



**THE UNITED NATIONS APPEALS TRIBUNAL**

Judgment No. 2016-UNAT-662

... The [Secretary-General] submit[ted] that on 29 February 2012, a fact-finding panel was appointed to investigate [Ms. Masytkanova's] claims ... .

... By note dated 5 March 2012, emailed to [Ms. Masytkanova], [the non-extension of her temporary appointment was reiterated. Reference was made to [her] harassment complaint against her supervisor, reassuring her that the investigation would continue after her separation in accordance with normal policy and procedures.

... [Ms. Masytkanova] was separated from service upon the expiration of her contract on 5 March 2012. She left her duty station on 6 March 2012.

... On 21 March 2012, the Ethics Office replied to an email sent by [Ms. Masytkanova] on 20 February 2012, noting that it did not find a prima facie case of retaliation, emphasizing that the performance and interpersonal issues with her supervisor had existed prior to [Ms. Masytkanova's] report of misconduct to CDU. On 22 March 2012, in response to a follow-up email from [Ms. Masytkanova], the Ethics Office suggested that the submitted documents seemed to indicate a pattern of harassment and abuse of authority, rather than a case of retaliation.

... On 29 March 2012, a Conduct and Discipline Officer, CDU, informed [Ms. Masytkanova] that a fact-finding panel to investigate her complaint had been convened and was expected to commence the investigation on 10 April 2012.

... On 26 April 2012, [Ms. Masytkanova] was interviewed by said panel.

... On 11 July 2012, she filed an application contesting the non-renewal of her temporary appointment [with the UNDT ... which ruled] by Judgment No. UNDT/2014/137, that the non-renewal decision was unlawful since [Ms. Masytkanova] had been given a promise of renewal for three further months; [Ms. Masytkanova] was granted compensation on this account. The Judgment was not appealed.<sup>2</sup>

...

... [Ms. Masytkanova] was blind copied on [an e-mail dated 8 May 2012] and, on 9 May 2012, she wrote to the members of the fact-finding-panel pointing out that she was in receipt of [this] e-mail indicating an intention of circumventing the panel's work [and requesting its] help and intervention.

... In reply to a request from [Ms. Masytkanova] for an update on the status of the

dissatisfaction for not having been timely informed thereof and asking when the panel would resume its work.

... On 16 October 2012, [Ms. Masykkanova] requested the Chief of Staff, UNAMA, to provide her with an update on the investigation. She renewed this request on 9 November 2012.

... On 27 November 2012, [Ms. Masykkanova] received an email, in response to a previous message from her, from one of the members of the fact-finding panel that had been disbanded, stating that “[she] was also disappointed by the way [the] panel [had been] treated”.

... On 7 December 2012, [Ms. Masykkanova] filed an application with the [UNDT], contesting the decision to disband and not to reinstate the fact-finding panel formed

[Ms. Masykhanova] clashed". The SRSG thus did not find that any of the incidents, in isolation or as a whole, rose to the level of harassment or abuse of authority.

... The memorandum further stated that delays in completing the investigation were regrettable but could not be avoided, explaining that: a first panel had been convened on 29 February 2012, but had to be dissolved due to objections raised by [Ms. Masykhanova's] former supervisor against two of its members; a new panel was convened in January 2013, which had to be dissolved as its chair left UNAMA; the panel was recomposed but the subsequent chairperson left UNAMA as well; on 17 February 2013, a new panel was convened; however, its work was delayed by the difficult nature of life in a hardship duty station, where staff constantly rotate, and also

opinion failed to protect her as per ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

... Pursuant to Order No. 117 (GVA/2015) of 11 June 2015, [Ms. Masykkanova] filed on 14 June 2015 a list of five witnesses, with a brief summary of the evidence she expected each of them to give, and she suggested several other individuals as witnesses. The Secretary-General submitted comments on [Ms. Masykkanova's] motion on 20 June 2015.

... By Order No. 136 (GVA/2015) of 1 July 2015, the Tribunal rejected [Ms. Masykkanova's] motion in full. Furthermore, it also conveyed

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8. The UNDT awarded compensation in the amount of USD 3,000 “for the inordinate delay in handling her complaint”,<sup>12</sup> finding “the delays ... were so important and so persistent that they obviously inflicted considerable anxiety, stress and a sense of neglect and injustice to [Ms. Masykkanova]” which the Administration could not have ignored given Ms. Masykkanova’s “repeated inquiries on the status of the investigation”.<sup>13</sup>

