuz cites a number of factual findings made by the UNDT in Judgment No. UNDT/2021/062, which adjudicated his challenge of the decision not to renew his appointment, that he characterizes as "established facts which clearly indicate possible conduct consistent with the definition of harassment and abuse of authority". 70. Mr. Yavuz's advanced interpretative proposition of the cited law provisions is misplaced. The same goes for Mr. Yavuz's understanding of the findings made by the UNDT in Judgment No. UNDT/2021/062, which do not support, as the Secretary-General correctly submits, an argument that the UNDT should have found

that his complaint met a standard that should have compelled the Administration to start an investigation. 71. In terms of Section 1.2 of ST/SGB/2008/5, harassment includes conduct “that might reasonably be expected or perceived to cause offence or humiliation to another person”. It is not necessary to establish that the alleged offender was ill-intended, namely the motive of the allegedly offender does not remove his conduct beyond the scope of harassment. Nevertheless, the test is not a subjective one, as it focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person. 72. On this issue, the UNDT Judge made a reference to Judgment No. UNDT/2021/062, wherein the UNDT opined, *inter alia*, that Mr. Yavuz’s performance had not been managed or evaluated in a fair and objective manner by her FRO and SRO, as it had been influenced by the contrasts between them and Mr. Yavuz. However, the UNDT noted, at first, that “one thing is the wrong use of managerial powers—in the present case, the wrong evaluation of performance that is an objective situation (connected to the results)—and another thing is the abuse of authority in performance evaluation (an abusive performance evaluation), which requires something more, that is the scope of harm and damage, or at least the awareness of the unfairness of the performance evaluation in its completion of it”.²¹ In this context, the UNDT held that the FRO and SRO had been acting in good faith, convinced of performing their duties to the best of their abilities, with no proven intention to abuse their position and/or deliberately underestimating or, worse, harming the staff member. “The Applicant’s supervisors followed the performance evaluation process and no sign of discrimination or abuse of authority emerges from the record, although the outcome of the performance evaluation was objectively unfair”.²² 74. Though the above mentioned UNDT’s first analysis of the complained of behaviour and its reasoning, referring to the motives of the FRO and the SRO, is erroneous, as it seems to have applied a subjective test incorrectly for establishing prohibited conduct, it is, nonetheless, inconsequential for the determination of the material issue in the present case, namely whether from the perspective of the third objective viewer that same behaviour provided sufficient grounds that the alleged facts might amount to such within the meaning of the applicable law. In this regard, as already alluded, the UNDT’s final conclusion is correct. 75. In fact, a close examination of the UNDT’s reasoning indicates that it considered there to be rational connection between the evidence, the contested decision, the reasons given for it and the purpose of ST/SGB/2008/5 (being to prevent and discipline prohibited conduct). In any event, an appeal is not against the reasoning of the lower tribunal; it is against the order. 76. Notably, although the

UNDT made express findings on the motives of the FRO and the SRO as well as on the lack of harm or damage, as constituent elements of the administrative process for setting up an investigation panel into Mr. Yavuz's complaint of prohibited conduct, we understand it to have also considered whether objectively the same conduct of the alleged offenders could reasonably be perceived as causing offence or humiliation, or constituted abuse of authority. On this basis, the UNDT reached its correct final conclusion that the various incidents described in Mr. Yavuz's complaint "do not disclose any possible prohibited conduct under ST/SGB/2008/5 by his FRO or SRO",²⁴ to wit the overall circumstances of the particular case do not offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the law. 78. Although it is clear that Mr. Yavuz was unhappy with his performance evaluation and his working relations with his FRO and SRO and that there were tensions in his work environment, the mere existence of a harassment and abuse of authority complaint does not render the relevant allegations true, nor does it equate that complaint, in and of itself, to a sufficient ground for the Administration to engage in a formal fact-finding investigation of the alleged misconduct. The existence of interpersonal problems does not amount per se to harassment and abuse of authority, nor does the concept of "abuse of authority" cover each and every case of impolite and awkward behaviour, as the UNDT rightly held making a reference to its Judgment in Benfield-Laporte (UNDT/2013/162),²⁵ upheld by UNAT in its Judgment No. 2015-UNAT-505. 79. Based on these legal propositions the UNDT then held that the Administration was acting within the scope of its authority when it decided not to set up a fact-finding investigation panel. Since there was no sufficient ground to believe that the FRO and SRO had engaged in prohibited conduct within the meaning of ST/SGB/2008/5, the Administration could not proceed in the way requested by Mr. Yavuz, namely to initiate a formal investigation against them. 80. We agree with this finding. There was no evidence in the case at bar that this exercise of discretion was inappropriate due to a failure by the Administration to take into account relevant considerations or due to a consideration of irrelevant factors. Consequently, the presumption of regularity of the challenged administrative decision stands. Moreover, as correctly indicated by the Dispute Tribunal, the jurisprudence provides that the tribunals cannot replace the decision-makers in such matters of discretionary authority. Finally, Mr. Yavuz's submissions with regard to the 31 October 2019 MEU decision are not relevant on appeal. Only the ASG's decisions to reject his requests to undertake a fact-finding investigation against Mr. Yavuz's FRO and SRO are subject to judicial review on appeal. Management evaluation is a mere condition of receivability of an application

before the UNDT and does not form part of the contested administrative decision.²⁶ The issues raised on appeal by Mr. Yavuz in terms of the MEU decision are of no legal relevance and will therefore not be reviewed by the Appeals Tribunal. Request for moral damages 82. Mr. Yavuz's claim for moral damages is rejected. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".²