9. The UNDT rejected Ms. Masykkanova’s request that the panel’s findings be voided on the grounds they were not a contestable decision and, therefore, their rescission was not envisaged as a possible remedy under Article 10(5)(a) of the Statute of the Dispute Tribunal (UNDT Statute). It held further that, even if Ms. Masykkanova were seeking the rescission of the refusal to take further action on her complaint, “it must be stressed that the delays ... are purely a procedural irregularity, which does not justify the rescission of that refusal decision”.<sup>14</sup>

10. The UNDT rejected all of Ms. Masykkanova’s other remedies and pleas on the grounds they were unproven, disconnected from the contested decisions or exceeded the UNDT’s powers pursuant to Article 10(5) of the UNDT Statute.<sup>15</sup>

#### Submissions

##### Ms. Masykkanova's Appeal

11. Ms. Masykkanova seeks (i) review of the Judgment “for its fairness and objectivity”; (ii) additional compensation (in the amount of 24 months of full emoluments, of which 12 would correspond to time during which she could have been employed and 12 for emotional distress, harassment and aggravation); and (iii) “a guarantee ... blacklisting does not exist [at the United Nations], either de-facto or de-jure [and] an immediate removal of [her] name and any reference from [any] such list”.

12. Ms. Masykkanova asserts “the extent of the damage and the magnitude of the actions directed against [her] by UNAMA require further examination of the case in order to find sufficient remedy situations”. Specifically, she claims the UNDT “seems to not take into account factual situations”; did not consider UNAMA’s “comparative advantage [in regards

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<sup>12</sup> *Ibid.*, para. 108.

<sup>13</sup> *Ibid.*, para. 105.

<sup>14</sup> *Ibid.*, para. 106.

<sup>15</sup> *Ibid.*, para. 107.

## **THE UNITED**

The Secretary-General's Answer

16. The UNDT correctly rejected allegations that the investigation was incomplete and obstructed by the Administration. It also correctly found, after reviewing the regularity of the procedure as per ST/SGB/2008/5, that the fact-finding panel had fairly and correctly exercised its discretion and that there was no evidence the panel acted unreasonably.

17. Ms. Masykkanova has not provided any evidence that would justify the reversal of the decision not to take further action on her complaint. The UNDT's conclusion that there were "no solid grounds to conclude that [the panel] exercised this discretion in an unreasonable, arbitrary or otherwise misguided fashion" should therefore stand. Further, the appeal should be dismissed on the ground that Ms. Masykkanova has failed to identify any error in the Judgment. She repeats or rephrases the same arguments that were presented to, considered by, and ultimately rejected by the UNDT in its Judgment, without specifying any particular error in the Judgment.

18. Ms. Masykkanova has failed to establish any basis for an award of additional compensation. There is no link between the finding of a delay in addressing her complaint under ST/SGB/2008/5 in the present case and

Considerations

22. As a preliminary matter, the Appellant requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues which arise from this appeal have been clearly defined by the parties and there is no need for further clarification. We do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. The Appeals Tribunal, therefore, denies Ms. Masykkanova’s request for an oral hearing.

23. The history of this case presents a sorry picture of delay on the part of UNAMA. There were several differently constituted panels to hear one complaint and a total of 26 months elapsed before a decision was given. This is a breach of the Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) which requires that complaints are addressed promptly. In fact, Section 5.14 of ST/SGB/2008/5 provides *inter alia* that:

Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

24. We agree with the UNDT and uphold its reasoning that there were “inordinate delays both at reviewing and assessing the complaint, and in setting [up] a fact finding panel and conducting the investigation itself” and that the UNAMA was in breach of ST/SGB/2008/5.

25. The UNDT’s award of USD 3,000 as compensation to Ms. Masykkanova, though at the lower end, is within the range of compensation which has been awarded for this type of breach.<sup>17</sup> Although the Secretary-General challenged Ms. Masykkanova’s claim for additional

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<sup>17</sup> See, for example, *Ivanov v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-572, para. 28.

compensation, he did not challenge the UNDT's award; and, therefore, there is no reason for the Appeals Tribunal to interfere with it.<sup>18</sup>

26. We also agree with the Secretary-General that Ms. Masykkanova has failed to demonstrate on appeal any error by the UNDT that would justify the reversal of its Judgment. As we have consistently emphasized, the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case; rather, an appellant "must demonstrate that the court below has committed an error of fact or law warranting intervention by the Appeals Tribunal".<sup>19</sup> The claims which Ms. Masykkanova makes on appeal are essentially a repetition of her arguments that did not succeed before the UNDT. We have reviewed the Judgment and find that Ms. Masykkanova's case was fully and fairly considered by the UNDT and there was no alleged error that would have changed the outcome of her case.

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