Decision Contested or Judgment/Order Appealed

Mr. Korkut Yavuz, a former staff member who served as an Economic Affairs Officer at the P-3 level with UNECE on a fixed-term appointment, contested before the UNDT the decision not to investigate his complaint under ST/SGB/2008/5 against his FRO and SRO . The UNDT found that the record of conduct alleged by Mr. Yavuz did not justify initiating an investigation and that there was no basis on which to hold that the contested decision was unlawful. The UNDT thus rejected Mr. Yavuz's application in its entirety.

Legal Principle(s)

There is a commitment that all international organizations must have "zero tolerance" for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority. This is especially true for the United Nations, as such behaviour or conduct is contrary to the spirit of the United Nations Charter, its Staff Regulations and Rules and the Standards of Conduct for the International Civil Service. The "zero tolerance" policy is aimed at providing a safe environment for all United Nations employees, free from discrimination on any grounds and from harassment at work including sexual harassment.

As a general rule, this policy aims to tackle the issue of harassment in the workplace mainly by means of two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has

the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.

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 UNAT 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. Under these provisions, a fact-finding investigation may only be undertaken if there are sufficient grounds or, respectively, reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed. Consequently, if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 or ST/AI/2017/1 can have a negative impact on the staff member concerned.

When it comes to the discretionary authority of the Administration, the Administration is under an obligation to exercise it lawfully according to the purpose of the authorizing statute and within the existing statutory limits. The Administration has not validly exercised its discretion if it has addressed a particular administrative matter in the same way it always has without any additional considerations or has operated under the erroneous belief that it was fettered to make a specific choice, to the exclusion of all other choices amongst the various courses of action open to it. In these situations, the Administration has, illegally, not engaged in a balancing exercise of the competing interests, by considering all aspects relevant for the exercise of its discretion, in order to select the proper course of action.

The discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.

When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance tribunal may consider whether relevant matters were ignored, and irrelevant matters considered, and also examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.

As a result of the judicial review, the first instance tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process, the first instance tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker.

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, which is not the case here. This Tribunal is mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before it.

In terms of Section 1.2 of ST/SGB/2008/5, harassment includes conduct "that might reasonably be expected or perceived to cause offence or humiliation to another person". It is not necessary to establish that the alleged offender was ill-intended, namely the motive of the allegedly offender does not remove his conduct beyond the scope of harassment. Nevertheless, the test is not a subjective one, as it focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person.

The mere existence of a harassment and abuse of authority complaint does not render the relevant allegations true, nor does it equate that complaint, in and of

itself, to a sufficient ground for the Administration to engage in a formal fact-finding investigation of the alleged misconduct. The existence of interpersonal problems does not amount per se to harassment and abuse of authority, nor does the concept of “abuse of authority” cover each and every case of impolite and awkward behaviour.

Outcome

Appeal dismissed on merits

Outcome Extra Text

The appeal is dismissed and Judgment No. UNDT/2021/129 is affirmed.

Full judgment

[Full judgment](#)

Applicants/Appellants

Korkut Yavuz

Entity

UNECE

Case Number(s)

2022-UNAT-1291

Tribunal

UNAT

Registry

New York

Date of Judgement

16 Dec 2022

President Judge

Judge Raikos
Judge Colgan
Judge Halfeld

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Fact-finding investigation
Discretionary authority
Investigation

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Secretary-General's bulletins

- ST/SGB/2008/5
- ST/SGB/2019/8

UNAT Statute

- Article 2
- Article 2.1(a)
- Article 2.1(e)

UNDT RoP

- Article 18.1

UNDT Statute

Related Judgments and Orders

2016-UNAT-697

2021-UNAT-1171

2017-UNAT-787

2015-UNAT-505

2015-UNAT-518/Corr.1

2010-UNAT-100

2010-UNAT-099

2019-UNAT-927

2019-UNAT-915

2018-UNAT-814

2018-UNAT-849

2017-UNAT-798

2015-UNAT-582

2015-UNAT-546

2011-UNAT-123

2016-UNAT-699

2015-UNAT-508

2015-UNAT-537

2014-UNAT-420

2010-UNAT-095